

DANIEL NEZANDONYI
versus
CHIPO NEZANDONYI

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 7 & 14 February and 12 March 2014

Trial Cause

Mr. T. Katehwe, for the plaintiff
Defendant: Self Actor

TSANGA J: While marriage constitutes a joining of lives and a sincere intention to partner, it is in reality a fluid rather than a solid contract. While vows are made for better or for worse; for richer and for poorer; in sickness and in health, these vows are frequently broken when idealism is put to the test by human realities. The spirit of oneness has often all but evaporated at the time of divorce especially when it comes to sharing earthly possessions that may have been so accumulated during happier times. It thereupon becomes the duty of the courts to strike a fair balance between competing claims.

The facts

The parties in the present case entered into a marriage contract in terms of the Marriage Act [*Cap 5:11*] in June 1994. They were no off spring from their union, a reality which in our cultural context sadly makes for less than a happy union, more so one that can withstand the test of time. Whilst the parties have come to court conceding that it is best for each to go their separate ways due to the irretrievable breakdown of the marriage, there is less consensus as they release each other to new beginnings, regarding which immovable property should go with who. There is equally no agreement as to who contributed what to some of its acquisition. The movable acquisitions have been allotted by consensus and are not subject to dispute. The plaintiff, who is the husband, takes with him a 2 plate stove, a wardrobe and a kitchen unit. The defendant, who is the wife, takes with her a 14 inch television, a 4 piece lounge suite, the kitchen utensils and a bed.

To be resolved by this court is the allocation of two Stands described as Stand 22241 Unit L in Seke, Chitungwiza (Unit L Stand) and Stand 666 in Dema Growth Point (Dema

Stand). The plaintiff's prayer is that he be awarded the Unit L Stand which is partly developed, and for his wife to be allotted the Dema Stand, presently a vacant stand. The defendant on the other hand insists that she be granted the Unit L Stand while the plaintiff is accorded the vacant stand. Each claims that the Unit L Stand came into their possession as a result of distinct efforts on their part which the other challenges.

The husband (plaintiff) argues that his contribution to the marriage should be given greater recognition in the division of the immovable property because as breadwinner, he contributed more compared to the wife's domestic role. The wife (defendant) contests the plaintiff's narrative of the acquisition of the property. Her chronicles urge the court to assess her collective work as wife, community political activist and cross border trader and how these merge together to defy the depiction of a hapless housewife who sat at home 'doing nothing'.

The plaintiff, a police man by profession told the court in his evidence that he met his wife in 1993. They registered their marriage in 1994 and lived together as husband and wife. Problems started in 2002 when they started having disputes. He left the matrimonial home in 2007. Plaintiff's evidence was that he acquired the Unit L Stand in Chitungwiza in 2002 using proceeds from money he received under the War Victims Compensation Act (1980) for injuries he sustained during the war. The evidence he produced in court in the form of two letters, (exhibits C & D) shows that he received a total of Z\$49 563.73 paid out in 1996. In 2002 he paid Z\$50 000.00 to Chitungwiza Municipality towards the servicing of the Unit L Stand. In 2004 he entered into a lease agreement with Chitungwiza Municipality in terms whereof he had an option to purchase the Stand. This agreement with the Municipality was produced in court as Exhibit A. He stated that during this time his wife was 'just a housewife who did household chores and looked after the family'.

As regards the Dema Stand he told the court that he acquired this when he joined a Cooperative at his workplace in 1998 called CIVAPOL. He said he has been making contributions from his monthly salary to the cooperative for this Stand. A small balance remains to be paid. Again he emphasised that when this property was also acquired his wife was 'sitting at home' to use his phrase. He indicated that he would like to retain the Unit L Stand because it is of emotional value since he bought it with proceeds from the war victim's compensation. He further pointed out that it is his wish that his wife takes the Dema Stand. He stated that there is a balance of \$800 still to be paid which they should both contribute to.

Regarding the Unit L Stand, he said that whilst he has an agreement with the City Council as right holder he has not been given title deeds yet because of the on-going dispute. He produced a certificate of occupation granted in 2011 which is in his name. It permits him to reside there with the defendant and his child.

In her cross examination of the plaintiff, the defendant averred that the money received as compensation was used by the plaintiff to build a rural home. The plaintiff disputed that they own a rural home. His version was that they built a structure at his parent's homestead which is being used by his parents and does not belong to them. He argued that it is almost 12 years since the defendant went to the rural home so she could not possibly know what has taken place. The defendant on the other hand, remained resolute that the money received in 1996 was used to build a house in the rural areas.

I found the defendant's assertion on this account more credible than the plaintiff's. It is common knowledge that by 2003 Zimbabwe was in the throes of hyperinflation even if inflation had yet to reach the skies. It is unlikely that the plaintiff would have received money in 1996 and simply sat on it in a highly inflationary environment, until 2002 as he would have the court believe. Furthermore, by 2002 the amount paid was only sufficient to meet the servicing fee as his own evidence suggests. He therefore cannot claim in all sincerity that subsequent developments were done using money from his compensation. It was moreover a lease agreement which could not have had the sentimental value that he claims.

The defendant further disputed the plaintiff's evidence that she contributed nothing. She said that she used to make and sell peanut butter. She said she also travelled to Mozambique on business. As regards acquisition of the Unit L Stand, she brought out in her cross examination that the Stand was acquired by her as an outcome of her work as a political commissar for her political party. She said she was awarded the Stand after having successfully campaigned for one Brighton Chirongwe during the 2000 elections.

Whilst confirming his wife's work as a political commissar, the plaintiff's response was that his wife was not allocated the Unit L Stand but another stand by a cooperative called Bazuka co-op which she failed to pay for. The defendant did not agree.

In her own evidence, she reiterated that she had been allocated the Unit L Stand under the circumstances that have been described. She stated that it would have been very difficult for her husband as a police man, to be actively involved in political campaigning in the manner that she was. She also said that it was a common understanding with those contesting in elections that they would reward those who had campaigned for them should they win. The

candidate she campaigned for honoured his promise by helping those who campaigned for him to acquire stands. She stated that while the initial intention had been to allocate her a stand in Unit M, members of her community had felt that this would impact on her ability to coordinate her political work in her area.

She said that the Stand had been registered in plaintiff's name because she had honoured him as head of the house since he was her husband. She further highlighted that she did not have divorce in mind when she did so. This, she stated, was more so as she had also allowed him to take on another wife since she herself was childless. Also he had argued that his father has two wives. She had thus given him free rein to go forth and multiply. She said she was at peace with his decision as he wanted more children. He already had one child when they married. When she therefore put the Stand in his name, her expectation was that this would, if anything, consolidate their marriage. She had given him due recognition as head of the house. She had permitted an additional wife despite the fact that his registered marriage only permits one wife. Her expectation was that he could not have been a happier man under these circumstances. He was clearly not, as he left her in 2007.

Unsavoury as politics of patronage may be in resource allocation and acquisition, her version of how she came to be allocated the Stand is credible. Further, her rendition of how and why it came to be registered in his name accords with the sacrificial wife who puts others interests before her own. In our context where *roora/lobola* exchanges hands, male headship in the home is assumed and indeed often demanded.

She also revealed that she would travel to Mozambique with women's groups on business. She said there were given repayable loans and that it was part of this that she had used towards the purchase of the Stand as well as for bricks and metal roofing sheets. The court was able to ascertain from her passport that she had indeed made trips to Mozambique. This is not to say that the plaintiff contributed nothing. Each appears to have played a role within the spirit of collective endeavours by a married couple.

She described the Dema Stand as the one that plaintiff had 'sweated for' to use her own words. She expressed her deep unhappiness at the fact that now that he has another wife and child he sees fit to throw her out in order to bring his new family into the house. She was vehement that she had put in a lot of hard work in developing the Unit L Stand. She objected to plaintiff's actions in now seeking an easy route for his new family by having her leave this property. In addition, she challenged that \$800.00 remains owing on the Dema Stand and stated that she had confirmed that only a balance of \$200.00 is still owing. While she alleged

that he had another stand no evidence was produced to the court in this regard. In cross examination the defendant was challenged on the billions that she said she had paid in 2003 as the currency was not yet in billions at that time. Her explanation was that she had not brought the receipts with her. The receipts which she ultimately produced showed some payments towards 'Civapol Cooperative'. Neither plaintiff nor defendant was able to produce to the court, any receipts for building materials in constructing the home. Notably however, the defendant's claim that she had purchased bricks and roofing materials was not challenged by the plaintiff.

The applicable laws

Several aspects of s7 of the Matrimonial Causes Act are pertinent to the analysis of the facts of this case. Section 7 (1) (a) for example provides as follows with regards to the possibility of transferring an asset from one spouse to another:

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 assets of the spouses, including an order that any asset be transferred from one spouse to the other.

Therefore the fact that an asset is in the name of one spouse only is not in itself a hindrance to the court in terms of transferring that asset to another spouse. In *casu* both Stands are in the plaintiff's name. In terms of this section, there is nothing that stops the court from transferring one to the other spouse where this seems most equitable. (See for example *Ncube v Ncube* 1993 (1) ZLR 39).

Also of relevance to the facts is section 7 (3) (c) which is couched as follows:

The power on an appropriate court to make an order in terms of paragraph (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 marriage

- a) By way of 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

This provision is of relevance in light of the plaintiff's assertion of the sentimental value of the Unit L Stand. However as I stated in the factual expose, the chances of the Unit

L Stand having been purchased from the proceeds from the War Victims compensation were unlikely in light of the evidence that the proceeds went to the construction of a rural home. As such I will not accord the Unit L Stand the protective sheath permitted by s 7 (3) (c).

Section 7 (4)(e) is also pertinent in that it allows the court among other factors to have regard to 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. Granted this is only one among other factors that have to be holistically considered. Others include such as income earning capacity, financial needs, age, physical and mental condition, value of any pensions and gratuities and duration of marriage that have to be evaluated by the court in making its order. Emphasis is on needs as well as contributions. (See *Shenje v Shenje* 2001 (2) ZLR 160 at page 163).

Counsel for plaintiff, Mr Katehwe correctly referred the court to cases such as *Gonye v Gonye* 2009 (1) ZLR 232 236H-237B regarding the exercise of the court’s discretion and to *Usayi v Usayi* 2003 (1) ZLR 684 and *Tangirai v Tangirai* HH 65-13 with respect to taking cognisance of contributions through domestic work.

Given the plaintiff’s strong emphasis on the superior value of his contributions compared to those of a domestic nature, in addition to the exhortations of section 7 (4) (e) of the Matrimonial Causes Act, I am of the view that it is also vital to be guided by the new Constitution and international instruments that speak to women’s standing in marriage and family life. This is especially necessary in light of the often less than equal role with which unpaid work in the home is often accorded. Settling such disputes in light of an understanding of constitutional and human rights values is likely to result in a more equitable outcome for both parties.

Section 56 (3) of the Constitution clearly prohibits the treatment of any person in a discriminatory matter on grounds such as culture, sex, gender economic or social status among others. Pitting the breadwinner’s role against that of the homemaker is gendered given difficulty of placing a monetary value on domestic contributions. To accord defendant a lesser standing in allocation of property on divorce because she was, as described by the plaintiff, ‘merely a housewife’ would in my view offend the letter and spirit of the Constitution in terms of non-discrimination. It would amount to discriminating against defendant on account of her social and economic status. Furthermore, given that in most instances it is women who find themselves as a result of gender roles saddled with unpaid

work in the home, regarding women's gendered roles as inferior would also amount to discrimination. I am buoyed further in this view by s 26(c) of the constitution which articulates that the state should take measures to ensure there is *equality of rights and obligations* of spouses *during marriage* and at its *dissolution*.

In addition to these provisions Zimbabwe is also party to several international instruments that are of relevance in articulating standards to be exercised in granting a divorce. These yardsticks which essentially embody the values of equality or equity. Article 16 9 (c) of the Convention on The Elimination of All Forms of Discrimination Against Women for example, accords women the same rights and responsibilities during marriage and at its dissolution. Article 7 (d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa similarly states that on separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property deriving from marriage. Zimbabwe is party to both these instruments.

In terms of s 327 (2) (b) of our Constitution, international treaties however, do not automatically form part of Zimbabwean law unless incorporated into law through an Act of Parliament, subject to some exceptions. Nonetheless s 327 (6) clearly imposes a duty on the courts to be guided by international instruments to which Zimbabwe is a party in interpreting legislation.

Section 327 (6)

When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

The values of equality and equity that are enshrined in these instruments are therefore essential guiding beams for the court in the exercise of its discretion that is accorded by s 7 (4) in particular of the Matrimonial Causes Act.

The defendant is currently the one staying in the Unit L Stand. She is thus enjoying access and control while the plaintiff who moved out in 2007 has lease rights with the Municipality. He also has the Dema Stand allotted to him through his cooperative at work. Since neither of the parties were able to produce evidence as to who actually contributed what to the building of the Unit L Stand, I choose to regard their efforts as having been symbiotic with the regard to this matrimonial property. The weight of evidence however leans in favour of the defendant who has remained on the premises for the last seven years

since their separation. In my opinion, it would make more sense for ownership of this property to be transferred to her albeit with a certain percentage going to the plaintiff. It would also make further sense for the plaintiff to remain in possession of Dema Stand. Guided by the principles in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) that suggest initial parcelling out in terms of “his”, “hers” and “theirs” before balancing any equation, I will allocate the Dema Stand to the plaintiff as his property given the very specific work related circumstances pertaining to its acquisition. I will treat the Unit L Stand as joint matrimonial property, taking into account the evidence led by both parties.

In light of the allocation to the defendant of Stand 666 Dema as his, the remaining question is what would be an appropriate share to be allocated to each from the property which is “theirs”. Of concern is an outcome that would ideally place the parties in the position that they would have been had a normal marriage relationship continued. In my view, taking into account that it is the defendant who has been in the house over the last seven years, Stand 22241 Unit L is best allocated to the defendant in the share of 60% to her and 40% to the plaintiff. Section 7 (1) permits the court to transfer an asset from one spouse to another where equity demands.

It is therefore ordered as follows:

- a) A decree of divorce be and is hereby granted.
- b) The movable assets be shared in accordance with the agreement reached by the parties prior to trial.
- c) The plaintiff is awarded Stand 666, Dema. In addition, he is awarded a 40 % share of Stand 22241 Unit L Seke.
- d) The defendant is awarded a 60% share of Stand 22241 Unit L Seke.
- e) That the Registrar shall appoint an estate agent for valuation of Stand 22241 Unit L Seke within 30 days of this order.
- f) Both parties shall contribute equally to the valuation.
- g) The Estate Agent shall produce a report of his/her valuation within 14 days of the date of his appointment.
- h) The defendant is given the option to buy out the plaintiff of his 40% share within a period of 12 months from the granting of this order. Failing this, the property is to be

sold to best advantage on the open market with the parties sharing the net proceeds in proportion to the shares awarded to them.

- i) That the plaintiff shall ensure that the lease which he currently holds in terms of his agreement with Chitungwiza Municipality, with agreement to purchase to Stand 22241 Unit L Seke, is transferred to the defendant in terms of this order, simultaneous to the release of his 40% share value.

- j) That each party pays its own costs.

Tadiwa and Associates, plaintiff's legal practitioners