

GODFREY MANAVIRA
versus
MATILDA MANAVIRA
(nee Musingarambwi)

HIGH COURT OF ZIMBABWE
CHITAKUNYE AND NDEWERE JJ
HARARE, 12 November 2015 and 14 December 2016

Civil Appeal

L Rufu, for the appellant
B T Chokuda, for the respondent

CHITAKUNYE J. The appellant and respondent were married on 28 June 1985 in terms of the African Marriages Act, [*Chapter 238* (now 5:07)]

In February 2014 the respondent sued the appellant in the Magistrates court seeking, *inter alia*, a decree of divorce and other ancillary relief.

On 24 August 2014 after a contested trial the trial magistrate granted the following order:

- “1. A decree of divorce be and is hereby granted.
2. The following movable property room divider, 3 plate stove, bedroom suite, 1 bed, dining room suite, kitchen unit, all kitchen utensils, display unit and 50% share of the Nissan Hardybody is hereby awarded to the plaintiff as her sole and exclusive property.
3. The following movable property fridge, radio, 1 bed, sofas, and 50% share of the Nissan Hardybody is hereby awarded to the defendant as his sole and exclusive property.
4. The plaintiff is hereby awarded 45% share of the 7 roomed house No. 1344 Mkoba 12, Gweru.
5. The Defendant is hereby awarded 55% share of the 7 roomed house No. 1344 Mkoba 12, Gweru.
6. Maintenance claim is dismissed because there is a maintenance order already in existence.”

The appellant was dissatisfied with the judgment and filed a notice of appeal with this court on the 22 October 2014.

He advanced the following grounds of appeal:

1. The learned Magistrate made a mistake at law and irrationally exercised her discretion in awarding the respondent a 45% share in the immovable property in circumstances where she did not make any contribution at all towards its acquisition.

2. The learned Magistrate erred by making an order which is not capable of execution.
3. The learned Magistrate erred at law when she awarded the plaintiff 50% of Nissan Truck in circumstances where Plaintiff did not make any contribution towards its acquisition.

In the circumstances the appellant's prayer was for the setting aside of the magistrate's judgement and its substitution with the order that:

1. A decree of divorce is hereby granted.
2. The respondent is awarded 3 plate stove, bedroom suite, 1 bed, dining room suite, kitchen unit, all kitchen utensils, display unit, refrigerator, radio, and sofas as her sole and exclusive property.
3. The appellant be awarded house number 1344 Mkoba 12, Gweru and Nissan Truck as his sole and exclusive property.
4. That there be no order of maintenance for the respondent.

It is pertinent to point out from the outset that the record of proceedings has a number of pleadings missing. Counsel for the appellant alluded to this fact and indicated that the trial magistrate has been discharged from service and so no one could attend to the missing papers due to the circumstances surrounding the magistrate's dismissal from service.

Upon perusal of the record of proceedings we opted to proceed with the hearing as in our view the issues raised on appeal were well covered in the evidence adduced by the parties which evidence is intact. It was on that basis that we heard the appeal in its present state on the merits.

It is pertinent to note that in grounds 1 and 3 appellant's point is that respondent should not have been awarded shares in the house and the motor vehicle because she did not contribute to their acquisition. Appellant seems to be of the view that unless a spouse has contributed towards the acquisition of an asset, they are not entitled to a share thereof/ or that a spouse can only be entitled to a share in an asset if they contributed towards its acquisition. The appellant thus argued that as respondent had not contributed towards the purchase of the two properties in question she should not have been awarded any share thereof. At most she should move out of the house with the items he, out of his benevolence, gave her. This is an attitude that is not in consonance with the law.

The issue that faced the trial court was what would be a fair and equitable distribution of assets of the spouses at the dissolution of their marriage. In this regard court had to be guided by the relevant legislation and case authorities from superior courts.

As counsel for both parties correctly pointed out to the court a quo and before this court, the division, apportionment and distribution of assets of the spouses at the dissolution of a marriage is governed by s 7 of the Matrimonial Causes Act, [*Chapter 5:13*].

Section 7 (1) states that:-

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at anytime 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 another.
- b) The payment of maintenance, whether by way of a lump sum or way of periodical payments, in favour of one or other of the spouses or any child of the marriage.”

As regards the basic considerations in deciding on how to distribute the assets of the spouses s 7 (4) provides that:-

“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 has been educated or trained or expected to be educated or trained.
- (d) The age, 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 spouse 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) 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.”

The approach in the consideration of the above factors has been considered in a plethora of case authorities. In *Shenje v Shenje* 2001(1) ZLR 160 (H) at 163E – 164 A GILLESPIE J had this to say on the issue:

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can

fairly expect from having been married to one another, and avoids the disadvantage, to the extent they are not inevitable, of becoming divorced.

The factors listed in the subsection deserve fresh comment. One might form the impression from the decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps it is time to recognise that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties' needs are met rather than that their contributions are recouped." See also *Gonye v Gonye* 2009 (1) ZLR

What emerges from the case authorities is that all the circumstances of each case must be considered. The direct contribution would in most cases not be the defining consideration where as in this case parties have been married for about 29 years. The evidence adduced showed that for most of those 29 years the parties stayed together as husband and wife.

It may further be said that were parties have been together for such a long time it is not easy to suggest that the indirect contribution by the wife is much less than the direct contribution by the husband.

The appellant argued that he deserved the house because he purchased the stand and developed it from money he received as lump sum gratuity for participation in the war of liberation and the monthly pension earned there from. The motor vehicle was purchased using lump sum he received as pension after retiring from the army. He argued these were not savings he made.

To buttress his argument he referred to the case of *Kanoyangwa v Kanoyangwa* 2011(1) ZLR 90 (H) at p 95 C - D wherein I said that:-

"In *casu*, it is common cause that the entire purchase price and transfer fees were paid from plaintiff's retrenchment package. That package was not the couple's savings over a period of time. It was not like a loan where repayment would be needed and whereby the period of repayment defendant would take care of some aspects to cushion plaintiff. Clearly in my view the circumstances show that this is an appropriate case where defendant's share maybe tampered with in favour of plaintiff."

By parity of reasoning appellant argued that as the properties were purchased from lump sums that had not been from savings, respondent should get no share.

That reasoning is faulty. In the first place in *Kanoyangwa v Kanoyangwa (supra)* the parties had been in marriage for a period of about 10 years. Further, the lump sum retrenchment package was not used to deny the wife a share but to adjust the share she was to get.

For the 10 year marriage the defendant's share was adjusted from the figure of 50% she had been asking for to 35% after taking into account all the circumstances of the case.

In *casu*, the marriage lasted almost 3 times long. According to appellant for close to 10/9 years the marriage was blissful. During that period he forbade her to engage in any income generating activities. According to appellant's evidence he wanted respondent to be a full time house wife. Her lack of direct financial contribution during that period can therefore not prejudice her as it is appellant who caused it. She nevertheless provided all wifely duties to appellant's satisfaction. After 1995 when respondent obtained a passport and started cross border trading that is when appellant said their relations soured. Whenever she was home she continued doing her duties as wife. She also did domestic chores. On the few years they had maids she would be assisted by the maids. I did not see anywhere in his evidence where appellant said respondent completely abandoned her wifely duties. He did not complain of being denied the wifely companionship when she was around.

In a way even after the 10 years of blissful relationship respondent continued contributing to the welfare of the family.

In *Masiwa v Masiwa* 2007 (1) ZLR 167(S) at 173F- 174 A GWAUNZA JA had this to say on contributions:

"In considering matters concerning direct and indirect contributions in marriage, the question of the length of time during which such contributions were made is, in my view, pertinent. This is particularly so where, as *in casu*, one party's initial contribution far outweighed the other party's. In this case, the appellant made no direct contribution to the deposit and mortgage repayments. From the evidence, her ability to match, both in cash and kind, the financial contribution made by the respondent, was undermined by two factors. These were, firstly, her relatively low income and, secondly and more seriously, the short duration of the marriage. Had the marriage endured longer than it did, there is no telling how much she might have been able to add to the value of her contributions. It would appear that the shorter the marriage, the more important it is to have made direct contributions."

After a careful analysis of cases on this aspect I am of the view that the longer the duration of a marriage the lesser the weight to be attached to direct contribution. The value of indirect contribution increases with the length of the time. It may also be said that where a marriage has subsisted for a longer time such as in this case other considerations such as the needs and expectations of the parties should receive serious consideration.

In casu, the question that arises is whether this is a good case for court to interfere with the court a quo's decision.

In *Gonye v Gonye* 2009(1) ZLR 232 (S) at 235 B-C MALABA JA stated that:

“For this court to interfere with the exercise of discretion by the court *a quo*, it had to be shown that one of the grounds upon which an appellate court may interface with the exercise of discretion by a trial court existed.”

In *Barros & Another v Chimponda* 1999 (1) ZLR 58 (S) GUBBAY CJ at 62 G-63 A said that:-

“These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has the material for so doing ...”

In *Masveto v Masveto* HB 51/2004 at p 2 of the cyclostyled judgment NDOU J had this to say on when an appellate court may interfere:

“We are dealing here with appeals on matters of discretion. The court *a quo* has given a decision on a matter within its discretion, and this Court of Appeal will interfere only if it comes to the conclusion that the trial court has not exercised a judicial discretion or it has exercised its discretion capriciously or upon a wrong principle, has not brought its unbiased judgment to bear on the question, and has not acted for substantial reasons- *The Civil Practice of the Supreme Court of South Africa (Herbstain and van Winsen)* 4th ed by L Van Winson, AC Cilliers and C Loots at pages 918-9, *Tjospomie Boedey (Pvt) Ltd v Drakensberg Bottliers (Pvt) Ltd & Another* 1989 (4)SA 31(T) at 40A-J and *Ex-parte Neethling & another* 1951(4)SA 331A.

In matters of the type subject matter of appeal, it is seldom possible for the court to ascertain with total accuracy the incomes and contributions of the parties to the joint estate

The learned Trial Magistrate in his judgment unfortunately did not directly make findings on the credibility of the testimony of the parties on this issue. This is a misdirection that makes the resolution of this issue (on appeal) problematic. In light of the evidence led, it is however, still possible to determine the issue even in the absence of such finding of fact by the court *a quo*. The court *a quo* proceeded to distribute the property on the basis that the appellant's contribution to the acquisition hereof was lesser than that of the respondent, and not that she did not contribute at all. The assessment of the contributions made by the Appellant involves the making of a value judgment. From the evidence the trial magistrate rightly found that the respondent contributed more on the house than the Appellant did. This finding cannot be faulted. It is the assessment of the, percentage due to each party that is really, in issue

This court is therefore, at large, as far as the distributing of the disputed property. this court must have regard to all circumstances of the case.”

In casu , the judgment by the trial magistrate leaves a lot to be desired.

She narrated the evidence given by each party without making findings on credibility and then proceeded to refer to the law applicable which is section 7 of the Matrimonial Causes Act. After quoting subsection 4 of section 7 and citing one case authority on the approach to distributing assets of the spouses the trial magistrate did not proceed to apply the

law to the facts or make known her findings of fact. She instead proceeded to pronounce her decision. Thus it is not clear from the reasons for judgment how she came to the sharing ratio she did.

Just as in *Masveto v Masveto (supra)*, in this case the trial magistrate in her judgment did not make findings on the credibility of the testimony on the issues at hand. This was misdirection. This court is thus at large to interfere with the distribution.

This court's assessment will be greatly aided by the evidence given by the parties. There are some aspects of the case that are either common cause or not highly contentious. These in our view are adequate for the task at hand.

From the facts alluded to above it is accepted that the marriage subsisted for a long time. The indirect contributions by respondent to the needs of the family must be looked at in that light.

The parties bore three children together. Respondent performed her role in the raising of those children; she provided comfort and consortium to appellant for the duration of the marriage. In fact she was entrusted with the couple's finances for most of the years. Even during the years appellant said their relations had soured he still entrusted her with his salary and other income and she duly kept the money for use as per family needs. From appellant's own evidence he alleged she diverted only \$240-00 during that period to build her mother's hut in the rural area.

It has been stated that quantifying indirect contributions is not an easy task. Indeed how much would one place on the diligence with which a spouse jealously guards family finances., moral support given to a husband as he goes about his work and ensuring that he comes home to a comfortable and happy home, caring and nursing children and husband, when they are unwell and many other chores that wives provide to their husbands. Without the wife how much would one have to pay to get some of those services?

In *Masiwa v Masiwa* 2007 (1) ZLR 167 (S) at 172C-D GWAUNZA J had this to say:

"It has generally been accepted that the indirect contributions made, in particular, by a wife during marriage include taking care of all household chores like cooking for and feeding the husband and the family, washing, ironing and child minding. Many studies have been conducted locally and internationally and books written about how this type of work is not only unappreciated but undervalued as well."

It is time society appreciated the value of such chores as without them society would collapse. No family would survive without some people performing such chores. When such

chores are performed for a long time surely they may be as good as someone's direct contribution.

These courts have made effort to recognise the value of the indirect contribution. In *Sithole v Sithole & Another* HB 14/94 court held that even if a wife made only indirect contributions she cannot leave empty handed merely because she did not contribute financially towards the acquisition and development of the matrimonial home. The wife in the case was awarded a 40% share.

In *Muteke v Muteke* S 88/94 the wife made no direct financial contribution except as a housewife but court awarded her a substantial share. The court in that case considered primarily her needs and expectations rather than her contributions. The marriage had lasted about 32 years.

In *Usayi v Usayi* 2003 (1) ZLR 684 (S) the Supreme Court in upholding a High Court decision to award a 50% share to a non-working housewife of 35 years held that:

"... it is not possible to quantify in monetary terms the contribution of a wife and mother who for many years faithfully performed her duties as a wife, mother, counsellor, domestic worker, housekeeper, and day and night nurse for her husband and children. It is not possible to place a monetary value on the love, thoughtfulness and attention to detail that she put into the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy; nor can one measure in monetary terms the creation of a home and an atmosphere from which both husband and children can function to the best of their ability. In the light of these many and various duties, one cannot say, as is often remarked: 'throughout the marriages she was a housewife. She never worked'. It is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the direct and 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."

Another aspect worth emphasizing on in this case is that of the needs and expectations of the parties. As noted in *Muteke v Muteke (supra)* court considered this factor in coming up with a just and equitable distribution.

In casu, the appellant and respondent married when respondent was about 21 years old. She has stayed in the marriage longer than that. She is now 51 years old. She has virtually been a housewife partly because appellant demanded so. She bore three children. Two of the children though majors are attending tertiary education and so are staying with her. Through appellant's belief she has not been empowered to fend for herself and so has largely been dependant on appellant. At her age she cannot be expected to return to her parents home as appellant seemed to suggest. She certainly needs to find accommodation of

her own. She thus expects that she will get adequate resources to secure shelter of her own. Her share must thus be such as would reflect the fact that both parties will have to sacrifice to ensure none is made destitute by the dissolution of the marriage. Indeed the Act requires this court to endeavour as far as is reasonable and practicable to place the spouses in the position they would have been in had a normal marriage relationship continued between the spouses.

It is thus not desirable that respondent be made destitute with only movable property whose value maybe negligible from wear and tear due to age. Clearly she deserves a sizeable share that is commensurate with the duration of the marriage and her expectation from such a marriage.

After a careful analysis of the evidence adduced and the applicable legal considerations I am of the view that the sharing ratio arrived at by the trial magistrate is appropriate. The misdirection in this regard was the failure to explain how the court *a quo* applied the law to the facts in arriving at the distribution ratio and the fact that some aspects of the order as granted were not capable of execution.

Accordingly I hereby conclude that a share of 45 % of the house in question and a 50% of the value of the Nissan Motor vehicle would meet the justice of the case. The appellant will be given the first option to buy out respondent. Should he fail to do so the properties will have to be sold to best advantage and the net proceeds shared in terms of the sharing ratio.

Though the appellant's prayer in the notice of appeal included the issue of Maintenance, this aspect was not proceeded with in the arguments before us. Presumably appellant abandoned that aspect.

Accordingly the appeal be and is hereby allowed to the extent of making it executable.

The judgement of the court *a quo* be and is hereby set aside and is substituted by the following:-

1. A decree of divorce be and is hereby granted.
2. The plaintiff is hereby awarded the following property – room divider, 3 plate stove, bedroom suite, 1 bed, dining room suite, display unit, kitchen unit and all kitchen utensils as her sole and exclusive property.
3. The defendant is awarded the following movable property – fridge, radio, 1 bed sofas as his sole and exclusive property.

4. The plaintiff is hereby awarded a fifty (50) percent share in the Nissan Hardbody motor vehicle with defendant retaining the other fifty percent. The vehicle shall be valued by a valuer agreed to by the parties and defendant shall buy out plaintiff's share within three months from the date of receipt of the valuation report. Should the parties fail to agree on the valuer one shall be appointed for them by the registrar and they shall meet costs of such valuation in equal shares.
5. If defendant fails to buy out plaintiff's share within the stipulated time the motor vehicle shall be sold by a registered vehicle sales agent agreed to by the parties or appointed by the registrar. The net proceeds shall be shared equally.

On the immovable property

6. The plaintiff be and is hereby awarded a 45 percent share of the immovable property namely Stand number 1344 Mkoba 12 Gweru.
7. The defendant is awarded 55 percent share in the said immovable property.
8. The immovable property shall be valued by an independent Valuator appointed by the Registrar of the High Court from his list of Valuators within 30 days of the date of this order.
9. The parties' shall meet the costs of valuation in equal proportions.
10. The defendant is hereby granted the option to buy out plaintiff's share in the immovable property within three months from the date of receipt of the Valuation report.
11. In the event that defendant fails to buy out the plaintiff within the three months or such longer time as the parties may agree, the property shall be sold to best advantage by Trevor Dollar Real Estate Agents or CC Sales Real Estate Agents, whoever shall be the first to find a buyer offering the highest price
12. The net proceeds, after deducting the Real Estate Agents fees and other attendant costs shall be deposited into the Trust Account of Dzimba Jaravaza and Associates and thereafter shared between the parties in the ratio set out above.
13. Each party shall bear their own costs of this appeal

Dzimba Jaravaza & Associates, appellant's legal practitioners.
Midlands State University, Legal Aid Clinic, respondent's legal practitioners