GLADYS CHIGUNDE (nee Mautsi)

versus

DAVID CHIGUNDE

HIGH COURT OF ZIMBABWE

CHITAKUNYE J

HARARE, 19 February 2015

**Divorce Action**

*H. Nkomo*, for the plaintiff

*B T Mudhara*, for the defendant.

CHITAKUNYE J: The plaintiff and defendant were married in terms of the Marriages Act, [*Chapter 5:11*] on 7 September 1985. The marriage subsists. Their marriage was blessed with two children who are both now adults.

On 7 June 2013 plaintiff issued summons out of this court for the dissolution of the marriage and a distribution of both movable and immovable properties owned by the parties. The plaintiff alleged that the marriage relationship has irretrievably broken down to such an extent that they can no longer live together as husband and wife. The factors of the breakdown included that:-

1. The defendant has improperly associated with other women during the subsistence of the marriage;
2. The defendant has failed to treat the plaintiff with respect as expected between husband and wife;

 c) The parties have not slept together as husband and wife for more than six years;

d) The defendant has physically and emotionally abused the plaintiff.

The defendant in his plea conceded that the marriage has indeed irretrievably broken down albeit for reasons different from those advanced by the plaintiff. He further conceded that the parties have not shared bed as husband and wife for more than six years preceding the institution of this case.

In his counter claim defendant prayed for a decree of divorce and an order for the distribution of assets of the spouses as per paragraphs 6, 7 and 8 of his counter claim.

From the aforementioned it is clear that both parties are of the firm view that there are no reasonable prospects of a restoration of a normal marriage relationship between them.

At a pre-trial conference parties settled on almost all the issues except on the issue of the distribution ratio for the matrimonial immovable property, namely No. 9 Harare Drive, Logan Park, Hatfield, Harare.

The parties agreed that: -

1. The marriage has irretrievably broken down to the extent that there are no prospects of the parties living together as husband and wife;
2. The plaintiff can have 50 per cent of a certain undeveloped piece of land known as Stand Number 24273 Ruwa Township of York Estates;
3. The plaintiff contributes 50 per cent of the amount owing on the property referred in paragraph 2 above;
4. The parties have already shared the movables between them; and
5. That each party shall bear his/her own costs.

The only issue referred to trial was: - what is a fair distribution of the matrimonial home, known as Number 9 Harare Drive, Logan Park, Hatfield, Harare.

The plaintiff claimed a 50 per cent share in the matrimonial property whilst defendant offered 20 per cent. At the pre-trial conference defendant upped his offer to 35 per cent just so that the parties can settle otherwise his unequivocal offer was only 20 per cent.

The plaintiff gave evidence and tendered documentary evidence in support of her claim for a 50 per cent share. The defendant thereafter gave evidence and also tendered into evidence documentary evidence in support of his contention that he deserved at least 65 per cent share of the property whilst plaintiff gets 35 per cent at the most.

The evidence by the parties confirmed that the parties married in 1985 in terms of the Marriages Act, [*Chapter 5:11*]. At the time of marriage plaintiff was employed as a clerk typist at ZESA whilst defendant was employed at MBCA. Parties were not agreed on the capacity defendant was employed as. Plaintiff alleged he was a bank clerk whilst defendant contented he was a supervisor. Upon marriage the couple moved into rented accommodation in Glen Norah. After about a year defendant obtained a mortgage bond from his employer and bought a house in Kambuzuma. The house was however registered in the name of MBCA Nominees as required by his employer. After staying in the Kambuzuma house for some time they sold that house and defendant obtained another loan from his employer to buy another house in Craneborne. The Craneborne property was again registered in the name of MBCA Nominees. Later the Craneborne property was sold and the parties bought a property in Mabelreign. The Mabelreign property was registered in the joint names of the parties. The Mabelreign property was later sold and proceeds used to pay off the loan and to deposit for the current matrimonial house, namely, Number 9 Harare Drive, Logan Park, Hatfield, Harare. This property is registered in defendant’s name only.

According to defendant he registered this property in his name only because plaintiff had let him down regarding payment of her portion of loan repayments leading to the accumulation of arrears on the Mabelreign property. This is what led to the parties disposing of the Mabelreign property. The plaintiff, on the other hand, alleged that defendant convinced her that as he was in the process of looking for a new employer, the prospective employer would take up the Mortgage if it was in his name only and this would be cheaper and easier to repay for them. As a result of this she agreed that the property be registered in defendant’s name only.

It may also be noted that the parties were not agreed as to whether plaintiff’s payslip was used when obtaining loans to purchase the Kambuzuma and Craneborne properties. Plaintiff argued that her pay slip was used whilst the defendant contended otherwise. He however conceded that on the Mabelreign property plaintiff’s payslip was used.

The parties’ evidence on the proposed sharing ratio was mostly based on what each said they directly contributed towards the purchase price of the properties. For instance defendant contended that as he bought the first two properties using loans from his employer and all loan repayments were made by him those properties were his. The plaintiff on the other hand argued that she also made direct contributions towards those properties.

As regards the current property parties agreed that the deposit of about half its purchase price came from the proceeds of the Mabelreign property which was jointly owned. In that way it was argued that plaintiff contributed directly as her 50 per cent share in the Mabelreign property went towards the purchase price of the Logan park property. Apart from that she also made further contributions towards improvements to the property.

It is common cause that throughout the 29 years of their marriage both parties were gainfully employed. Plaintiff progressed from being a clerk typist to managerial positions. Defendant equally advanced in his employment. Their earnings progressively increased and as of now plaintiff was said to be earning more than the defendant whereas in the beginning she was earning less. That improvement in earning translated to improvement in their standard of living hence their moving house from high density areas to low density areas. It is in that progression that they cannot agree that each contributed to that improvement and hence deserves what they are asking for.

The principles governing the distribution and apportionment of assets of the spouse at the time of the dissolution of a marriage are found in s 7 of the Matrimonial Causes Act, [*Chapter 5:13*];

 Section 7(1) thereof states 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:-

1. division, apportionment or distribution of assets of the spouses, including an order that any asset be transferred from one spouse to the other…”

The factors to be considered when determining how to apportion or distribute assets of the spouses are laid out in s 7 (4) in the following manner:-

“In making an order in terms of subsection(1) any appropriate court shall have regard to all the circumstances of the case, including the following:-

1. The income –earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
2. The financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
3. (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;
4. The age and physical and mental condition of each spouse and child;
5. 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 other domestic duties;
6. 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;
7. 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.”

It is clear from the above that when determining what would be a fair and equitable distribution of the assets of the spouses, court is not hamstrung by direct contributions by each spouse. Court is enjoined to look at a wide spectrum and endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouse in the position they would have been in had a normal marriage relationship continued between the spouses.

In fact in terms of s 7 (4) (e), when considering contributions both direct and indirect contributions must be taken into account. As aptly noted by ZIYAMBI JA in *Usayi* v *Usayi* 2003 (1) ZLR684 (SC) at pages 687 H to 688 D when she said that: -

“Mr. Gijima, who appeared for the appellant, was persistent in his submission, that the respondent, having made no financial contribution to the acquisition of the house, was not entitled to an award of 50 percent of the sale price. Having regard to the provisions of s 7(4) of the Act, this submission is unsound. The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, housekeeper, day and night, nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home, and the creation of an atmosphere therein from which both husband and children can function to the best of their ability? In the light of these many and various duties, how can one say, as is often remarked: “throughout the marriage she was a housewife. She never worked”? In my judgement, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of 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.”

Section 7 (4) (e) recognises other contributions made by spouses in a marriage and is not restricted to direct financial contribution. In *casu*, it is an accepted fact that each spouse contributed to the needs of the family throughout the 29 years of their marriage. The levels of contribution may have differed but that is as it should be. It is impossible to quantify contributions by each spouse over 29 years of marriage. Surely unless one was keeping an accurate record such would not be an easy task. In any case as already alluded to there are some contributions to the welfare of the family that are not easy to quantify.

On the property in question defendant conceded that plaintiff did directly contribute to some of the improvements effected. His only query being on how much that should translate to. I am of the view that where parties have been married for a long time, as in this case, the issue of direct contribution whilst relevant should not take the centre stage. Instead parties should look at other features such as the needs and expectations of the parties as they go out of the marriage. Their needs and expectations should carry more weight than direct financial contribution.

In *casu*, I am of the view that the parties family was provided for by both parties with each party doing their best given their circumstances. For the 29 years I did not hear defendant to seriously suggest plaintiff did not play her role as wife and mother of the house well. Equally plaintiff did not allude to defendant failing in his husbandly and fatherly role in the family. That being the case it would be an act of great injustice to ask the parties to each go out of the marriage with what they directly contributed financially. I am of the view that whatever each party was doing was for the betterment of the family and each party benefited immensely from the industry and thrifty of the other as each played their role in raising the standard of the family. Indeed for the marriage to have lasted that long suggests each played their role responsibly.

In an endeavour to as far as is reasonable and practicable, place the spouses in the position they would have been in had a normal marriage relationship continued, I am of the view that each party should be awarded a 50 per cent share in the matrimonial home. The duration and the industry and thrifty of each spouse during the 29 years is such that only an equal share for each spouse would meet the justice of the case. This is a case where court is enjoined to exercise its discretion in terms of s 7(1) of the Act and order the transfer of half of the share in defendant’s name to plaintiff.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted.
2. The plaintiff is hereby awarded a 50 per cent share in a certain undeveloped piece of land known as Stand Number 24273 Ruwa Township of York Estates.
3. The plaintiff shall contribute 50 per cent of the amount owing on the above Ruwa property referred to in para (2) above.
4. The plaintiff is hereby awarded a 50 per cent share in the Matrimonial property known as Number 9 Harare Drive, Logan Park, Hatfield, Harare with the defendant being awarded the other 50 per cent in the said property.
5. The parties shall agree on a value of the property within 14 days from the date of this order failing which they shall’ within 14 days, appoint a mutually agreed valuer to do the valuation.
6. Should the parties fail to agree on a valuer the registrar of the High Court shall appoint one such valuer from his list of valuers within 14 days of being advised of the failure by the parties to agree on a valuer.
7. The cost of the valuation shall be borne by the parties in equal shares.
8. The defendant is hereby granted the first option to buy out plaintiff in respect of her share as valued within six months from the date of receipt of the report of valuation.
9. Should the defendant fail to buy out plaintiff or make a payment plan acceptable to plaintiff within the period stated above, plaintiff shall be eligible to buy out defendant’s share within three months from the date of defendant’s failure.
10. Should plaintiff fail to buy out defendant or make a payment plan accepted to defendant within the stipulated period, the property shall be sold to best advantage by an estate agent mutually appointed by the parties within 14 days of such failure or one appointed by the registrar of the High Court. The parties shall share the net proceeds as per their respective shares awarded above.
11. Each party shall bear their own costs of suit.

*Mtetwa & Nyambirai*, plaintiff’s legal practitioners.

*Mundia &Mudhara*, defendant’s legal practitioners.