NOBUHLE MUPUDZI
and
RUEBEN MUPUDZI

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 19 & 20 January 2010 and 27 January 2011

**MATRIMONIAL TRIAL**

*C. Kwaramba,* for plaintiff
*M. V. Chizodza,* for defendant.

CHITAKUNYE J. The plaintiff married defendant on 2 March 1996 at Bulawayo in terms of the Marriages Act, [*Cap 5:11*]. The marriage still subsists. There are two minor children of the marriage herein after referred to as M and L. M was born on 21 July 1995 and L was born on 13 April 2005. During the subsistence of the marriage the parties acquired both movable and immovable properties. As fate would have it after about 14 years of marriage the parties wish to divorce.

On the 12 October 2007 plaintiff filed a suit for divorce against defendant on the ground that their marriage had irretrievably broken down. In para 3 of her declaration she outlined how the movable property should be distributed. On the immovable property, which is essentially the matrimonial home, she requested to be granted occupation of that property.

The plaintiff claimed custody of the two minor children with defendant being granted reasonable rights of access. She also claimed for maintenance in the event that she is granted custody of the children.

The defendant in his plea conceded that the marriage had irretrievably broken down and so a decree of divorce should be granted. He however disagreed with the manner of distribution of the matrimonial property. He provided his own schedule of how the movable property should be shared. On the immovable property he suggested that the property be awarded to him with apparently nothing for plaintiff.

At the pre-trial conference the issues for trial were determined as follows:-

1. Who gets custody of the two children?
2. What constitutes reasonable access to the minor children?

3. What would constitute reasonable maintenance in respect of the minor children?

4. What constitutes a fair and equitable distribution of the immovable property, namely number 16 Exton Close, Marlborough, Harare.

On 30 July 2009 defendant filed a notice to amend his plea in paragraphs 8, 9 and 10. He now sought that the immovable property be registered in the names of the minor children of the marriage with the plaintiff meeting the costs thereof. He also asked to be awarded a usufructuary right over the immovable property until he dies or remarries. He further asked to be awarded custody of the two minor children with the plaintiff being awarded access to the minor children every alternate weekend, and every half of the school holidays. If granted custody he would not seek an order for maintenance.

On 19 January 2010 plaintiff not to be left out filed a notice of amendment to amend paragraph 8(h) of her declaration. She now sought that she be awarded a "50% share in the matrimonial property namely No. 16 Exton Close, Marlborough, Harare. That the house be sold for best value and the proceeds be shared between the parties. That the parent who is awarded custody be given the first option to buy out the non-custodian parent of his or her share."

On the trial date the two amendments were granted with the consent of the parties.
The plaintiff gave evidence and tendered a number of documents as exhibits in support of her claim. The defendant thereafter gave evidence and also tendered some documents in support of his contention.

In their evidence the parties confirmed that though still living under the same roof they have lost all love and affection for each other and have not shared conjugal rights for a period in excess of two years. Neither of them has any intention of reconciliation. It is there fore clear beyond doubt that the marriage has irretrievably broken down. It is only proper that a decree of divorce be granted.

The parties could not agree on the other issues.

**What constitutes a fair and equitable distribution of the immovable property, namely number 16 Exton Close, Marlborough**, **Harare**.

A number of aspects were common cause as evident from their evidence.
The following factors were common cause. The parties were married on 2 March 1996 at Bulawayo. At that time neither of them had any immovable property. Towards the end of 1996 defendant obtained a loan at concessionary interest rate from his then employer, Barclays Bank, to purchase the immovable property in question. The property comprised double stands;

that is stand 1093 and 1094. The residential house was on stand 1093. It is common cause that at the time of the purchase both parties were gainfully employed and contributing in their own way to the family needs.

All loan repayments were being met from defendant's salary by way of direct deductions from his salary.

In 1998 defendant resigned from Barclays Bank. The bank adjusted the interest rate from the concessionary rate of 5% per annum to the punitive rate of 26% per annum. According to defendant, that increase in interest rates would have doubled the indebtness in a short time. There was therefore need to urgently find a way to pay off the Barclays Bank loan. In order to pay off that loan they settled for a mortgage bond with Beverly Building Society. This option was facilitated by plaintiff. The plaintiff obtained a letter from her friend indicating that defendant was employed in that friend's entity and earning a certain salary per month. Apart from that letter there was also plaintiff's friend who was used to influence a board member at Beverly Building Society to grant the application. The letter provided by plaintiff's friend and plaintiffs' pay slip were furnished to Beverly Building Society in support of the application. As a result of the plaintiff's efforts in this regard Beverly Building Society granted defendant a mortgage bond and with it he was able to pay off Barclays Bank loan which had ballooned to Z$767000- 00 from an initial loan of Z$620000 -00. Repayments of the bond were arranged as before whereby defendant's income went mostly towards meeting the bond repayments.

The defendant did not seriously deny that during the time he was paying the Barclays Bank loan plaintiff's income was used to meet other family household needs. When the Beverly mortgage bond was obtained plaintiff continued meeting household needs. There was no denying that as parties who were both gainfully employed they both contributed to the family estate/welfare.

The defendant's contention that plaintiff's contribution was negligible, deserving only a 10% share was not well supported by evidence from both parties. For instance in her evidence plaintiff said that-

> "We agreed with defendant as a couple seeing that repayments were being deducted from his salary. I was responsible for the day to day household needs namely monthly and weekly grocery, I would pay the maid. I purchased clothes for the children and all other incidentals. From extras from his salary he would pay rates and electricity."

She emphasized that- "we were pulling our resources together."
When asked about defendant's offer to her of only 10% she said;-

> "Firstly I do not think it is fair to think that my contribution to our house is worth 10%. Secondly, we were pulling our resources together. Though he would have put more we were each putting our 100%. Thirdly, I was gainfully employed. I tried to run here and there to raise money for the family. Fourthly, though he was paying the mortgage bond we could have swapped to say my 3500 dollars goes to repay the loan. I was not just an ordinary house wife who spent days looking after the children and is a helper."

The defendant's response to the plaintiff's position as outlined above was not a categorical denial of contribution by plaintiff. When asked why he thought that plaintiff should only get 10% he said words to the effect that-

> "I have a lot of information but a lot has been said. The short of it is that I applied for all the loans. I got the loans that bought the property and I paid all the loans. Of course I got help from plaintiff here and there."

When asked to explain plaintiff's involvement in the purchase of the immovable property his explanation was to the effect that:-

> "Her involvement came much later in 1998. When I left Barclays bank in 1998 there was need to get another arrangement to pay off Barclays bank because interest rate being charged was now high."

He described the interest rates being charged as sky rocketing. He alluded to the fact that he had other options which included a mortgage bond from Founders Building Society but the interest rate for Founders Building Society was higher than Beverly's and so they opted for Beverly Building Society because of its low interest rate. This is what he said of this option:-

> "On this option plaintiff said she had someone she knew who knew the managing director. We went for Beverly. My wife did the ground work. There was this person so I applied for a loan. As my company was not yet doing well this is when plaintiff asked her friend to prepare a pay slip/letter indicating that I worked there and I earned so much."

When submitting the loan application defendant confirmed that plaintiff's pay slip was also submitted. Apparently the income plaintiff's friend said defendant earned at plaintiff's instance together with plaintiff's income satisfied decision makers at Beverly Building Society that defendant and plaintiff were able to repay the loan hence the loan was granted.

There was also the influence by plaintiff's contacts to consider. As regards plaintiffs direct payment towards the loan repayment defendant said that plaintiff did not make any payments towards the bond at any time except a little payment she made to pay off the 2nd Beverly bond for home improvement.

Under cross-examination defendant was asked:-

> "Was it not the arrangement of your family that whilst servicing the loan, your salary would be deducted whilst plaintiff met household needs?"
> To which he replied: - "I would say yes."
> When further asked- "At all times when this was happening was it not a family arrangement that you would meet the bigger costs and she would meet smaller costs?" And his reply was- "yes she has always met the weekly things." Further on he was asked- "When you were paying for the immovable property did you consider it to be yours alone? To which he replied: - "yes but I was alive to the fact that there were contributions by plaintiff."

The above responses by defendant confirm that plaintiff's contribution was substantial bearing in mind she earned much less than defendant. For 14 years of their marriage plaintiff met the family's weekly needs. She also paid wages for the maid and bought clothes for the children She also paid off the balance of the 2nd mortgage bond which they had obtained to make improvements to the family home using her retrenchment package.

To crown it all defendant confirmed that the way in which they contributed to the family needs was as per their arrangement as a couple. That arrangement should now not be used as proof that one spouse did not deserve a fair share from the estate.

Section 7(4) provides the factors to be taken into account by court in the distribution of matrimonial estate. That section provides that:-

> "In making an order in terms of subs (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."

I have no doubt that in taking all or some of the above factors into account, the appropriate court is enjoined to try as far as it is practicable and reasonable, to place the spouses and the children of the marriage in a position they would had been in had a normal marriage relationship continued.

See *Takafuma v Takafuma* 1994 (4) ZLR103 (S), *Marimba v Marimba* 1999 (1) ZLR 87 (H) and *Masimirembwa NO v Chipembere* 1996(2) ZLR 378(S) at 381

In an endeavour to meet the task this court has held that even a fulltime housewife is entitled to a sizable share for the role she plays looking after the home and looking after the children and one would also say, and in providing a comfortable home for the husband. See *Sithole v Sithole* HB 14/94.

In cases where the wife is gainfully employed and makes some contributions from her salary towards the welfare of the family, there should be no doubt that she would ordinarily deserve a reasonable share.

In *casu* it was common cause that as a result of a family arrangement defendant's income went towards loan repayments whilst plaintiff's income went towards groceries and other weekly needs of the family.

The plaintiff paid off the balance of the 2nd mortgage bond which was for home improvements.

It is admitted that at a time when defendant needed an urgent option to pay off Barclays bank loan plaintiff provided that option through her friend and her pay-slip. Though the defendant said that apart from Beverly building society option he had other options which he could have resorted to, those options, according to his own words, were more expensive than the option facilitated by plaintiff. In any case I did not hear defendant to say that those other options would not have required him to prove that he was employed and earning a salary. I also did not hear him to say that the use of plaintiff's pay-slip to prop up the family income would not have been necessary. So clearly which ever financial house he would have approached would have required the letter procured by plaintiff on his purported income and plaintiff's pay-slip. It may also be said that by opting for the option facilitated by plaintiff defendant was served the extra costs he would have incurred had he gone for any of his own

options. That serving must surely be credited to plaintiff. Plaintiff was doing all this believing this was a family home she was helping acquire.

The duration of the marriage is also an important consideration in this case, the marriage lasted for about 14 years and during that period plaintiff was gainfully employed and contributing to family needs to the best of her ability. The plaintiff's contributions towards the family needs over such a long period cannot be easily quantified. This is especially so because her contributions were according to an arrangement between the spouses. It was never said that she failed to meet what had been agreed she would utilize her income on. One may say that the parties designed how they were to use their respective incomes as a couple and each met their side of the arrangement. This is akin to the parties pulling their resources together for their common good. This arrangement was so that they attain a certain lifestyle as a family

In situations were spouses have pulled their resources together this court has considered that as a basis not to differentiate much in the share to be distributed to the spouses. in *Muwalo v Mugunga* 2006 (1) ZLR 485 @ 489C-E BHUNU J said that:-

> "Both parties having been employed as domestic workers their wages could not have been significantly different. They must therefore, have pooled their resources together for the benefit of the common household. That being the case it does not seem to matter who paid for what. What matters is that they were contributing to the common household. While the appellant was paying for the house, the respondent was paying for the other amenities of life for their common good."

In his closing address defendant's counsel contended that plaintiff was not entitled to a 50% share as she had no clear right of ownership. He went on to refer to the case of *Muswere v Makanza* 2004 (2) ZLR 264 wherein MAKARAU JP (as she then was) dealt with the legal relation of a wife to property registered in the sole name of her husband. I am of the view that counsel missed the issue. Plaintiff's claim was not based on a right of ownership to the property but on her entitlement to a share of the matrimonial estate as provided for in terms of s 7 of the Matrimonial Causes Act. Not only did she live with defendant as husband and wife but she made both direct and indirect contributions. In any case s 7(1) provides that:-

> "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;"

I am of the view that taking into account all the circumstances of this case as enjoined by s 7(4) of the Act, this is an appropriate case to award plaintiff a 50% share of the immovable property.

**Custody**

The next issue pertains to custody of the two minor children of the marriage. The elder child is a boy aged 14 years old and the other is a girl aged 5 years old.
The plaintiff's evidence was to the effect that she is the more suitable parent to have custody of the children. She has more time for the children than defendant. The defendant initially asked for custody of both children. Later he opted for custody of the boy with plaintiff retaining custody of the girl. His argument was to the effect that the boy at his age needed to learn from the father and be guided by his father. As a disciplinarian he feels he is better suited to instill the requisite discipline in the child especially at his age. He contended that plaintiff has no time to inculcate appropriate discipline to the children as she travels a lot on business.

In ascertaining which parent to award custody, court must be guided by what is in the best interests of the child.
See *Nugent v Nugent* 1978 (2) SA 690 @ 693A-B and *Jeche v Mahovo* 1989 (1) ZLR 364 (S)

In so far as custody for the girl child is no longer in issue a question to be asked pertains to whether there is any good reason why the children should be separated. The defendant's contention for seeking custody of the boy child is primarily because he feels plaintiff is not a disciplinarian and so the boy at his age needs to stay with a disciplinarian. It is common cause that the parties have been living under the same roof enjoying same access to the children. They both have had the same opportunity to discipline the children yet from his own words he has not been effective in disciplining the children. If anything his own evidence shows that it is plaintiff who has been more involved with issues pertaining to the children. In as far as opportunity to inculcate discipline in the boy is concerned I do not think defendant will not have such opportunity. This is so because from the defendant's own submissions both parents will virtually have same periods of access to the boy. For instance parties agreed that the boy should continue attending boarding school and so most of the time he will be at school. The parties agreed that the non-custodian parent should enjoy access to the boy every alternate weekend and for half the school holiday. The other half he will be with the custodian

parent. The defendant's claim for custody was not based on any other rights of a custodian parent.

After all has been said I am of the view that plaintiff has not been shown to be an unsuitable parent to have custody of the boy as well. It has not been shown that granting custody to plaintiff will not be in the best interest of the boy child. Plaintiff will thus be awarded custody of the boy as well.

**Maintenance**.

The plaintiff's claim was to the effect that in the event she is granted custody of the children she would want the maintenance arrangement to continue as it currently is. Currently the arrangement is that the defendant has been paying the school fees whilst plaintiff has been meeting the children's all other needs such as buying groceries, uniforms, paying the maid etc. The school fees were in fact being paid by the family company Nebuer Management Systems (Pvt) Ltd. which plaintiff will retain. The defendant on the other hand contended that if he is to vacate the matrimonial house he would need assistance in raising school fees for the children. He would require plaintiff to contribute $1600 per quarter/ term towards the school fees. On his own he would be unable to raise the expensive school fees.

The defendant tendered some documents in support of his assertion that Nebuer Management Systems (Pvt) Ltd is in the red and thus cannot afford the high school fees. Those documents comprised a Tel-one overdue bill for Nebuer Management Systems and an Old Mutual Rental Invoice in the name of Nebuer Management Systems showing rentals due. There is also a letter reflecting defendant's income as being a total of $410 per month.

When asked why his company continued to rent the entire 8th floor at Eastgate Complex when the logical thing, if in financial difficulties, would have been to rent fewer offices or even relocate to a smaller place, defendant had no ready answer. The documents on their own are in my view inadequate to show that the company is in the red. Defendant could easily have furnished a proper financial statement reflecting the exact financial position of the company. I am of the view that defendant was not candid with court on his financial situation.

In the circumstances defendant will be ordered to continue paying school fees for the children whilst plaintiff meets the other needs she has been responsible for.

Accordingly it is hereby ordered that:-

(1) A decree of divorce be and is hereby granted.

(2) Plaintiff is awarded a fifty percent (50%) share in the matrimonial property being a piece of land situate in the district of Salisbury called stand 1093 Marlborough Township 18 of stand 307A Marlborough Township measuring 2002 square metres also known as NO 16 Exton Close, Marlborough, Harare.

(3) The defendant is awarded the remaining fifty percent (50%) share of the said immovable property.

(4) The parties shall agree on the value of the property within seven (7) days of the date of this order. If the parties fail to agree on the value they shall, within 14 days of this order, appoint a mutually agreed evaluator to evaluate the property. If the parties fail to agree on an evaluator, the Registrar of the High Court shall be and is hereby directed to appoint an independent evaluator from his panel of evaluators to evaluate the property. The parties shall share the costs of such evaluation in equal proportions.

(5) The plaintiff shall be granted the first option to buy off defendant by paying him his Fifty percent (50%) share of the value of the property within 120 days of the date of receipt of the evaluation report unless the parties agree otherwise. If plaintiff fails to pay off defendant as above defendant shall be given 60 days within which to buy off the plaintiff unless the parities agree otherwise.

(6) Should the parties fail to buy off each other in terms of the above clause (5) in full within the stipulated periods the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the registrar of the High Court and the net proceeds there from shall be shared in the ratio 50:50.

(7) Each party to pay their own costs of suit.

*Mbidzo,Muchadehama & Makoni*, plaintiff's legal practitioners.
*M.V Chizodza-Chineunye*, defendant's legal practitioners