CHARITY NCUBE
versus
PHANANKOSI NCUBE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 18, 19 March 2015, 11, 12, 13, 26, 27, 28 May 2015, 03 and 23 July 2015

Civil Trial

R. Moyo, for the Plaintiff
M. Moyo, for the Defendant

UCHENA J: The plaintiff has lost love and affection for the defendant her husband. Her loss of love and affection led to the irretrievable break down of their marriage. They were happily married, at Western Commonage Magistrate's Court on 13 December 1997. They married in terms of the Marriages Act [*Chapter 5:11*]. The plaintiff was the first to give up on her marital vows, when she left the matrimonial home in May 2009. The defendant would have according to his testimony carried on with the marriage, if the plaintiff had not given up on her vows. He however accepted her right to opt out. The plaintiff's resolve to opt out was crystallised on 7 February 2012, by the issuance of summons in which she sought a decree of divorce and ancillary relief. She, in her declaration, declared the irretrievable break down of their marriage. The defendant accepts that their marriage has irretrievably broken down.

Their marriage was blessed with two children, Nkosenhle Nazariel Ncube born on 10 September 1995, now an adult, and U born on 2 June 1999, still a minor. They initially both worked for Zesa, in Zimbabwe, but eventually worked for South African companies. The defendant later went further afield to work in Dubai. He lost that employment, and is now out of employment. The plaintiff is still employed in South Africa.

They brought before this court two issues for determination;

1. The maintenance of U the minor child. and
2. The distribution of their two immovable properties No 14466 Selbourne Park Bulawayo, a property in Zimbabwe. And Erf 48 Albemarle Township Johannesburg the South African property.

The parties, agreed on the following, which this court should incorporate in its order;

1. That the plaintiff will have custody of the minor child U born on 2 June 1999.

2. That the defendant will continue to pay for Nkosenhle's university education even though he has attained the age of majority.
3. That the defendant will have generous access to U as was the case before the pre-trial conference.
4. That each party shall keep the movables in his or her possession and that the defendant shall deliver to the plaintiff an Adam Bede Bedroom suit and green leather sofas.

The parties acquired several immovable properties in Zimbabwe, most of which they have since sold except the Selbourne Park Property. They jointly acquired the Selbourne Park property though it is in the plaintiff's name. Two prior properties the Zimre Park, and Calton Court, properties, were registered in the plaintiff's name. The Gope Court property was in the defendant's name.

It is common cause that the Zimre Park and Calton Court properties were sold with the consent of both parties and that part of the proceeds were used for the benefit of the family. In particular party of the Zimre Park property's proceeds were used to develop the Selbourne Park property. It is also common cause that the Johannesburg property was acquired by the defendant during separation without any direct contribution from the plaintiff though she alleges that he used proceeds from the Gope Court property to finance the purchase of that property to which she had indirectly contributed..

It is also common cause that the defendant is not employed though he has agreed to continue paying for the education and maintenance of their two children from his savings. He also agreed to pay US$150-00 per month as maintenance for the minor child U. The dispute on maintenance is due to his resistance to contributing more than he has offered.

U's Maintenance

The plaintiff wants the defendant to contribute US$400-00 per month towards U's maintenance over and above the payment of school fees. She justifies her claim on the basis that she needs R5500-00 for rentals. She explained the need to have her own flat instead of sharing a flat as she is doing. She said U sleeps in the lounge and studies from there as the other bedroom is occupied by a flat mate. Maintenance of children is the responsibility of both parents. The plaintiff said she earns R14500-00 to R16000-00 per month depending on whether or not she works overtime during the month. The defendant is currently not employed but has offered to take full responsibility for the maintenance of Nkosenhle who though an adult is a student at the University of Pretoria. He also took responsibility for U's school fees and school

requirements. He on top of that offered to pay maintenance in the sum of US$150-00 for U's maintenance. He told the court that he will meet these expenses from his savings as he is currently not employed.

Mr *Moyo* for the plaintiff while appreciating that the defendant has voluntarily taken a heavier burden of their children's maintenance insisted on his paying more than US$150-00 because he has not fully disclosed his savings even though he was given an opportunity to do so. It is true that the defendant was not candid with the court as regards his savings but that does not justify the granting of maintenance in sums the court cannot justify. The court has a duty to ensure that the order to be granted can be justified in terms of the responsible person's means. If the plaintiff finds the defendant's allegedly hidden treasure, she can always approach the courts for variation. The court cannot agree to grant maintenance without assessing it against the responsible person's means. That will be like shooting in the dark. I am also not satisfied that the plaintiff has taken sufficient responsibilities towards the maintenance of their children. She cannot while employed and able to contribute place an uneven burden on the unemployed defendant.

I will therefore grant maintenance in terms of what the defendant offered.

Distribution of the Immovables

The plaintiff after presenting different proposals on the distribution of the immovables settled on her being awarded the Selbourne Park property while the defendant is awarded the Johannesburg property. She said the Selbourne Park Property is theirs it having been acquired through a deposit from their wedding gifts, and monthly instalments from their incomes, after which they developed it from, their joint effort, and from proceeds of their previous properties. She was the owner of Calton Court which helped develop the Zimre property. The Zimre property was originally bought by the defendant through a relative from whom it was transferred into the plaintiff's name. The defendant in evidence said when the Zimre property was sold the plaintiff could do what she wished with the proceeds. This is an acceptance of her having through the introduction of the Calton Court proceeds become the main contributor to its development.

The defendant on the other hand purchased the Johannesburg property through a mortgage bond. He struggled to explain how he raised the deposit. He initially said the deposit came from his annual bonus. During cross-examination he changed and said that he used the bonus plus his savings to raise the deposit. He abandoned his earlier position when the

inadequacy of the bonus funds was exposed. He had tried to mislead the court as to the true source of the deposit. There was a serious dispute as to what he had done with the proceeds of Gope Court. He belatedly tried to give an impression that he had shared the proceeds with the plaintiff. I say belatedly because that version had not been put to the plaintiff or her wittiness, Miss Ndawana, even though the sale of Gope Court had been put in issue by the plaintiff who said she learnt of its having been sold through her cousin sister Miss Ndawana, who she had send to collect rentals so that she could pay school fees for Nkosenhle who had been expelled from school. It is evident from the evidence adduced that the plaintiff had to pay certain fees for the children, yet the defendant had savings from which he could pay a deposit for the Johannesburg property. Commenting on how he handled, proceeds of Gope Court, the defendant said he kept the money in his pocket, and crossed the boarder with it in his pocket. He further said he used it for his up keep and the payment of children's school fees

Mr *Moyo* for the plaintiff submitted that the defendant used proceeds of Gope Court to pay a deposit for the Johannesburg property. He further submitted that the defendant starved the family of support while he saved for the deposit of the Johannesburg property. The defendant's lack of candidness as to how he handled the proceeds of Gope Court, makes it highly probable that he used them to help him pay a deposit for the Johannesburg property. It should therefore be taken into consideration in the distribution of the couple's two properties. I appreciate that the defendant produced receipts to prove that he contributed towards the development of the Selbourne Park property. The receipts were however of insignificant amounts and could not have developed the property to its present state. I am satisfied that the proceeds of the Zimre Park property played a major role in the development of the Selbourne Park property.

All property which belonged to the parties before marriage, and was acquired by the parties during the marriage except that exempt by s 7 (3) of the Matrimonial Causes Act [*Chapter 5:13*], and property acquired during separation is distributable subject to the parties' direct and indirect contribution and considerations mentioned in s 7 (4) of the Act . See the case of *Gonye* v *Gonye* 2009 (1) ZLR 232 (S) at p 237 B to F where Malaba JA (as he then was), commenting on distributable property said;

> "The terms used are the "assets of the spouses" and not "matrimonial property". It is important to bear in mind the concept used, because 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 concept "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 *aquo* 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 the proper exercise of which the rights of the parties depend.

It must always be borne in mind that s 7 (4) of the Act requires the court, in making an order regarding the division, apportionment or distribution of the 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. The object of the exercise must be to place the spouses in the position they would have been in had a normal marriage relationship continued between them. As was pointed out by Lord Denning MR in *Wachel* v *Wachel* {1973} 1 ALL ER 829 (CA) at p 842:

"In all these cases it is necessary at the end to view the situation broadly and see if the proposals meet the justice of the case".

If the marriage between the parties had continued, they would both have continued to have their own accommodation. They had clearly positioned themselves to avoid homelessness. It is in my view just and fair, that each party should have a house. Mr *Moyo* for the defendant submitted that the plaintiff should contribute towards the Johannesburg property for her to be awarded a share in it. That is not necessary in view of my finding that the defendant used family resources to buy that property. The defendant obviously has a stronger attachment to the Johannesburg property which the plaintiff only discovered much later. The plaintiff 's attachment to the two properties is with the Selbourne Park property which they jointly acquired, through wedding gifts, monthly payments to City of Bulawayo, after which she ploughed the Zimre Property 's proceeds into its development.

It is in my view just and equitable that the plaintiff be awarded the Selbourne Park property, and the defendant be awarded the Johannesburg property.

In the result I order as follows;

1. That a decree of divorce be and is hereby granted.
2. That custody of the minor child U born on 2 June 1999, be awarded to the plaintiff.
3. That the defendant shall have access to the minor child for two weeks of every school holiday, and in the manner which was prevailing as at the date of the pre-trial conference.
4. That the defendant shall maintain and pay school fees for Nkosenhle Nazariel Ncube born on 10 September 1995, who is now an adult until he completes his under graduate studies at the University of Pretoria.

5. That the defendant shall pay U's school fees, meet all his school requirements, and pay monetary maintenance for him to the plaintiff in the sum of US$150-00 per month until he attains the age of 18 years.
6. That the plaintiff be and is hereby awarded No 14466 Selbourne Park Bulawayo as her sole and exclusive property.
7. That defendant be and is hereby awarded Erf 48 Albemarle Township Johannesburg as his sole and exclusive property.
8. Each party shall bear his or her own costs.

Messrs Gill Godloton & Gerrans, plaintiff's legal practitioners
Messrs Dube Banda Nzarayapenga & Partners, defendant's legal practitioners