

FARAI ZVEKARE (NEE MUTUNDUWE)  
versus  
LINCON ZVEKARE

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 18 August 2016

**Divorce action**

*B. Makuvis* for plaintiff  
*F. Nyangani* for defendant

CHITAKUNYE J. The plaintiff and defendant were married on 14 February 2003 in terms of the Marriages Act [*Chapter 5:11*]. Their marriage was blessed with one child born on 26 December 2004.

On 14 November 2011 the plaintiff issued summons out of this court seeking a decree of divorce and other ancillary relief. The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there is no reasonable prospect for restoration of a normal marriage relationship between the parties.

The particulars of the breakdown included that:-

- (a) The parties have been living apart for a period in excess of a year;
- (b) The parties have constant disagreements which are inconsistent with the continuation of a normal marriage relationship.

The defendant in his plea conceded that the marriage has indeed irretrievably broken down and he also wished that a decree of divorce be granted.

At a pre trial conference the following were agreed:-

- (a) That the marriage has irretrievably broken down and both parties want a decree of divorce to be granted;
- (b) That the plaintiff be awarded custody of the minor child of the marriage with the defendant being granted rights of access to the minor child at least one week of every school holiday and on every alternate public holiday;
- (c) Defendant shall contribute towards the maintenance of the minor child as follows:

- (i) The defendant shall pay USD50-00 per month for the minor child until the child attains the age of 18 years or becomes self supporting whichever is earlier;
  - (ii) The money shall be deposited into a bank account that plaintiff will provide on or before the last day of each month;
  - (iii) The defendant shall pay the child's school fees and any tuition fees on or before the first day of each school term. Payment shall be made directly to the school;
  - (iv) The defendant shall also buy school uniforms and formal clothing for the minor child at least twice every year.
- (d) Each party shall retain as his or her sole and exclusive property any movable property which was in his or her possession at the time of separation.

The only issue the parties could not agree on was on the just and equitable distribution of the parties' single immovable property; namely Stand 16738 Mhakure Road, Zengeza 2, Chitungwiza.

The plaintiff gave evidence after which the defendant gave evidence as well. The two confirmed in their respective testimonies all the aspects that are now common cause. They confirmed they wish a decree of divorce to be granted as their marriage has irretrievably broken down with no prospects of restoration to normalcy.

Having confirmed all issues agreed to at Pre-trial conferences their evidence zeroed in on the immovable property, namely Stand 16738 Zengeza 2, Mhakure Road, Chitungwiza.

The plaintiff's claim was for a 90 percent share whilst defendant was to get a 10 percent share. The defendant on the other hand demanded a 70% share with the plaintiff getting a 30% share.

The basis for each party's claim was the alleged direct financial contribution to the purchase and development of the property.

The division and distribution of assets of the spouses at the dissolution of a marriage is governed by s 7 of the Matrimonial Causes Act [*Chapter 5:13*].

Section 7(4) of the Act enjoins court to consider all the circumstances of the case. Some of the factors are outlined in s 7 (4) (a)-(g) thereof. In *Shenje v Shenje* 2001 (2) ZLR 160 (H) at p 163E-164A GILLESPIE J had this to say on this section:

"In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of more important, and more usual, circumstances are listed in the subsection. This list is not complete. It is not possible to give a complete list of all possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all 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.

The factors listed in the subsection deserve fresh comment. One might form the impression from the decisions of the court that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of 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 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."

As the parties go out of the marriage they should as far as is reasonable and practical continue with their lives without unjustly enriching one party whilst impoverishing the other. Their expectations had a normal marriage continued must be not be lost sight of.

In terms of the income earning capacity of the spouses it was apparent that both do not have much. The plaintiff is into tailoring whilst the defendant was assisted by the plaintiff to obtain a marketing qualification. As a result he has been employed as a manager at some point. Their evidence painted a gloomy picture in their respective areas of training due to the economic downturn affecting the country as a whole. They thus will have to tailor their needs according to what is available.

It is common cause that the property was purchased by the plaintiff as a vacant Stand before the parties got married. Developments which included the construction of a cottage and the main house took place after marriage. It is also common cause that at the time of separation the construction of the main house was not complete. As at the date of trial the main house was still incomplete, though it was agreed that the plaintiff continued effecting improvements after defendant had left. To this extent she erected a pre-cast wall, fitted door fittings and did flooring to enable the house to be habitable. She also did outside plastering and completed roofing and ridging.

She has been maintaining the house without the defendant's contribution since he left more than 5 years ago.

The plaintiff's claim for a greater share is also buttressed by the fact that she is the custodian parent of the minor child of the marriage. She thus needs shelter not only for herself but for the child as well. In her evidence in chief she conceded that defendant maybe entitled to a 25% for the contributions he made towards the developments.

Under cross examination she further conceded that in terms of contributions to developments defendant contributed 40% with her contributing 50%. The other 10% percent on the developments she allotted it to the developments she did after defendant had left. So

on the developments alone (less the acquisition of the Stand) plaintiff now viewed a 60:40 sharing ratio as just and equitable.

The defendant's evidence on the other hand was to the effect that whilst the plaintiff purchased the Stand on her own before marriage, he greatly contributed towards the construction of the structures on the Stand as from 2003. When asked on the quantum of his contribution to construction, the defendant said his contribution was about 70% with the plaintiff's being 30%. When asked to consider that the plaintiff had acquired the vacant stand on her own the defendant said in that case a 50:50 share would be fair and equitable. That then became his final stance in his evidence in chief.

Under cross examination the defendant admitted that after he left the matrimonial house the plaintiff continued effecting developments to the house. These included the erection of a pre-cast wall, plastering the outside of the house, flooring, and putting ridges on the roofing. He conceded that these would add to the share to be awarded to the plaintiff.

It may also be noted that the defendant has been out of the matrimonial home for over 5 years and appears to have found comfortable shelter somewhere else.

It is thus only just and equitable that a greater portion of the matrimonial house be awarded to the plaintiff.

In any case the defendant seemed to concede as much when asked under cross examination whether in the light of all the developments the plaintiff had effected after separation the plaintiff should not be entitled to a greater portion and he responded saying: 'if she gets 60% there would be no problem.'

In the light of the above and plaintiff's already stated climb-down from her original claim I am of the view that a 65: 35 share would be just and equitable bearing in mind that plaintiff acquired the vacant Stand before marriage.

Both parties expressed inability to buy the other out in a short period. The plaintiff asked for a period of about 5 years for her to buy out the defendant in instalments. I am of the view that a period of 5 years is rather long. The defendant should get his share in a reasonable period to be able to realise value from the share. A period of about two years should be adequate for plaintiff to raise the required sum and pay off defendant's share.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted
2. Plaintiff is hereby awarded custody of the Minor child; namely Grace Zvekare born 26 December 2004.

3. Defendant shall exercise reasonable rights of access to the minor child at least one week every school holiday and on every alternate public holiday.
4. Maintenance:
  - i) The defendant shall contribute the sum of \$50-00 per month towards the maintenance of the minor child; Grace Zvekare born 26 December 2004, until the minor child attains the age of 18 years or becomes self supporting whichever is sooner.
  - ii) The money shall be deposited into an account that Plaintiff will provide on or before the last day of each month.
  - iii) The defendant shall also pay for the minor child's school fees and any tuition fees on or before the first day of each school term. Payments shall be made directly to the school.
  - iv) The defendant shall also buy school uniforms and formal clothing for the minor child at least twice a year.
5. Each party shall retain as his or her sole and exclusive property any movable property which was in his or her possession at the time of separation.
6. The plaintiff be and is hereby awarded a 65 percent share of the immovable property namely Stand 16738 Mhakure Road Zengeza 2, Chitungwiza with the Defendant being awarded a 35 percent share of the aforesaid immovable property.
7. The parties shall within 30 days from the date of this order appoint a mutually agreed estate agent to evaluate the property. Should they fail to agree on the estate agent one shall be appointed for them by the Registrar of the High Court from his list of evaluators.
8. The cost of evaluation shall be paid by the parties in equal shares.
9. The plaintiff is hereby granted the option to buy out defendant of his share within 24 months, or such other longer time as the parties may agree, from the date of receipt of the valuation report.
10. Should the plaintiff fail to buy out defendant within the 24 months or any other longer time as the parties may agree, the property shall be sold to best advantage by a mutually estate agent or one appointed by the Registrar of the High Court from his list of such agents.
11. The net proceeds shall be shared in the ratio of 65:35 in favour of the plaintiff.
12. Each party shall bear their own costs of suit.

*Legal Aid Directorate*, plaintiff's legal practitioners.  
*Nyangani Law Chambers*, defendant's legal practitioners.