

ALVIN CRISP

Versus

STELLA MARY MASVIKENI

HIGH COURT OF ZIMBABWE

MUSAKWA J

HARARE, 3, 4, 5 JUNE 2009 AND 15 APRIL 2010

FAMILY LAW COURT

Divorce Action

Mr. *J. P. Mutizwa*, for the plaintiff

Mrs. *B. T. Mtetwa*, for the defendant

MUSAKWA J: The plaintiff instituted action for a decree of divorce and other ancillary relief. The defendant in turn counter-claimed for a decree of divorce and other ancillary relief.

The parties married in 1981 and four children were born of the marriage and they are all adults. The parties have been on separation since 1987 when the plaintiff left the matrimonial home. The defendant has been living in the United Kingdom since 1999. All the children are residing in the United Kingdom as well.

It is agreed between the parties that the marriage relationship has irretrievably broken down. In contention is what constitutes the matrimonial estate and how it should be divided as well as a counter-claim for arrear maintenance in respect of two of the children of the marriage. From the evidence led the estate comprises lot 1 of Lot 75 Chisipite Township of Chisipite also known as number 9 Harare Drive, Chisipite, stand number 3471 Warren Park Township of stand 2372 Warren Park Township of Warren Park, stand number 11817(980g) also known as number 16 Maruta Crescent, Beatrice

Road Cottages, Mbare, Lot 3 of 99 Block C of Hatfield Estate and two business entities, Crovis Agencies (Private) Limited and Selfast Industries (Private) Limited.

Despite having initially claimed to be awarded number 9 Harare Drive, Chisipite as his sole property the plaintiff later conceded and offered his half share to the defendant. He also confirmed that his half shares in stand number 3471 Warren Park and number 16 Maruta Crescent, Beatrice Road Cottages, Mbare be awarded to the defendant. In view of the concession by plaintiff it has to be determined whether the overall result would place the parties in the same position they would have been had a normal marriage relationship subsisted. In respect of the matrimonial estate what has to be determined is whether defendant should have shares in Crovis Agencies (Private) Limited and Selfast Industries (Private) Limited.

Before I delve into the issues there is one aspect that needs to be disposed of. At the commencement of the proceedings counsel for defendant sought an amendment of the counter-claim. The effect of the amendment was that in distributing the matrimonial estate the court should take into account plaintiff's conduct in deserting the family. In other words, it sought to introduce the issue of gross marital misconduct perpetrated by plaintiff and that he should be penalized in the distribution of the matrimonial estate. This was opposed by counsel for plaintiff as being out of time. It is noted that during the pre-trial conference stage it was directed that defendant was to file the amendment by 31st October, 2008. The notice of amendment was only filed on 3rd June, 2009 and no condonation was sought. I therefore hold that the purported amendment was filed out of time. In anticipation of this issue evidence was also led on the gross marital misconduct perpetrated by plaintiff and will accordingly be disregarded. In any event the parties had agreed that the marriage had irretrievably broken down.

S 7 of the Matrimonial Causes Act [*Chapter 5:13*] provides that-

- (1) 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 the assets of the spouses, including an order that any asset be

transferred from one spouse to the other;

(b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of

one or other of the spouses or of any child of the marriage.

(2) An order made in terms of subsection (1) may contain such consequential and supplementary provisions as

the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of

securing that the order operates fairly as between the spouses and may in particular, but without prejudice to the

generality of this subsection—

(a) order any person who holds any property which forms part of the property of one or other of the spouses to

make such payment or transfer of such property as may be specified in the order;

(b) confer on any trustees of any property which is the subject of the order such powers as appear to the appropriate

court to be necessary or expedient.

(3) The power of 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 the marriage—

(a) by way of an 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.

(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances

of the case, including the following—

(a) the income-earning capacity, assets and other financial resources which each spouse and child has or 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 age and 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;

(g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct,

is just to do so, to place the spouses and children in the position they would have been in had a normal marriage

relationship continued between the spouses.

(5) In granting a decree of divorce, judicial separation or nullity of marriage an appropriate court may, in accordance

with a written agreement between the parties, make an order with regard to the matters referred to in paragraphs (a) and (b) of subsection (1).

In applying section 7 of the Act McNALLY J.A. had this to say in the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 at 106 (S)-

The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term "his", "hers", and "theirs". Then it will concentrate on the third lot marked "theirs". It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked "his", plus the appropriate share of the items marked "theirs". And the same to the wife. That is the first stage.

Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, "as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ...".

Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually "his" or "hers".

The parties hold in equal shares the following property-lot 1/75 Chisipite Township of Chisipite also known as number 9 Harare Drive, Chisipite, stand number 3471 Warren Park Township of stand 2372 Warren Park Township of Warren Park, stand number 11817(9809) also known as number 16 Maruta Crescent, Beatrice Road Cottages, Mbare. This is the property in which plaintiff under oath conceded that his half shares be awarded to defendant. That is no longer in issue as plaintiff has relinquished his claim. I will take into account that the Beatrice Road property is undeveloped. The Warren Park property is a commercial premise which from the defendant's evidence is leased at US\$250 per month. Prior to the introduction of multiple currencies the proceeds went to defendant.

In as far as the residential properties are concerned defendant will be awarded a greater share as defendant only remains with lot 3 of lot 99 of Block C of Hatfield Estate. This is the three bedroomed house that he acquired in 1999 after separation with defendant. This compares well with the Chisipite property although it may well be that the Chisipite property is more valuable by virtue of its location.

Crovis Agencies (Private) Limited at its inception dealt in motor spares. It was defendant's testimony that she contributed towards the establishment of the business. She used to negotiate sales with Nissan Clover Leaf where plaintiff's late partner Steven Madovi was employed. In addition, it was defendant's testimony that Crovis Agencies (Private) Limited was established from capital that was generated from Shambidzo Investments. Crovis Agencies (Private) Limited subsequently acquired two properties, namely what is commonly described as 66 Seke Road where Selfast Industries (Private) Limited trading as Mega Bricks operates from and 59 Caledon Avenue, Prospect.

Since the death of plaintiff's business partner 59 Caledon Avenue has been distributed to the surviving spouses. This was not disputed by defendant. Therefore the claim in respect of 59 Caledon Avenue falls away.

What remains in contention is 66 Seke Road where plaintiff is involved in the business of manufacturing cement bricks. This was the business that was incorporated in 1988. Plaintiff's contention is that this was not a family business as he formed it in

partnership with the late Steven Madovi after he and defendant separated. On the other hand defendant's contention is that the business evolved from Shambidzo Investments.

In his written submissions Mr. *Mutizwa* contended that the assets owned by Selfast Industries (Private) Limited are separate from plaintiff. He further contended that it cannot be said plaintiff is the alter ego of the company as he was a co-director together with the late Steven Madovi. What cannot be denied is that if the Caledon Avenue business was distributed to the late Steven Madovi's spouses, plaintiff remained in sole control of the 66 Seke Road business. Plaintiff did not lead any evidence to show the nature of the shareholding since the death of Steven Madovi, or alternatively to show that additional directors were appointed. In fact he admitted during cross-examination that he remained in control of the brick making business.

Mrs. *Mtewa* cited the case of *Masiyiwa Cleopas Gonye v Stella Maris Gonye S C 15/09* in support of the contention that it is necessary to pierce the corporate veil in order to do justice to the matter. In that case the appellant formed a company in which he and the respondent and two sons were the shareholders. The respondent did not play any active role in the management of the company's affairs. In dismissing the appeal MALABA J.A (as he then was) for all practical purposes the company was a one man company in which the appellant was the sole active director. The share held by respondent was not an income generating asset. The learned judge of appeal went on to say at p 10 of the cyclostyled judgment-

"Stripped of the corporate veil, the proceeds from the farming operations belonged to the appellant. The company was nothing more than the appellant's alter ego. It had no greater right to the money than he possessed."

In the present matter I would therefore hold that the defendant is entitled to a share in Selfast Industries (Private) Limited. It is immaterial that the business was commenced after the parties had separated. In making this decision I take into account that s 7 (1) of the Matrimonial Causes Act provides that-

(1) 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 the assets of the spouses, including an order that any asset be transferred from one spouse to the other;

It is not stated that the court may distribute matrimonial assets, but rather it distributes the assets of the spouses. In this regard a court has a wide discretion. However, in making the award I will take into account that the business was formed after the parties had separated and that defendant did not make any contribution. Had a normal marriage relationship continued she would have benefited from the business. However, taking into account that she is going to be awarded the bulk of the immovable properties I will only award her fifteen percent of the share.

On the issue of arrear maintenance defendant testified that when plaintiff moved out of the matrimonial home plaintiff neglected to give her financial support. She confirmed though that he paid the children's school fees. Having endured financial hardships she decided to move to the United Kingdom. She did not challenge plaintiff's evidence that he is the one who provided money for her air ticket. In 2000 plaintiff also paid for the two children's air tickets when they visited defendant during the holidays and when they eventually went to join her.

According to defendant her regular salary was not enough and she had to engage in agency work. She also had to apply for overdraft facility with her bank. Although she did not pay school fees she had to pay for the children's college fees which she had to borrow. She produced a bank statement showing debits for rent, telephone charges, gas and car loan. She claimed defendant never offered to assist with the children's fees and upkeep.

Defendant is no longer working as she retired from her nursing job on medical grounds. She now lives with her daughter and son-in-law. She stated that she has no other means of earning a living apart from rentals from Shambidzo Investments.

It is quite evident that defendant failed to prove the claim for arrear maintenance. For example, in her counter-claim she prayed for an order for reimbursement of all expenses incurred in respect of the children until they became adults or self-supporting. No evidence was led regarding when the children became self-supporting. No evidence was led on the total expenses she incurred. The bank statement only covers the period between 17 April, 2002 and 14 June, 2002.

Defendant also sought an order for plaintiff to account for rentals in respect of the Chisipite property. However, it is not clear which period defendant wanted plaintiff to account for. If it is the period prior to February 2009 before the introduction of multiple currencies, Plaintiff's evidence was that he used to receive rent in Zimbabwean dollars. It was further his evidence that he deposited defendant's share with Kingdom and that the money became worthless due to hyperinflation. It appeared from the evidence led that for the period after February 2009 plaintiff had already paid part of defendant's share.

On costs, none of the parties has been completely successful in their respective claims. It will only be proper that each party be ordered to pay their own costs.

Accordingly, it is ordered as follows-

1. That a decree for divorce be and is ordered.
2. That plaintiff be awarded lot 3 of Lot 99 Block C of Hatfield as his sole property.
3. That plaintiff is awarded 85% of Selfast Industries (Private) Limited trading as Mega Bricks.
4. That within two months of the granting of this order plaintiff shall transfer his 50% share in the following properties; lot 1 of Lot 75 Chisipite Township of Chisipite also known as number 9 Harare Drive, Chisipite, stand number 3471 Warren Park Township of stand 2372 Warren Park Township of Warren Park, stand number 11817(980g) also known as number 16 Maruta Crescent, Beatrice Road Cottages, Mbare to defendant.
5. That plaintiff shall within two months of the granting of this order pay defendant 15% of the value of Selfast Industries (Private) Limited trading as Mega Bricks.
6. The counter-claim for arrear maintenance is dismissed.

7. The counter-claim for plaintiff to account for rent in respect of 9 Harare Drive, Chisipite is dismissed.
8. That each party shall bear their own costs.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners

Mtewa & Nyambirai, defendant's legal practitioners