

BONANG FAKAZI MBULAWA DUBE  
**versus**  
EKHETHELENG ROSELYN DUBE (Nee NOKO)

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 14, 15 FEBRUARY 2017 AND 23 FEBRUARY 2017

### **Civil Trial**

*T Masiye Moyo* for the plaintiff  
*N Mazibuko* for the defendant

**MATHONSI J:** The plaintiff and the defendant are husband and wife who were married at Bulawayo on 27 April 1985. Although their marriage has survived for 32 years it has run into turbulence. He has now approached this court seeking a decree of divorce and ancillary relief which relief the defendant wholly contested right up to trial.

At the commencement of the trial she underwent some damascene experience. She indicated that not only was she abandoning her contestation of the grant of a decree of divorce she was also throwing out through the window her claim for personal experience. Therefore of the six issues for trial identified at the pre-trial conference and captured in the joint pre-trial conference minute signed by the parties essentially two issues remained for determination at the trial. These are:

1. How the parties' immovable property should be divided upon divorce.
2. How the parties' movable property located both in Zimbabwe and in the United Kingdom should be divided upon divorce.

In his summons and declaration the plaintiff averred that he should be awarded 80% of the immovable property known as 598 Scone Road Killarney Bulawayo (the matrimonial home) while the defendant should be awarded 20% of it. He pleaded that each party should retain whatever movable property is in his or her possession at the time of divorce. At the trial the plaintiff conceded that the defendant may have the kitchen utensils located in storage boxes at the matrimonial home.

For her part the defendant averred in her pleadings that the matrimonial home should be evaluated after which it should be sold to best advantage and the proceeds shared between the two of them at the ratio of 60% to herself and 40% to the plaintiff. The movable property should also be sold with the proceeds being shared equally between them.

At the trial the plaintiff, who I must state from the outset did not acquit himself very well confirmed that he had indeed married the defendant on 27 April 1985 and produced a certified copy of the marriage certificate given to them at the time. They were blessed with one child a girl who is now 31 years old. He is seeking a decree of divorce because the two of them have lost love and affection for one another. They commenced living apart in 2003 or 2004 as the defendant works in the United Kingdom while he had a brief stint there before relocating to Zimbabwe where he is now based. They have not shared the matrimonial bed since 2010. As such there is really no marriage to talk about.

Although the defendant contested the reason why the two have not enjoyed conjugal rights, she admitted that the marriage has failed. For that reason a decree of divorce will be granted.

Regarding the matrimonial home, the plaintiff stated that he had purchased a vacant stand from one Moffat Cephas Ndou in 1992 without any assistance from the defendant. In 1994 they started constructing a house on it. He started by accumulating building material, again without any financial input from the defendant, and later commenced building. It was only after he had singularly completed building the house that the defendant requested to be allowed to buy and install kitchen cupboards and carpets.

After he had granted the defendant permission to do so, she applied for a loan from CABS which was granted to her. She used that loan to install kitchen fittings and carpets at the house. She had taken the title deed which was originally in his name only to apply for the loan and never gave it back to him.

The plaintiff stated that since 2010 he is the one who has been paying rates for the house without any assistance from the defendant. Prior to that they had leased the house out and the tenant is the one who was paying the rates. He said there is a time during the subsistence of the marriage when he fell ill and was admitted to hospital. The defendant took advantage of his

illness to transfer a half share of the property into her own name such that the title deed showed that they jointly owned the house.

Although he discovered the change in the title after he recovered he did not do anything to reverse what would have been an unlawful alienation of his half share. About the year 2001 he again fell ill and was admitted to hospital. Upon his discharge from hospital, he again discovered that the defendant had taken advantage of his illness and transferred the other half share of the matrimonial home then held by him into her own name. This meant that the defendant was now the registered owner of the matrimonial home.

The plaintiff stated that when he discovered that he now held no title to the house he tried to discuss the issue with the defendant who became hostile. As such he could not get her to reverse the transfer which had been done without his consent or knowledge. He then engaged his own sisters to try and reason with the defendant to return ownership of the matrimonial home to him but the efforts of the sisters also came to naught.

He admitted that although the defendant took transfer of the whole of stand 598 Marvel Township Bulawayo on 24 July 2001 and he became aware of that fact immediately after it occurred, he did not taken action to reverse the transfer or report the defendant to the police for fraudulently taking transfer of his property. Instead the two of them moved to the United Kingdom in search of good fortune. They lived there for sometime before he returned to Zimbabwe and set up base at the matrimonial home leaving the defendant there.

The plaintiff denied that they bought any building material in Botswana where the defendant's sister and her family live. He maintained that most of the building material was acquired by himself locally. He used the war veterans' gratuity he had obtained as well as pension to purchase building material. While it is true that the defendant was also employed at the time she did not contribute anything towards the acquisition of property and did not even assist in paying tuition fees for their daughter. He did that from the war veterans' education assistance fund.

As things stand now he is unemployed and survives on the war veterans' pension of \$202-00 a month which is not enough to cater for his needs. On the other hand the defendant has acquired British citizenship, is employed there and even if she retires at the age of 60 years, she

is now 56 years old, she will be entitled to a fat pension from which to survive. For these reasons he needs the matrimonial home which he should be allowed to retain while the defendant re-establishes herself elsewhere.

Regarding the movable items, the plaintiff stated that he had been using those at the matrimonial home to the exclusion of the defendant since 2010. The defendant has also been using those located in the United Kingdom to his exclusion since 2010. In light of that it is only fair that each retain what is in their possession.

I have said that the plaintiff faired very badly in the witness box. His demeanor was terrible. He evaded simple questions and spent a lot of time grand standing. He could not give a reasonable explanation as to how the matrimonial property was transferred into the name of the defendant from his own without him appending his signature to authorize transfer. Even assuming that the property was transferred in two tranches without his consent or knowledge, he could not explain how and indeed why he did not do anything about such illegality for more than 16 years. In fact he only issued divorce summons and claimed a bigger share without even making an averment about the alleged illegal transfer.

In that respect I am of the view that the explanation given by the defendant to the effect that the plaintiff was a bad debtor who was hounded by creditors who were by then baying for his blood and wanted to attach and sell the house is more likely the correct version. In fact considering the performance of the defendant, who gave evidence with dignity, calmly and without attempting to mislead the court in any way, where her evidence is in conflict with that given by the plaintiff, I accept that of the defendant.

The defendant was quick to conceded that although she was employed at the time the stand was purchased, her only direct contribution towards its purchase was a sum of \$800-00. She stated that during construction she also contributed but not in respect of the building material purchased in Zimbabwe which was the bulk of it, but in respect of what they were buying in Botswana. When they went to Botswana to purchase material the two of them pooled their money together.

The defendant stated that even before that the plaintiff had taken all the money, including that which came from her own family, which the parties received as presents and gifts at their

wedding and did not account for it. Before the stand was purchased the plaintiff and his father had agreed that the latter would appropriate the farm produce she had single handedly harvested in return for two heifers. Those heifers were part of the cattle business which the plaintiff was engaged in which brought money used to purchase the stand and build the house.

The defendant stated that she directly contributed to the construction of the house after she took out a loan from CABS against registration of a mortgage bond on the title deed of the matrimonial home. Cabs had insisted that before advancing the loan to her she need to hold title to the property to be encumbered. She discussed the issue with the plaintiff and he readily agreed to that arrangement and signed away 50% share of the matrimonial home. This was in 1997. It explains why the plaintiff donated to her the initial 50%. After that the two jointly held title to the house by deed of transfer number 3934/97. The defendant was adamant that she only applied for a loan from Cabs once. Mr *Moyo* for the plaintiff took issue with the fact that mortgage bond number 3353/2001 was registered on 24 July 2001 suggesting that the defendant was either lying or took two loans. In my view the defendant gave a reasonable explanation for that. The probabilities are that the bond in question was a carryover from the previous one and had to be registered against deed of transfer number 2474/2001 in the defendant's name only.

The defendant went on to say that when the plaintiff's inherited house in Kumalo was attached for sale in execution by the plaintiff's business partner, the plaintiff decided to protect the matrimonial home by transferring his half share to herself. I have already said that this explanation is plausible and I accept it. She added that she indirectly contributed to the acquisition of matrimonial assets as she fed the family including the hordes of employees who worked at the plaintiff's businesses. She is the one who bought the food.

There is also a time when the plaintiff deserted the matrimonial home in 1999 to live with another woman. She had to foot all the bills on her own including the child's school requirements and tuition fees. The defendant stated that this was before the war veterans fund started paying school fees for children. Ironically when the fund paid the arrears after its inception, the plaintiff took all the money and converted it to his own use despite the fact that it is the defendant who had paid the school fees and not him.

When they were living in the United Kingdom, the plaintiff accumulated a lot of debts which she documented in exhibit 3. He then absconded leaving the debts unpaid. Although she has not settled those debts the plaintiff's liabilities have meant that she has been disqualified from securing loans for her benefit. Financiers in that country have a record that the house she lives in belongs to a bad debtor, they will not advance her loans.

She added that there was indeed time when the plaintiff was ill and had to be admitted to hospital. The diagnosis had been that he had been a heavy drinker suffering from withdrawal symptoms. Whatever the case, she had looked after the plaintiff during these difficult times. He was receiving treatment from her medical aid scheme and therefore she is the one who footed the medical bills.

The distribution of the matrimonial property of spouses at divorce is an issue that is within the discretion of the court. See *Kwedza v Kwedza* SC 73/14 (unreported); *Masendeke v Masendeke* HB 266/16; *Ndlovu v Ndlovu* HB 341/16. In exercising that discretion the court has to consider the various factors set out in s7 (4) of the Matrimonial Causes Act [Chapter 5:13]. The court must endeavour as far as is reasonable and practicable having regard to their conduct, to place the spouses in the position they would have occupied had a normal marriage relationship continued. The factors set out in subsection (4) s7 are:

- (a) the income-earning capacity, assets and other financial resources of the spouses;
- (b) the financial needs, obligations and responsibilities of each spouse;
- (c) the standard of living of the family;
- (d) the age and physical and mental condition of each spouse;
- (e) the direct or indirect contribution of each spouse to the family including contributions made in looking after the home and caring for the family and any other for domestic duties;
- (f) the value to each spouse of any benefit which such spouse will lose as a result of divorce; and
- (g) the duration of the marriage.

It is generally accepted that the *locus classicus* on the subject of the division of matrimonial assets is the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) 107 C – F where McNALLY JA made the following pronouncement;

“The approach which I have outlined is consistent with an earlier decision of this court. In *Ncube v Ncube* (1993 (1) ZLR 39). KORSAN JA dealt with a similar situation at (pp 45-48) of the judgment. He adopted the approach of starting from a position of 50-50 ownership and only moving away from that position if the justice and equity of the case required it. I refer in particular, to the following passage at (p47) of the judgment:

‘It is incorrect to say that the appellant as a registered joint owner is not entitled to a half share of value of the Napier Avenue property because she did not contribute money or money’s worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property. The proper approach is to accord her her share of that property and then, taking into account all the assets of both spouses to endeavour as far as is reasonable and practicable and is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered, in the exercise of its discretion, to order that any asset be transferred from one spouse to the other’”.

Therefore where the spouses are joint owners by virtue of registration of title in both their names, it matters not that one of them did not contribute money or its worth towards the acquisition of the property in question. The court starts from the premise that they are joint owners of the property.

More recently, MAKARAU JP (as she then was) advanced that jurisprudence further in *Dzvova v Dzvova* 2008 (1) ZLR 294 (H) 297A when she remarked:

“---the plaintiff is a half owner in the immovable property. Such ownership is not derived from her status as a wife nor does it arise from direct contributions that she made towards the acquisition of the property. She is an owner by virtue of the registration of her name against the Deed of Transfer in respect of the property. Her title to the property in this regard holds against the world at large and, to an extent, against her husband, unless he can show recognizing her right in the property will not achieve the objectives set out in the Act, namely placing the spouses in the position they would have been in had a normal marriage relationship continued, as far as this is reasonable and practicable.” (The underlining is mine)

To those authorities should be added the provisions of s26 (c) of the constitution of Zimbabwe which provides that the state must ensure that there is equality of rights and

obligations of spouses during marriage and at its dissolution. To that extent equality at the time of divorce is now a constitutional imperative.

What we have in this matter is a situation whereby the defendant holds full title of the immovable property to the exclusion of the plaintiff, never mind the respective contributions of the parties in monetary terms towards its acquisition. The import of the plaintiff's claim is that she should have 80% of the title she holds taken away from her because her contribution towards acquisition was negligible. The law does not allow that.

In fact even were we to consider contribution and ignore registration of title, the defendant's contribution towards the acquisition and retention of the matrimonial home is immense. She had an input when the stand was acquired. She completed construction work by taking a loan which was used to install fittings and carpets. When the property was at the risk of being attached and sold in execution to recover what the plaintiff owed to creditors, she stepped in and assumed the risk of ownership by taking full title. That way the parties retained the property.

I have not lost sight of the fact that the defendant was employed throughout. She therefore made indirect contributions to the family by feeding the family including the plaintiff's employees. She paid the child's education. She paid for the plaintiff's medical treatment and looked after him when he was uncapacitated by illness. We are here talking of a marriage that has lasted for 32 years. The defendant is now 56 years old while the plaintiff is 59 years old. They are separated by only 3 years.

Accordingly taking into account all the factors set out in s 7(4) of the Act the justice and equity of the case points towards equality in respect of the distribution of the matrimonial home. In that regard Mr *Mazibuko* for the defendant was right to concede that even though the defendant holds full title, half of it should properly be awarded to the plaintiff.

Regarding the movable property, Mr *Moyo* for the plaintiff submitted that awarding the unknown quantities of that property to the party who has possession accords with justice and fairness especially as the property has not been particularized and the plaintiff has had sole use of the property in Zimbabwe while the defendant has had the same benefit in respect of the UK



property. I agree. It occurs to me that identifying the items in question, evaluating them and selling them for the parties to share the proceeds would be an unnecessary burden on the parties.

I have already mentioned that the plaintiff conceded the defendant's claim to the items which are packed in boxes and kept at the matrimonial home.

In the result, it is ordered that;

- 1). A decree of divorce be and is hereby granted.
- 2). Save for the utensils and items which are packed and kept at Killarney, each party is hereby awarded whatever movable property is in his or her possession at the time of divorce
- 3). The utensils and other items of property which are packed in boxes and stored at No. 598 Scone Road Killarney Bulawayo are hereby awarded to the defendant.
- 4). The matrimonial home, being No 598 Scone Road, Killarney Bulawayo otherwise known as stand 598 Marvel Township 2 of Marvel A, Bulawayo is hereby awarded to the plaintiff and the defendant in equal shares.
- 5). The said property shall be valued by estate agents appointed by the Registrar of this court to determine its market value after which either party shall be entitled within 3 months from the date of valuation to pay to the other his or her 50% share and retain full ownership of it.
- 6). In the event of the parties' failure to exercise the option given to them by clause 5 herein then the matrimonial home shall be sold by estate agents appointed by the Registrar of this court best advantage and the proceeds shared equally between the parties.
- 7). Each party shall bear its own costs.

*Masiye-Moyo and Associates*, plaintiff's legal practitioners  
*Calderwood, Bryce Hendrie and Partners*, defendant's legal practitioners