

DISTRIBUTABLE (2)

Judgment No. SC 2/10
Civil Appeal No. 78/09

LOSSON MTONGWIZA v LIZZIE MTONGWIZA

SUPREME COURT OF ZIMBABWE
SANDURA JA, GARWE JA & CHEDA AJA
HARARE, JANUARY 26, 2010

H Zhou, for the appellant

T R Hove, for the respondent

SANDURA JA: This is an appeal against part of the judgment of the High Court in a divorce action. The appeal is against the award to the respondent of fifty percent of the value of the matrimonial home at 1 Barlow Close, Glen Lorne, Harare. After hearing both counsel, we dismissed the appeal with costs, and indicated that the reasons for that decision would be given in due course. I now set them out.

The background facts are as follows. The appellant (“Losson”) and the respondent (“Lizzie”) were married to each other in terms of the Marriage Act [Cap. 5:11] in April 1998, and thereafter had two children. Both Lizzie and Losson were gainfully employed.

In June 1998 Losson borrowed Z\$450 000 from his employer and bought an undeveloped stand in the suburb of Bluff Hill in Harare. Thereafter, the parties worked together on a number of projects, raised some money and built a cottage on the stand. They then commenced building the main house, which they completed in August 2004. It was common cause that Lizzie's contribution to the purchase of the stand and the building of the main house was largely indirect, in the sense that she bought groceries with her salary, looked after the children and supervised the builders.

Subsequently, the parties sold the immovable property in Bluff Hill and bought another immovable property at 1 Barlow Close, Glen Lorne, Harare ("the property"). The property was registered in their joint names.

Thereafter, the relationship between the parties deteriorated, and on 26 April 2006 Lizzie instituted divorce proceedings in the High Court claiming, *inter alia*, fifty percent of the value of the property.

At the trial Losson admitted that the marriage had irretrievably broken down, but denied that Lizzie was entitled to fifty percent of the value of the property. In his view, Lizzie was not entitled to more than ten percent of the property's value.

However, after carefully considering the evidence given by the parties, as well as the provisions of s 7(4) of the Matrimonial Causes Act [*Cap 5:13*] ("the Act"),

the learned Judge in the court *a quo* awarded to Lizzie fifty percent of the value of the property. Dissatisfied with that result, Losson appealed to this Court.

In his notice of appeal Losson set out four grounds of appeal, which read as follows:

“The court *a quo* erred in that:

1. It placed undue weight on the indirect contribution made by the plaintiff (now the respondent) towards the acquisition of the matrimonial home and completely disregarded the direct and indirect contributions made by the appellant.
2. The court *a quo* gave undue weight to the fact of the registration of the property.
3. The court *a quo* erred in that it failed to make a proper assessment of the factors set out in s 7 of the Matrimonial Causes Act. Had there been a proper assessment, the award made would not have been made. In particular the court *a quo* completely disregarded the direct contributions made by (the) appellant and gave undue weight to the needs of the respondent.
4. The time given to (the) appellant within which to buy (the) respondent’s share is unreasonable in the circumstances particularly in light of the fact that the Zimbabwean economy has effectively dollarised.”

In our view, there is no merit in all the grounds of appeal. The first and second grounds of appeal will be dealt with together.

In awarding fifty percent of the value of the property to Lizzie the learned Judge in the court *a quo* did not rely solely on Lizzie’s indirect contribution to the acquisition of the property. The most important factor was that Lizzie and Losson were

joint owners of the property. This meant that each of them owned fifty percent of the value of the property. However, the learned Judge could have taken part of Lizzie's share of the value of the property and given it to Losson had she considered it necessary to do so in order to place the spouses in the position they would have been in had a normal marriage relationship continued between them. The learned Judge did not do that because Losson did not establish any basis for it.

Dealing with the fact that the property was jointly owned by the parties, the learned Judge said the following at p 14 of the cyclostyled judgment:

“I have also taken into account that the parties are both registered on the property with equal shares. I have noted that the parties are sophisticated as can be seen from their lifestyle and business ventures. In registering the property in their joint names the defendant was alive to the fact that he was giving the plaintiff an undivided half share in the property. The registration of rights in terms of the Deeds Registries Act [*Cap 20:05*] is not just a formality. It is a matter of substance as it conveys real rights to the person in whose name the property is registered. (See *Takafuma v Takafuma* 1994 (2) ZLR 103). In my view, the defendant has not laid out a basis for me to take away a portion of the plaintiff's 50% share in the matrimonial home.”

We are in complete agreement with the learned Judge. That disposes of the first and second grounds of appeal.

In the third ground of appeal Losson alleges that the learned Judge failed to make a proper assessment of the factors set out in s 7 of the Act. In our view, there is no merit in this ground.

Dealing with the factors set out in s 7(4) of the Act, the learned Judge said the following at pp 13-14 of the cyclostyled judgment:

“It was apparent from the evidence, however, that the parties during their marriage lived well and enjoyed an above average lifestyle. They both worked throughout their marriage, and in my view contributed to the best of their ability to building the matrimonial estate. It is now settled that in order for the court to achieve an equitable distribution it must take into account all the factors that are set out in s 7(4) of the Matrimonial Causes Act. In making the award the court must endeavour to place the parties in the position they would have been (in) had the marriage continued. In *Shenje v Shenje* 2001 (2) ZLR 160 (H) GILLESPIE J stated that the court must consider all the factors set out in s 7(4) of the Matrimonial Causes Act. ...

Section 7(4) of the Matrimonial Causes Act obliges the court to look at the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future. The plaintiff and the minor children will need a suitable house for accommodation following divorce. They require a house in a good area as that is what the plaintiff and the children are accustomed to.”

It is quite clear from what the learned Judge said that she considered and properly assessed the factors set out in s 7(4) of the Act.

In addition, the further allegations in the third ground of appeal, that the court *a quo* completely disregarded the direct contributions made by Losson and gave undue weight to Lizzie’s needs, have no valid basis. As already stated, as a joint owner of the property Lizzie was entitled to fifty percent of the value of the property, and that is what was awarded to her by the learned Judge.

Finally, I come to the fourth ground of appeal. The allegation in this ground was that the period of sixty days within which Losson was to pay Lizzie fifty

percent of the value of the property was unreasonable. The period of sixty days was to run from the date of the valuation of the property.

However, it is pertinent to note that in the heads of argument filed on behalf of Losson in this appeal no submission was made in support of the fourth ground of appeal. It, must, therefore, be assumed that the ground was abandoned.

In any event, the period of sixty days cannot be regarded as short, bearing in mind the fact that Lizzie required the money in order to purchase a suitable house for herself and the two minor children after the dissolution of the marriage.

In the circumstances, the appeal was devoid of merit, and we dismissed it with costs.

GARWE JA: I agree

CHEDA AJA: I agree

Kantor & Immerman, appellant's legal practitioners

Hove & Associates, respondent's legal practitioners