

WASHINGTON MARUZA
versus
MERCY MARUZA (nee Muzindidya)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE; 22 May 2024, 5 June 2024 & 19 September 2024

Civil Trial

T. INdlovu, for the Plaintiff
C. Kwaramba, for the Defendant

MAXWELL J:

The Plaintiff and the Defendant (the parties) married each other on the 18th of December 2018 in terms of the then Marriage Act [*Chapter 5:11*] now the Marriages Act [*Chapter 5:17*]. They were blessed with three children, Anotida Romah Maruza born on 14 June 2009, Tawananyasha Mike Maruza born on 17 June 2012 and Rufaro Maruza born on 30 January 2016. On the 16th of November 2022 the Plaintiff issued out summons claiming a decree of divorce and ancillary relief.

In his declaration, Plaintiff stated that the marriage between the parties had broken down irretrievably and there were no prospects of restoration of a normal marriage relationship. He proposed that custody of the children be awarded to him with the Defendant having access two weeks of every school holiday on mutual arrangements with him. He also proposed that Defendant contributes \$50.00 per child per month as maintenance until each child reaches the age of 18 years or becomes self-supporting whichever occurs first.

Plaintiff submitted that during the subsistence of the marriage between them, the parties acquired both movable and immovable property. He proposed how the property should be shared between them, and that each party should bear its own costs.

Defendant gave notice of entering an appearance to defend. In her plea she denied that the marriage had broken down irretrievably and stated that she believed the marriage was capable of being restored. She submitted that a decree of divorce was not warranted. She further submitted

that in the event that a decree of divorce is granted, custody of the minor children ought to be awarded to her with the Plaintiff having access two weeks of every school holiday on mutual arrangement with her. She proposed that the Plaintiff contribute towards the maintenance of the children by paying all educational and medical expenses for the children until they reach the age of 18 or become self-supporting whichever occurs first. She proposed that she be responsible for all the daily domestic expenses towards the upkeep of the children until they reach the age of 18 or become self-supporting whichever occurs first. She counter – proposed on the distribution of the movable and immovable property acquired by the parties during the subsistence of the marriage.

The parties held a round table conference on which the parties agreed that a decree of divorce be granted. Subsequently a pre – trial conference was held and the following issues were referred to trial:

- 1) Who should be awarded custody of the minor children
- 2) Whether or not the house in Budiro being number 4566 56th Crescent Budiro 3 is matrimonial property and available for distribution.
- 3) Whether or not Plaintiff is entitled to a share in Defendant’s 40% shares in Cermiate Private Limited and if so how many percentages.
- 4) Whether or not the house in Mutoko Growth Point is awarded to the Defendant that should be enough to settle as her claims in the house in Budiro.

TRIAL

The trial opened with the Plaintiff testifying to the following effect. He has been married to the Defendant for 15 years. He is employed by the Commercial Bank of Zimbabwe Limited (CBZ). The parties are in the process of building a house at Mutoko Growth Point which is now at ringbeam level. The property was acquired through Defendant’s efforts. The construction is being done jointly. He obtained a mortgage for the Budiro house which will run until the year 2040. The property under mortgage was acquired valued at about USD\$37 000.00. It was renovated and now has a value of USD\$42 000.00. Defendant is not entitled to any share in the property under mortgage as she is not contributing towards the repayment of the mortgage loan. On movable assets there is one vehicle and household property which Defendant took with her when she moved out. There is a business in Mbare and Chivhu in the name of Cermrate

Investments (Pvt) Ltd. He is willing to accept 20% shareholding in Cermrate Investments (Pvt) Ltd as 60% of the shares are owned by the children. For the entire period, the parties have been married, they both have been gainfully employed. He believes the children are better off with him as Defendant is harsh towards them and he has a softer emotional relationship with them. That was the Plaintiff's case.

Defendant also gave evidence in her case. She has shouldered the bulk of the children's school fees burden. Apart from her income, she would use proceeds from rentals of the property acquired by the parties. At most the rentals were not sufficient for the children's educational needs. She preferred that custody of the children be awarded to her. She took the youngest child to boarding school after the parties started having altercations in front of the children.

They got married in 2008 and started off staying at Plaintiff's parents' house. They moved in 2011. From 2011 to 2015 Plaintiff was paying rent whilst she took care of the household expenses. In 2015 they acquired a house through a mortgage from Plaintiff's workplace. They moved into the acquired house in 2016. When deductions for the mortgage loan started, Plaintiff would bring nothing home. The family was sustained through the proceeds of her hustle. At times Plaintiff would bring groceries from his workplace but at other times he would take the groceries to his parents' house. She paid for renovations to the house and bought household property through a loan from her workplace. Apart from the property acquired through a mortgage bond there is a property in Mutoko which was offered by her customer who failed to pay her. The property was developed to ring beam level.

Cermrate is a family business in which the children hold 60% shareholding and she holds 40%. The company sells construction/building materials. The proceeds therefrom were used mainly to pay school fees and for the welfare of the family. That was Defendant's evidence.

ANALYSIS

CUSTODY

The first issue for consideration is the issue of custody of the minor children. Our courts have emphasized that the determining principle is that the interests of the children take precedence over those of the parents. In terms of sections 19(1) and 81(2) of the Constitution of Zimbabwe as read with the Guardianship of Minors Act [*Chapter 5:08*], "*a child's best interests are paramount in every matter concerning the child*". This is further reiterated in Article 3 of the United Nations

Convention on the Rights of the Child and Article 4 of the African Charter on the Rights and Welfare of a Child. The said Charter and Convention provide that, “*In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration*”.

Section 80(2) of the Constitution of Zimbabwe states: -

“Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.”

The Guardianship of Minors Act [*Chapter 5:08*] provides that either parent can be the custodial parent pending divorce. The Defendant currently enjoys custody of the minor children. For her to be divested of such custody it must be established that it is not in the children’s best interests to remain in her custody. Close to six months have passed and Plaintiff did not approach the court to claim custody of the children. In my view, the passage of time is indicative of the fact that Plaintiff did not see any danger to the children’s welfare posed by their being in Defendant’s custody, otherwise he would have approached the court soon after Defendant left the matrimonial home with them. Plaintiff alleged that Defendant is not suitable for custody of the children as she is too harsh towards them and he has a softer emotional relationship with them. The Defendant responded that she was firm with the children on disciplinary issues. In *Machacha v Mhlanga* HH 185/23 it was highlighted that:

“Children are not chattels to be exchanged at will, held and used as pawns for parents’ selfish ends either to settle scores or score a victory. Children have rights and are entitled to their dignity and humane treatment.”

One of the factors to be taken into account in considering the best interest of the minor child is the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the *status quo*. See *Mcall v Mcall* 1994 (3) SA 201. As stated above, if Defendant posed a danger to the children as Plaintiff alleged, he would not have waited until the divorce trial to claim custody of the children. They have settled to a routine in the custody of the Defendant ever since the parties separated. No justification has been tendered to disturb that routine. The children are entitled to stability in terms of their welfare and environment. Plaintiff’s prayer for custody of the minor children therefore fails.

IMMOVABLE PROPERTY

The second issue referred for trial in the Joint Pretrial Conference Minute is whether or not stand 4566 56th Crescent Budiro Township, Harare, and a stand at Mutoko Growth Point constitute matrimonial property. In *Gonye v Gonye* 2009(1) ZLR 232 it was stated that the adoption of the concept “matrimonial property” often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The proper concept is as stated in the Matrimonial Causes Act [Chapter 5:13] “assets of the spouses”.

The parties agree that these properties are assets of the spouses available for distribution, division or apportionment. The point of departure is what each is entitled to.

(a) Stand 4566 56th Crescent Budiro Township, Harare

Plaintiff submitted that even though Defendant claimed 50% of the Budiro house, if the court is to judge that she be awarded a share, she should only be awarded 10% of the shares in the house and the obligations thereof with an option that he buys her out. Defendant claimed a 50% share on the basis that she indirectly contributed to the acquisition of the property.

It is trite that when distributing the assets of the spouses, the court has a wide discretion to exercise. And in giving effect to the broad discretion bestowed on it by S7(1) of the Matrimonial Causes Act [Chapter 5:13], the court must have regard to the factors set out in S7(4) thereof which are:

- a) the income-earning capacity, assets and other financial resources which each spouse and child is likely to have in the foreseeable future.
- b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future.
- c) The standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained.
- d) The physical and mental condition of each spouse and child
- e) The direct or 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

f) The value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;

These factors were summarized in **Mhora v Mhora** SC 89/20 where Uchena JA had this to say;

“The division and distribution of assets of the spouses at divorce are governed by S7 of the Act. It is trite that in matters involving the distribution of property, the court has to exercise its discretion in deciding what is just and equitable distribution of parties’ property. As a result, a lot of authorities, in construing the provisions of S7 as a whole, refer to the need to achieve an equitable distribution of the assets of the spouse’s consequent upon the grant of a decree of divorce. This Court’s view on the discretion of the trial court on the distribution of assets of the parties was aptly stated in the Ncube case, supra at page 14A where the court said;

“The determination of the strict property rights of each spouse in such circumstances, involving, as it may, factors that are not easily quantifiable in terms of money, is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion”

The factors were also explained in detail in **Gonye v Gonye** 2009 (1) ZLR 232, at 236-237B, where Malaba JA (as he then was) said:

“It is important to note that a court has an extremely wide discretion regarding the granting of an order for the division, apportionment or distribution of assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an order with regard to the division, apportionment and distribution of the assets of the spouses, including an order that any assets be transferred from one spouse to the other. The rights claimed by the spouses under S7(1) are dependent upon the exercise by the court of the broad discretion.

The terms used are the ‘assets of the spouses’ and not ‘matrimonial property’. It is important to bear in mind that the concept used because the adoption of the concept ‘matrimonial property’ often leads to the erroneous view that assets acquired by one spouse before the marriage or when the parties are on separation should be excluded from the division, apportionment or distribution exercise. The concept of ‘the assets of the spouses’ is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.

To hold, as the court a quo did, that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under s 7(1) of the Act is to introduce an unnecessary fetter to a very broad discretion, on a proper exercise of which the rights of the parties depend.

It must always be borne in mind that s7(4) of the Act requires the court, in making an order regarding the division, apportionment and distribution of assets of the spouses, and therefore granting rights to one spouse over the assets of the other, to have regard to all the circumstances of the case.

It is clear from the above that the proper question should not be whether the house is a matrimonial home, but whether it is an asset of the parties subject to distribution in terms of s7(4) of the Matrimonial Causes Act [Chapter 5:13]. The fact that the house was acquired before the marriage is just one of the many factors to be considered in the court's exercise of discretion. The property is not excluded from consideration just because the plaintiff bought it in 2014 and did most of the developments before the marriage.

The Matrimonial Causes Act [Chapter 5:13] in s7(4) in particular, lays out the considerations that the courts must consider in the exercise of their discretion as to how property is to be distributed upon divorce. These include factors such as the income earning capacity of the spouses; financial needs, obligations and responsibilities; standard of living, age, physical and mental condition of each spouse; direct and indirect contributions, value of pensions and gratuities; and the duration of the marriage.”

Defendant testified that when the mortgage loan was availed, she was already working and contributing to the general expenses of the household. Further that whilst Plaintiff's salary went towards the repayment of the loan, the parties agreed that her own earnings would be utilized for the general upkeep for the family. The earnings were both from formal employment and an informal business of buying and selling construction material. The parties were agreed that the property was renovated through their joint contributions.

I am persuaded that the parties are entitled to equal shares in the Budiro property. In *Shenje v Shenje* 2001(1) ZLR 160 it was stated that the legislative intent and the objective of the courts, are more weighed in favour of ensuring that the parties' needs are met rather than that their contributions are recouped. It has also been stated that one cannot put a monetary value on the indirect contribution of a party. See *Usayi v Usayi* 2003(1) ZLR 864. That the Plaintiff's employer facilitated the mortgage bond does not make Defendant's indirect contribution insignificant. Each party will therefore be awarded a 50% share. That share includes the obligation to pay the outstanding amount of the mortgage.

(b) Stand at Mutoko Growth Point

Plaintiff's position was that this property must be awarded to the Defendant whilst he is awarded the Budiro property. However, I made a finding that the Budiro property must be shared equally between the parties. In his evidence, Plaintiff conceded that Defendant had contributed more than him to the acquisition and construction of this property. He had rated their

contribution at 40% to 60% in favour of the Defendant. He had proposed that the property be shared in that ratio. Defendant however indicated that as the property was a family property it should be shared equally between the parties. Accordingly, the property will be shared equally between the parties.

(c) Cermrate Investments (Pvt) Ltd

Defendant's evidence was that 60% of the shares of this company are owned by the parties' three children. She holds 40% of the shares. She agreed to offer the Plaintiff half of the shares she holds. Accordingly, Plaintiff will be awarded 20% of the shares in Cermrate Investments (Pvt) Ltd.

DISPOSITION

1. A decree of divorce be and is hereby granted.
2. Custody of the minor children Anotida Romath Maruza born on 14 June 2009, Tawananyasha Mike Maruza born on 17 June 2012, and Rufaro Maruza born on 30 January 2016 be and is hereby awarded to the Defendant.
3. Plaintiff will have access to the minor children during half of the school holidays, every alternative public holiday, and as and when agreed by the parties.
4. Both parties shall contribute equally to the maintenance of the minor children until they reach the age of 18 years or become self-supporting whichever occurs sooner.
5. Plaintiff be and is hereby awarded:
 - (a) 50% share in stand 4566 56th Crescent Budiro Township, Harare.
 - (b) A 50% share in the stand at Mutoko Growth Point.
 - (c) A 20% share in Cermrate Investments (Pvt) Ltd.
6. Defendant be and is hereby awarded:
 - (a) A 50% share in stand 4566 56th Crescent Budiro Township, Harare.
 - (b) A 50% share in the stand at Mutoko Growth Point.
 - (c) A 20% share in Cermrate Investments (Pvt) Ltd.
7. The properties shall be valued by a valuer agreed to by the parties within 30 days of this order.
8. If the parties fail to agree on a valuer, one shall be appointed by the Registrar of the High Court within seven days of such failure to agree from the list of registered valuers.

9. Plaintiff shall have the first option to buy out Defendant from the Budiro property within six months of the date of receipt of the valuation report, or such time as agreed by the parties, failing which Defendant will have the option to buy out Plaintiff within a month of the Plaintiff's failure.
10. Defendant shall have the first option to buy out Plaintiff's share in the Mutoko stand within three months of the date of receipt of the valuation report, or such time as agreed by the parties, failing which Plaintiff will have the option to buy out Defendant within a month of the Defendant's failure.
11. If the parties fail to buy each other out from any property, it shall be sold to best advantage by an agent agreed to by the parties failing which the Registrar of the High Court shall appoint one from the list of registered estate agents. The net proceeds of the sale will be shared equally between the parties.
12. The costs of the valuations shall be borne equally by the parties.
13. The Defendant be and is hereby awarded all the movable property acquired by the parties during the subsistence of the marriage.
14. Each party shall bear its own costs.

MAXWELL J:



Chatsama & Partners, Plaintiff's legal practitioners

Messrs Mbidzo, Muchadehama & Makoni, Defendant's legal practitioners