

DUDZAI MUZHIRA (NEE MAPFUMO)
versus
LOITY MUZHIRA

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J

HELD AT HARARE, 4, 5, 6 & 12 June 2013 & 31 October 2013

FAMILY LAW COURT

Trial Cause

Ms P. Chaparira, for the Plaintiff
A. Muchadehama, for the Defendant

GUVAVA J: The plaintiff issued summons out of this court seeking a decree of divorce, custody of the parties' minor children and ancillary relief. The facts in this case were mainly common cause and most of the issues were resolved at the Pre Trial Conference which was held before a judge in chambers. The parties reduced the terms of their settlement into writing and indicated during the hearing that they would like it to be made an order of the court upon finalisation of the trial.

The plaintiff and the defendant are husband and wife. They married in terms of the Marriage Act [*Cap 5:11*] on 29 July 2000. The marriage was blessed with two minor children namely A (born 6 February 2001) and B (born 25 October 2002). The plaintiff has custody of the minor children whilst the respondent has access in accordance with their agreement. The parties are agreed that the marriage has irretrievably broken down due to a number of factors suffice to say that they have not lived together as husband and wife for a period in excess of twelve months. As the parties are agreed that the marriage has broken down it is not necessary to delve into the reasons for the breakdown. (See *Ncube v Ncube 1993 (1) ZLR 39*) Thus the sole issue in dispute was how their matrimonial home should be distributed between them.

The plaintiff gave evidence and stated that she resides at Stand 3669 Muzari Extension, Chinhoyi, which is the matrimonial home with the minor children. The defendant left the matrimonial home in September 2011. He now resides in Harare and is employed at Altfin Life Assurance as an agent. The plaintiff testified that she is employed at Public Service Medical Aid Society (PSMAS) as a branch manager earning a salary of US\$2 100 per month. She testified that the defendant was not entitled to a 50% share of their property because she had purchased it with no assistance from the defendant. She stated that she acquired the stand on her own after she obtained a loan of Z\$100 million. The stand cost Z\$50 million and the balance was used to build the slab for the main house. She also used the money to build a two roomed cottage, a wall and a gate before the money ran out. At the relevant time the defendant was unemployed and she was the sole bread winner.

The defendant also gave evidence. He testifies that he is domiciled in Zimbabwe and therefore the court has jurisdiction to deal with the matter. He stated that when he left the matrimonial home in 2011 he did not take any of the moveable property but left it all for the plaintiff. He is however claiming a 50% share of the immoveable property. He denied that he was unemployed during the duration of his marriage to the plaintiff. He stated that when he met and married the plaintiff he was employed by Hardlife Christian Assembly as a junior pastor. At the relevant time the plaintiff was a member of Zvakatanga Sekuseka Housing Co-operative which she had joined in 1999. Soon after their marriage he lost his employment and they went to live with the plaintiff's mother. After about a year the plaintiff was allocated a house at the Co-operative. They put up a wall and gate and moved into the property. When the house was allocated to them it consisted of a two bed roomed structure. They decided to add a bedroom with a bathroom en – suite and a dining room. At the time he was self-employed as a landscape designer. At the time they also purchased a motor vehicle which he used to ferry people on hire from Domboshava to Mbare where they would sell their produce. They were generating quite a lot of money and so decided to purchase a Datsun Pulsar motor vehicle. When the plaintiff was promoted to the post of branch manager in Chinhoyi they owned three motor vehicles, a Peugeot, a Datsun pulsar and a Toyota Carina. The defendant testified that he would give the plaintiff money from his earnings and it was used for the extension of the property in Hatcliff. He stated that before the plaintiff was promoted to the

post of branch manager at PSMAS in Chinhoyi she was a claims officer earning about 30% of their income whilst he earned 70% of their total income.

They moved to Chinhoyi in 2003 and acquired the stand which is in dispute in 2005. He conceded that the plaintiff obtained a loan from her employer to purchase the stand. It was his evidence however that he played a pivotal role in the acquisition of the property as he had identified it in the local newspaper. He also drove the plaintiff to Harare to pay for the stand. When the plaintiff was paying off the loan for the stand he was now in the business of buying and selling motor vehicles and his income was used for the day to day expenses for the family. After two years he had raised enough money to purchase two taxis which operated in Chinhoyi. He also formed a church under the banner of Christ Embassy Church. The money he derived from his pastoral activities and the taxi business was deposited in the plaintiffs Standard Chartered Bank Account as he did not have a bank account. The money he earned was used for the benefit of the family.

The defendant stated that they used the money which plaintiff borrowed to buy the stand and to build a two bed roomed cottage as well as the foundation for the main house. He conceded that his contribution towards the purchase and development of the stand was indirect as he used his earnings to look after the family whilst she repaid the loan. In 2007 due to inflation the rent where they were staying kept going up so they decided to sell the Co-operative house in Hatcliff and used the proceeds to buy material to build the main house in Chinhoyi. He assisted the gardener in digging the trench for the plumbing and went to Bulawayo to buy the Cement. He confirmed that he was given the money to buy the cement by the plaintiff. As he was not in formal employment he was able to source the building material whilst plaintiff was at work. He sold the Toyota Sprinter and used the proceeds to pay the transporters and buy the trusses for the roof. He also engaged the electrician, one Mr Chifamba, to electrify the house. He engaged a security guard to provide twenty four hour security. A friend of his donated the tub and the French door. They moved into the property before it was complete as the rent kept going up. He stated that they would put up the ceiling one room at a time as and when they got money.

The defendant stated that he loved the plaintiff. When they married he had problems from his family members because he was a bachelor and the plaintiff had two children from a previous relationship and was older than him. He stated that in view of the effort he put into the purchase and development of the property he should be awarded a 50% share of its value.

The plaintiff gave very brief evidence. Most of her story was elicited through cross examination by the defendants counsel. She did not produce any documentary proof of her assertions nor did she call any witness. Fortunately for the plaintiff her evidence was not contested in a major way with regards to her contribution towards the purchase of the matrimonial home. It was largely conceded by the defendant that the plaintiff made the direct contributions in the acquisition of the property whilst the defendant's contribution was by and large indirect. Although the plaintiff in her pleadings and her evidence was adamant that the defendant was not entitled to more than 5% share of the immovable property, in cross examination she conceded that the defendant had made indirect contributions to the purchase of the property. She agreed under skilful cross examination by the defendants counsel that the defendant did most of the running around sourcing the building material and arranging for the construction of the house. Even where it was apparent that the defendant had made some direct contribution in the acquisition of an item she did not readily concede the fact. She however accepted that the marriage had lasted for about thirteen years.

The defendant on the other hand gave his evidence well. He was not shaken in cross examination. He explained his story in a very straight forward manner which was not difficult to understand. He readily conceded that he was not as financially sound as the plaintiff although he was firm in the role that he had played in making indirect contributions. He was quick to give credit to the plaintiff where it was due. I found his evidence both credible and believable.

In order to determine how the immovable property should be distributed between the parties the court is enjoined to take into account the provisions of s 7 (4) of the Matrimonial Causes Act [*Cap 5:13*] (the Act). The court must therefore take into account the following factors that are set out in the Act i.e. the direct and indirect contribution of the parties, the duration of the marriage, the financial resources of the parties, duration of the marriage, the financial resources of the parties, their financial needs and obligations and their responsibilities. In an attempt to distribute the property as fairly and equitably as possible the court must strive to maintain the parties in the lifestyle that they had lived prior to the divorce. In the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) MCNALLY JA stated that in coming up with a fair and equitable distribution the court must begin by awarding the property into defined categories of "his" and "hers". The court should thereafter take away part of the property from one party and give to the other in order to come up with equitable distribution. In dividing the property the court must take into account all the factors set out in

section 7 (4) and endeavour to maintain the *status quo* or lifestyle that the parties had become accustomed to before the divorce. In making such an award the court has a wide and unfettered discretion so that it can achieve fairness between the parties. (See also *Gonye v Gonye* SC 15 /09 and *Shenje v Shenje* 2001 (2) ZLR 160 (H).

It was quite apparent from the evidence and the submissions filed by the parties that it was accepted that the defendant was entitled to a share of the immovable property. The dispute as between the parties was the percentage that he should be awarded. Whilst the defendant submitted that he was entitled to a 50% share the plaintiff was of the opinion that he was not entitled to more than a 5% share. In assessing the how the property should be distributed I will take into account that both parties made significant contributions into the acquisition and development of the property albeit in different ways. They worked as a tag team, one injecting the financial resources required to purchase the stand and to develop the structure and the other putting in their time and labour to ensure that the property is built. I will also consider that they were married for a period of thirteen years prior to the breakdown of their marriage. This is no mean feat especially by today's standards where marriages break down within a short time.

From the evidence, it was quite clear that the marriage was not an easy one for the plaintiff as the defendant was not very successful in his business ventures. The bulk of the financial resources had to come from the plaintiff who was in a steady job. The defendant however did not give up as he would try all kinds of ventures in order to play his role as a husband and father.

I will also take into account that the parties have agreed that the plaintiff should have custody of the two minor children. Although they have agreed on the defendant paying maintenance this will depend largely on whether or not he is successful as an insurance agent or any of his ventures. It is therefore quite clear the burden of looking after the children will lie heavily on the shoulders of the plaintiff. When questioned by the court, the plaintiff stated that she may be able to get a loan from the bank in order to pay out the defendant any share that is awarded to him. As of last year when the property was valued it had a market value of about US\$48 000. This will obviously be an added burden on the plaintiff as she will have to repay the loan to the bank as well as look after the day to day expenses of the children.

I have taken note that the plaintiff has continued to develop the property even after the defendant had vacated the matrimonial home. It was not in dispute that the plaintiff took out a loan of US\$10 000 to make up the kitchen and other outstanding things that needed to be

done on the property. This was obviously in an effort to make the property comfortable and habitable for her and the minor children. However in taking out that loan it also means that she has further enhanced the value of the property without any input from the defendant. This has of course increased her financial burden as she may end up with two loans to repay.

The defendant in his evidence stated that he wanted to start afresh and was not opposed to the plaintiff buying him out. In making an appropriate order I will take this factor into account. I will also consider that a disposition in this manner will mean that the minor children will not be unnecessarily uprooted from the only place they know as home.

Thus taking into account all the above factors I will make the following order:

1. A decree of divorce is hereby granted.
2. Custody of the minor children A (born 6 February 2001) and B (born 25 October 2002) is hereby awarded to the plaintiff.
3. The defendant shall have access to the minor children on alternate school holidays and upon consultation with the plaintiff on public holidays.
4. The defendant shall pay maintenance in the sum of US\$80 per month per child until each of the minor children attains the age of eighteen or becomes self-sufficient whichever occurs first.
5. The defendant shall pay school fees and all school related expenses for each of the minor children until they complete their tertiary education.
6. The plaintiff is hereby awarded all the moveable property that the parties acquired during the marriage.
7. The plaintiff is hereby awarded a 60% share of the immovable property and the defendant is awarded a 40% share.
 - (i) The property shall be valued by a registered estate agent appointed by the Registrar from his list of registered estate agents within 30 days of this order.
 - (ii) The plaintiff shall pay out the defendant his 40% share within 60 days from the date of receipt of the valuation report.
 - (iii) The parties shall share the cost of valuation by the plaintiff paying 60% of the cost and the defendant 40%.

- (iv) In the event that the plaintiff fails to pay out the defendant in terms of the period set out above, the property shall be sold and the net proceeds shared with the plaintiff getting 60% and the defendant 40%.
8. There shall be no order as to costs.

Munangati & Associates, Plaintiff's Legal Practitioners
Mbidzo, Muchadehama & Makoni, Defendants Legal Practitioners