

ABIGAIL CHIBADURA (Nee Mubariki)
versus
DAVID TONGESAI CHIBADURA

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 15 & 16 March 2016 and 28 April 2016

Family Law Trial

I.E.G. Musimbe, for the plaintiff
S Kampira, for the defendant

MWAYERA J: The plaintiff issued summons for divorce and ancillary issues there to on 28 October 2014. The defendant entered an appearance to defend and subsequent pleadings there to. At pre-trial conference stage the parties agreed that their marriage had irretrievably broken down. The parties further agreed on issues for referral to trial namely, how to share the matrimonial home and the quantum of maintenance for the one minor child of the parties. The parties testified in their respective cases. It is common cause from the evidence that parties were married for about 16 years. Also not in dispute is the fact that the matrimonial home was acquired during the subsistence of the marriage in 1999. The defendant obtained a loan from the bank for purposes of purchasing the stand on which the matrimonial home was constructed. It was also clear from the evidence that the defendant was gainfully employed while the plaintiff was a housewife. From the evidence of both parties the plaintiff was not just an ordinary housewife but a wife and mother who played an active role in decision making for acquisition of the matrimonial property as well as upkeep of the home and family. The plaintiff would engage on foreign trips to South Africa to purchase items for sale to the company in which the defendant was a director. She would also purchase household goods. The defendant on the other hand being gainfully employed made direct and indirect contributions to the acquisition of the property which falls for division, apportionment and distribution.

The plaintiff in her claim insisted on 50% share of the matrimonial home and \$160 per month maintenance for the one minor child. The defendant on the other had moved from her earlier proposed sharing ratio of 10:90 in favour of the defendant to 25:75 in favour of the

defendant. Further the defendant suggested that monthly contribution of maintenance in the sum of \$50 and payment of school fees was adequate for the minor child. Given the issues for determination it is important for the relevant law to be brought into perspective. Section 7 of the Matrimonial Causes Act [*Chapter 5:13*] is relevant in so far as division, distribution and apportionment of property is concerned. The section enjoins the court to have regard to all the circumstances of the case including the following.

1. The income, capacity, access and other financial resources which each spouse and child has or is likely to have in the foreseeable future.
2. The financial needs and responsibilities which each spouse and child has or likely to have in the foreseeable future.
3. The structure of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained.
4. The age and physical condition of each spouse and child.
5. The direct or indirect contribution made by each spouse to her family; including contribution made by looking after the home and caring for the family and any other domestic duties,
6. The value to either of the spouses or to any child of any benefit including pension of gratuity which such spouse or child would lose as a result of the dissolution of the marriage.
7. The duration of the marriage.

The consideration of all circumstances is with a view to ensuring that the court as far as reasonable and practicable, places the spouses and children in a position they would have been in had the marriage relationship between the spouses continued. In the present case the parties have been married for about 16 years. The defendant made direct contribution to the acquisition of the matrimonial property while the plaintiff made indirect contribution.

From the reading of Matrimonial Causes Act both direct and indirect contributions are regarded. Whereas the defendant was making direct financial injection the plaintiff was looking after and maintaining the home. She was also looking after the couple's minor child and was a wife and mother in the home. The legislature in its wisdom made provision for consideration of all circumstances and all forms of contribution. This is a clear realisation that whatever form of contribution is made for sustenance of a happy marriage and acquisition of matrimonial assets should not be demeaned but considered. In *Usayi v Usayi* ZLR 2003 (1) SC11 Ziyambi JA quoted with approval the court *a quo*'s decision which state

“.....it should be presumed that the plaintiff assumed equivalent, though different duties, which were equally beneficial to the welfare of the family.”

In the *Usayi* case *supra* the court after considering all circumstances as guided in the Matrimonial Causes Act ruled that the parties were to share the matrimonial property 50% each despite the fact that the plaintiff had made direct financial contribution while the defendant contributed indirectly.

The equality of rights and obligations of spouse even upon divorce is well articulated in the Zimbabwean Constitution Amendment Act 20 2013. Section 26 (c) and (d) on marriage is instructive. It reads:

“The State must have appropriate measures to ensure that.....

(c) there is equality of rights and obligations of spouses during marriage and at its dissolution
(d) in the event of dissolution of marriage whether through death or divorce, provision is made for the necessary protection of any children and spouses.”

Even though the parties agree that their marriage has irretrievably broken down the equality of rights and obligations has not been eroded. This is moreso when one considers all circumstances outlined for consideration under section 7 of the Matrimonial Causes Act. Both parties have future need for accommodation and sustenance. The plaintiff, after separation was forced to secure accommodation for herself and the minor child and this clearly shows that the 10% being offered of the matrimonial home would not be appropriate as it would not cater for the futuristic needs of the plaintiff and child. The court in dealing with division and apportionment of property has to seek to place the parties in a apposition they would have been in had the normal marriage relationship subsisted. See *Samson Manyoni v Francisa Selina Manyoni* HH 4/16, *Shenje v Shenje* 2001 (2) ZLR 160, *Chidewu v Cuthbert Tembedza* HC 7479/03 and *Usayi* case *supra*. A reasonable share of the matrimonial home will enable the plaintiff to provide for herself and the child. Both the defendant and the plaintiff seem to have ‘O’ level educational qualifications and no professional qualifications. They both have to find ways of fending for themselves and the minor child.

The picture painted requires utmost consideration of not disadvantaging the other party by over valuing the contribution of the other. The wording of s 7 1 (a) gives the court a wide discretion in deciding what is just and equitable distribution. Property may even be transferred from one spouse to the other so as to ensure that the parties are placed in a just equitable position. The whole principle is centred on the fact that the courts should endeavour to ensure that no unnecessary hardship is brought about by the dissolution of marriage. The

parties would have contributed directly and indirectly to the acquisition of their matrimonial assets and no contribution should be under played. At the end of the day the parties should be put in a position they would have been in had the normal relationship subsisted for the obvious reason that when they built their home or empire it was not with an intention to divorce. In the circumstances of this case the parties acquired the matrimonial home during the subsistence of their marriage. They were married for about 16 years and have one minor child who needs care. The parties assumed different roles but equally important roles in the upkeep of their marriage. I find no basis why their equality in the marriage should be questioned on dissolution. To that extent therefore after considering all circumstances of the case the matrimonial home ought to be shared equally between the parties. The defendant in whose name the house is registered and being the person currently staying in the house will be given the first option to buy out the plaintiff.

In so far as maintenance of the minor child is concerned the evidence revealed that the defendant is shouldering his responsibility well by paying school fees, medical bills and giving pocket money to the child. The plaintiff being a young lady of similar qualifications as defendant equally has a responsibility to maintain the minor child. There is no justification for the claim of lump sum maintenance by the plaintiff. The plaintiff also sought to rely on a City of Harare outstanding water bill to boost its claim for maintenance. If anything, the fact that the defendant is in arrears is in support of the defendant's version that he is living in hard times where his business has folded and he is relying on a private car to ferry passengers for survival. Maintenance is hinged on whether or not the responsible person has neglected his obligation and the quantum depends much on the means. In the circumstances of this case the defendant and the plaintiff equally have to contribute to the upkeep of the minor child. Given the equitable distribution of the matrimonial property, there is no basis for ordering the defendant to shoulder all the welfare needs of the child. In my view, if the defendant is to continue paying school fees as he has been doing then his offer of \$50 per month is reasonable given the parties financial standing as presented in evidence. The plaintiff would then come up with the other portion of maintenance to complement the contribution by the defendant.

Accordingly it is ordered that

1. A decree of divorce be and is hereby granted.
2. The custody of the minor child namely, Tanatswa Chibadura (born 17 August 2004) shall be awarded to the plaintiff.

3. The defendant shall have access rights to the child for one week of every school holiday and on two weekends of every month of the school term per the parties' arrangement.
4. The movable property set out in Annexure 'B' of the summons and declaration namely:
 - 1) LG 32 inch colour tv
 - 2) 2 piece leather sofas
 - 3) Dining room suite
 - 4) DVD player
 - 5) Decoder
 - 6) 2 beds
 - 7) Dressing table from the main bedroom suite
 - 8) Kitchen utensils, cookery
 - 9) Bread maker
 - 10) Slow cooker
 - 11) Coffee maker
 - 12) Toastershall be awarded to the plaintiff as the sole property inclusive of the dining room suite.
5. The movable property set out in Annexure "C" of the summons and declaration namely:
 1. 2 piece leather sofas
 2. Tv stand
 3. Radio
 4. VCR player
 5. Decoder
 6. 2 beds
 7. The remainder of the bedroom suite (excluding dressing table)
 8. Deep freezershall be awarded to the defendant as his sole property.
6. The defendant shall pay \$50 per month, all school fees and levies for the minor child Tanatswa Chibadura till she attains her tertiary degree or because becomes self-sustaining whichever occurs first.

7. The plaintiff shall be awarded 50% share of number 8035 Cold Comfort Tynwald Harare and the defendant shall be awarded the other 50%
 - (a) The property shall be valued by a valuer appointed by the Registrar of the High Court from his list of valuers within two months of this order.
 - (b) The defendant shall within two months of the date of valuation buy out the plaintiff's 50% share of the value of number 8035 Cold Comfort Tynwald Harare.
 - (c) The plaintiff shall within two months of date of the defendant's failure to buy out the 50% share of the value of number 8035 Cold Comfort Tynwald Harare buy out the defendant's 50% share.
 - (d) If the plaintiff fails to buy out the defendant's share the property shall be sold by an Estate Agent to be appointed by the Registrar, and the proceeds be shared in terms of 7 above that is 50% share each party.
 - (e) The cost of valuation and Estate Agent's Commission should be shared between the parties according to their 50% shares.
8. Each party shall bear his or her own.

IEG Musimbe and Partners, plaintiff's legal practitioners
Sibonile Kampira Law Chambers, defendant's legal practitioners