

SIPHIWE JOYCE MOFFAT
versus
PHEOSE MOFFAT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15 December 2016

Civil Trial

N P Gonese, for the plaintiff
T P Mateisanwa, for the defendant

CHITAKUNYE J: The plaintiff and the defendant were joined in holy matrimony on 3 October 1997 in terms of the Marriage Act [*Chapter 5:11*]. Prior to the solemnisation of their marriage the parties had been in an adulterous relationship for about 17 years. At the time of commencement of their relationship the defendant was in a monogamous marriage to his first wife.

In her declaration the plaintiff alleged that they ‘married’ in terms of customary law in 1981 when the defendant paid the bride price (lobola) at a time she was pregnant with their first child. The defendant on the other hand contended that he paid the bride price for the plaintiff in 1996 after the death of his first wife Margret Cook.

The plaintiff and the defendant were blessed with three children who are now majors. The three children were all born during the period of the adulterous relationship as the defendant’s marriage to his first wife was still subsisting.

The defendant married his first wife on 28 May 1979 in terms of the Marriage Act, 1964 (now Chapter 5:11). That marriage subsisted till Margret Cook’s death on 17 February 1996.

It was only after Margret’s death that the plaintiff and the defendant had their adulterous relationship solemnized into a marriage in terms of the Marriage Act.

On 2 May 2013, the plaintiff issued summons out of this court seeking a decree of divorce and the sharing of assets of the spouses. The plaintiff alleged that the marriage has

irretrievably broken down to such an extent that there were no prospects of restoration of a normal marriage relationship in that:-

1. The parties have not lived as husband and wife since 2004, a period of more than 8 years as at the date of the summons;
2. the defendant has committed adultery with two women, one being a relative of plaintiff;
3. The parties have lost love for each other.

The Plaintiff sought a decree of divorce and a distribution of the property comprising movable and one immovable property acquired during the subsistence of the marriage.

The defendant in his plea admitted that the marriage has irretrievably broken down. He however disputed the manner in which the plaintiff proposed that the immovable property be distributed.

Whilst the plaintiff alleged that there was only one immovable property, namely Number 31 Drayton Avenue, Woodville, Bulawayo, the defendant, on the other hand, contended that there were three immovable properties. These comprised- House number 31 Drayton Avenue, Woodville, Bulawayo, House no. 4026/2 Mkoba 9, Gweru and house number 94 Glassco Avenue North, East Side of Glassco, City of Hamilton, Canada. He thus suggested that he be awarded the Bulawayo property as his sole and exclusive property whilst plaintiff is declared the sole and exclusive owner of the other two properties.

At a pre-trial conference held on 17 January 2014 the parties agreed that their marriage had irretrievably broken down and so a decree of divorce should be granted. They also agreed on the distribution of the movable property. The Plaintiff was to be awarded the dining room suite whilst defendant was to retain the rest of the movable property in Zimbabwe.

The issue referred to trial was captured as follows:-

What is an equitable distribution of the following immovable properties?

- (a) House No. 31 Drayton Avenue, Woodville , Bulawayo;
- (b) House No. 40261/2, Mkoba 9, Gweru; and
- (c) Number 94 Glassco Avenue North, City of Hamilton, Canada.

The plaintiff gave evidence and called one witness. The defendant thereafter gave evidence. Both parties produced documentary evidence in support of their case.

From the evidence adduced it was common cause that house number 31 Drayton Avenue, Woodville, Bulawayo (hereinafter referred to as the Bulawayo property was

purchased in December 1984 in terms of an agreement of sale tendered as exh. 2. An initial deposit of Z\$1000-00 was paid after which the balance was to be paid in instalments of one hundred dollars per month. It was agreed that the house was identified by the plaintiff's sister who then advised the plaintiff. The plaintiff was the one who entered into the agreement of sale with the seller and signed on behalf of the defendant. She paid the initial deposit to the seller after she had signed the agreement of sale. The property is registered in the defendant's name as per Deed of Transfer No. 2006/93.

At the time of the purchase the property was in a dilapidated state. The property was later renovated to a habitable state. The parties are however not agreed as to when the renovations were done and who did the renovations.

It was also common cause that house number 4026/2 Mkoba 9, Gweru (hereinafter referred to as the Mkoba property) was allocated to the plaintiff in 1981 on a rent to buy basis. The defendant had assisted by being cited as the plaintiff's employer on the application form. The property is in the plaintiff's name. Though this property was at times cited as no. 4026/1, the rent to buy card tendered confirmed the correct citation as no. 4026/2

It is further common cause that house number 94 Glassco Avenue North, East side of Glassco, Hamilton, Canada (hereinafter referred to as the Canada property) was acquired by the plaintiff through a mortgage loan in 2008. She acquired it for the price of one hundred and sixty four thousand and nine hundred (164 900-00) Canadian dollars. The loan is repayable over a period of 40 years. The property is in the plaintiff's name.

The plaintiff testified that the Mkoba property and the Canada property should not be considered as matrimonial property as she purchased these properties on her own and without the defendant's contribution. The Mkoba property was purchased in 1981 before the parties were customarily married. The plaintiff now asserted that the money the defendant paid in 1981 was not for bride price, as she had earlier on stated, but was a token of appeasement to notify the plaintiff's parents that he was responsible for the plaintiff's pregnancy and she was with him. The customary law marriage only took place in 1983 when the defendant paid the bride price in part.

The defendant, on the other hand, contended that he facilitated the allocation of the Mkoba property to the plaintiff by writing a letter to Gweru Council which letter influenced the Council to allocate the property to the plaintiff. At that stage the two of them were lovers only and not yet married. In this way he contributed to the acquisition of this property.

It is in this scenario that the plaintiff insisted that the property should not be considered in the distribution of matrimonial property as she acquired it before the two were married.

As regards the Bulawayo property, whilst both parties agreed that it was purchased in 1984 they were not agreed as to whose money was used to pay the purchase price.

The plaintiff's evidence was to the effect that she contributed both directly and indirectly towards the purchase of this property and so it should be shared equally.

The defendant on the other hand contended that the plaintiff did not make any direct contribution as he is the one whose money paid for the property. He gave the plaintiff the money for the deposit as he was tied up at work and did not want to miss the opportunity of buying the house. After the payment of the deposit, he thereafter would send money for instalments through the registered mail. When challenges arose, as the seller later on was no longer collecting the posted money, he resorted to paying through his legal practitioners. Some receipts of payments made through the lawyers were produced. These were however inconclusively contested as to whether they pertained to the purchase price or rates. It was in that respect that the defendant contended that he be awarded the Bulawayo property whilst the plaintiff is awarded the Mkoba and Canada properties.

It was clear that the Mkoba and Bulawayo properties were acquired when the parties were in an adulterous relationship.

The Canada property is the only property acquired during the subsistence of the valid marriage. It was acquired by plaintiff through a mortgage loan and that she is still servicing that loan. The Mortgage loan facility letter tendered into evidence confirmed that the loan repayment period is 40 years from 2008. In essence this property was acquired after separation and is still with liabilities.

On the issue of whether or not all or any of the properties have to be considered, it is pertinent to note that the Gweru and Bulawayo properties were acquired when the parties were in an illicit affair. The purported customary law marriage was a nullity as the defendant was married to his first wife in terms of the Marriage Act. The parties, nevertheless, brought these properties into their marriage at the time the marriage was solemnized in terms of the Marriage Act in 1997.

Section 7(1) of the Matrimonial Causes, [*Chapter 5:13*] empowers an appropriate court to apportion or distribute assets of the spouses at the time of dissolution of a marriage. It also empowers court to transfer any asset from one spouse to the other.

It is pertinent to note that the term used is 'assets of the spouses' and not matrimonial property. This thus applies to assets owned by either or both spouses as at the time of the dissolution of the marriage.

In *Gonye v Gonye* 2009 (S) ZLR 232 (S) MALABA JA in reference to this subsection held that such assets include all assets purchased whether before or during the marriage and includes property acquired after separation.

The use of the term matrimonial property tends to give the impression that only assets acquired during the subsistence of the marriage when parties are still living together should be considered. This is clearly wrong. All the assets owned by either of the spouses or jointly owned by the spouses at the time of the dissolution of the marriage must be put on the table for consideration.

In *casu*, there is no denying that all the three properties have to be considered. The circumstances of how the assets were acquired and in whose name they are registered will be part of the factors to consider in the exercise of courts discretion in the apportionment and distribution of the assets.

In this regard s 7(4) of the Act outlines some of the factors to consider in the distribution of assets of the spouses. That subsections states 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 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 the family including the manner 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 after 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 dissolution of the marriage; and
- (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 the 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 parties.”

In essence court is enjoined to consider all the circumstances of the case in an endeavour to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the parties.

The task involves an exercise of wide discretion in determining what share each spouse should get. In *Gonye v Gonye (supra)* at pp 236 H to 237 B MALABA J (as he then was) aptly noted that:

“It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division or apportionment and distribution of assets of the spouses in divorce proceedings....”

Upon a careful analysis of the evidence adduced it was apparent that in respect of the Mkoba property and the Canada property the defendant had very minimal contribution if any. For instance, in respect of the Mkoba property his accepted contribution was the use of his name as employer and a letter he said he wrote. There was no clear evidence of any monetary contribution he could have made. The evidence clearly showed that the property was purchased on a rent to buy basis and the plaintiff was the one making the monthly rent payments. If at all the defendant assisted that could have been as a boyfriend assisting a girlfriend in times of hardships and nothing to write home about.

On the Canada property defendant said that his only contribution was a sum of US\$800-00 which he assumed he was supposed to receive as bride price. No evidence was led to show that he was entitled to that \$800-00 or that he had offered that perceived sum as his contribution to the property. It was clear that the defendant was simply trying to stretch his luck too far. He clearly did not pay a cent for that property as he was not even aware of its acquisition till he stumbled upon some documents pertaining to the mortgage loan for the property. From his own evidence, that property has a liability of over US\$160 000-00.

The plaintiff's evidence was to the effect that the loan on the Canada property is a sum of US\$166 000-00 which has to be paid over a 40 year period. Should she default in payments the property will be repossessed.

If this property is to be shared between the parties the loan sum must be considered. I did not hear defendant to be willing to share in the loan repayments. Clearly this property must remain with the plaintiff.

In *Takafuma v Takafuma* 1994 (2) ZLR 103 MCNALLY JA held that:

“In dividing up the assets the court must not simply lump all property together and then divide it up in as fair a way as possible. The correct approach is first to sort out the property into three lots, which may be termed “his”, “hers” and “theirs”. Then the court should concentrate on the lot marked “theirs”. It must apportion this lot using the criteria set out in s 7(1) of the Matrimonial Causes Act 33 of 1985. It must then allocate to the husband the items marked “his”, plus an appropriate share of the items marked “theirs”. It must then go through the same process in relation to the wife. Having completed this exercise, the court must finally look at the overall result and again, applying the criteria set out in s 7(1) of the Act,

consider whether the objective has been achieved of placing the parties in the position they would have been in had the marriage continued, insofar as this is reasonably practicable and just, having regard to the conduct of the spouses.”

In casu, I am of the view that the Mkoba and Canada properties be treated as “hers” and the Bulawayo property in so far as it is registered in defendant’s name it be taken as “his”.

The question that arises is whether the objective of placing the spouses in the position they would have been in had the marriage relationship continued would by such distribution be achieved taking into account the conduct of the parties.

The plaintiff’s stance is that such would not be just and equitable in that she contributed to the purchase and renovation of the Bulawayo property whilst the defendant did not contribute to the purchase of the Mkoba property. On the Canada property, the defendant was not willing to contribute and so it will remain her burden. She thus insisted on a share in the Bulawayo property since she contributed towards its purchase and renovation.

The circumstances of the Bulawayo property were heavily contested and in the process some untruths were told.

In her pleadings, the plaintiff alleged that the parties jointly acquired the Bulawayo property. When asked in her evidence on why she wanted a 50% share the plaintiff said that she wanted such a share because she bought that property. She moved into that property soon after purchase and bore all her children in the house. She lived in that property till she left for Canada in 2004.

On the intricacies of how the property was acquired, the plaintiff’s evidence was to the effect that in 1984 her sister who resided in Bulawayo informed her of houses that were on sale. In apparent agreement with the defendant she went to Bulawayo to buy the house. She met the seller and signed the agreement of sale after paying a deposit of \$1000-00. It was her evidence that the purchaser was indicated as the defendant and she signed on his behalf. She however left some space for the defendant to eventually sign as purchaser. After paying the deposit she moved into the house in 1984 and stayed there till the time she left for Canada. She further stated that she was the one paying the \$100-00 instalments to the seller. However, the receipts she tendered were in the defendant’s name.

In an effort to rebuff the defendant’s contention that he is the one who bought the property plaintiff categorically stated that the defendant never even met the seller. The defendant only came to view the house a month after it had been bought. On seeing the

dilapidated state of the house the defendant said that he could not stay in the bush and so he went back to Gweru. Thereafter he would only come once a month. She then set upon renovating the house to a habitable state using her own resources.

The plaintiff further refuted the defendant's contention that he bought the property together with his late wife. As far as she was concerned that wife was not part to the sale and never set her foot onto that property.

An apparent contradiction noted was that the plaintiff initially said that she jointly purchased the property and later said that she is the one who bought the property. On being asked why she endorsed the defendant's name as purchaser if she had acquired it herself, the plaintiff said that it was out of respect for the defendant as the head of the family. Such an explanation was surely not borne out by the fact that the receipts tendered, though few, had the defendant's name as payer. The plaintiff may not have been candid on this aspect.

The plaintiff's elder sister, Kathazile Khumalo, gave evidence for the plaintiff. This witness' evidence tended to confirm that the property was purchased by the plaintiff and the defendant as husband and wife. It was her evidence that after she had informed the plaintiff and the defendant of the availability of the property on sale, the defendant sent the plaintiff to view the property. On being satisfied with the property the plaintiff returned to Gweru where she later came back with money for the deposit. It was her further evidence that before taking occupation the plaintiff would come every month to make the monthly payments. The witness stated that to her knowledge the defendant purchased this property together with the plaintiff. After the plaintiff had taken occupation renovations were effected and at that time the defendant was still based in Gweru. This witness was emphatic in both her evidence in chief and under cross examination that the plaintiff and the defendant bought that property as a couple and not that either of them bought the property to the exclusion of the other.

The defendant's version, on the other hand, was to the effect that he acquired this property together with his late wife in 1984. At that time he was not yet married to the plaintiff. In paragraph 7 of his plea the defendant stated, *inter alia*, that:

".. Number 31 Drayton Avenue, Woodville, Bulawayo the immovable property in question was acquired by the defendant together with his now deceased first wife in the year 1984. The plaintiff does not have a valid claim in that property because it is defendant's matrimonial property with his now deceased first wife. The plaintiff never contributed anything towards the acquisition and improvement of the immovable property."

After such a categorical statement it was surprising that, from the defendant's own explanation, the first wife never took any active part in the purchase of this property. Instead

it was the plaintiff who took an active part. It was the defendant's evidence that when he learnt of the property on sale in Bulawayo he sent the plaintiff to go and inspect the property for him. He gave her money to pay as deposit and the mandate to enter into an agreement of sale with the seller. He confirmed that the plaintiff signed the agreement of sale on his behalf. Though he later appended his signature thereto as purchaser, the agreement had already been entered into on his behalf.

The defendant confirmed that his first wife never set her foot onto the property in question from the time of its purchase till her demise. The reason he advanced was that he was not in a hurry to move to the Bulawayo property as he had another 3 bed roomed house in Nashville, Gweru where he lived with his first wife. He therefore took his time in effecting renovations to the Bulawayo property. He also stated that from the time of purchase to 1997 that house remained unoccupied as he was effecting renovations. Later he changed this aspect and said that it only took him about a week to effect the renovations and this was in 1997 when he was preparing to move into the house after retirement.

The defendant's version is highly unlikely. Firstly, I find it highly unlikely that the property would have remained unoccupied for over a decade especially that he had bought it in a dilapidated state. The inclination would have been to attend to it in a bid to protect and secure his investment. If he had bought it jointly with his first wife it is surprising that that wife never set foot in that house for a period exceeding a decade till her demise.

It is clear to me that the defendant and the plaintiff were behind the purchase of this house for their secret adulterous relationship. This is why the defendant's first wife was not part to the transaction and never set her foot in that house. Had she been aware that her husband had purchased such a property the probabilities are that she would have, at the very least, visited the property to just see it, but this was not so. What we heard from both the defendant and the plaintiff was that they were the ones behind the purchase of this property and the renovations that followed.

I am inclined to accept the plaintiff's version that after the purchase of the property she moved to live in it. This is on the background of the defendant's contradictory versions on when and how he effected the renovations. Initially he said that it took him from 1984 to 1997 to effect the improvements as he was doing it at his own pace when he had time off from work. Later he changed to say he effected the renovations in about a week in 1997 when he had retired and was to move into that property. Such contradiction was not consistent with

a person who had effected the renovations. The contradiction exposed his sheer desire to deny the plaintiff's contributions towards the renovations.

The defendant's contention that after purchase the property remained unoccupied for over a decade rings hollow. It is unlikely that he would have accepted a situation where his secret wife, as he called her, remain squashed with their three children in a 2 roomed house in Mkoba for over a decade when they had purchased a more spacious house in Bulawayo.

The probability is that the property was acquired to accommodate the defendant's paramour away from the town he lived with his lawful wife and so much safer for his escapades.

I am of the view that though the defendant was the purchaser of the property, the plaintiff did contribute both directly and indirectly in that she was the one who was used to conclude that sale and also to effect the initial payments. She also effected renovations to the property.

Had this been the only immovable property, I would not have hesitated to award a half share to each party.

In the distribution of this asset I am enjoined to consider the other properties alluded to by the parties.

Under cross examination the defendant said that he was not in a hurry to renovate the Bulawayo house because he had a house in Nashville, Gweru. That house is described as no. 3384 Nile Street, Nashville, Gweru. According to the defendant that house was a 3 bed roomed house and so his family was comfortable living in it. Unfortunately, the fate of that house was not explored with any clarity such that it remained unclear as to whether the defendant still owns this house or not. Not much will turn on this house. The properties that need to be distributed are the three already mentioned.

Upon a careful analysis of the evidence and considering all the circumstances of the matter I am of the view that the plaintiff deserves to be awarded the Mkoba property. This property is much smaller than the Bulawayo property and, in my view, the plaintiff should retain it.

The plaintiff should also retain the Canada property. This property is in reality a liability that the plaintiff will remain saddled with.

I have already indicated that on the Bulawayo property both parties contributed and its circumstances are such that but for the other properties, I would have distributed it equally between the parties. It would be unjust to deny the plaintiff a share in a property she

contributed to so much without any recompense and when the circumstances of the divorce are not of her own making. As the plaintiff will retain the other properties the share I would have awarded her in this property will be reduced.

In deciding on how much to award to the defendant the circumstances leading to the divorce have to be considered. The defendant's conduct of infidelity continued unabated from the time of his first wife to the time of the second wife after regularizing their illicit affair. Had he conducted himself well he would have benefited immensely from the industry of the plaintiff.

Apart from a consideration of the conduct of the parties, I have also considered the current and future needs and expectation of the parties. They both require shelter at their advanced ages. The defendant as a retiree may not be able to raise adequate resources to acquire another property.

I am of the view that the plaintiff be awarded a smaller share in the Bulawayo property whilst the defendant gets the larger share. In this regard a 25% share for the plaintiff and 75% share for the defendant should meet the justice of the case.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted.
2. The plaintiff is hereby awarded the Dining Room suite as her sole and exclusive property whilst the defendant is awarded the remainder of the movable property in Zimbabwe.
3. The plaintiff be and is hereby awarded the following immovable properties as her sole and exclusive property-
 - (a) House number 4026/2 Mkoba 9, Gweru;
 - (b) House number 94 Glassco Avenue North, East Side of Glassco, City of Hamilton, Canada and a 25% share in House number 31 Drayton Avenue, Woodville, Bulawayo.
4. The defendant is awarded a 75% share in house number 31 Drayton Avenue, Woodville, Bulawayo.
5. The parties shall, within 30 days of this order, appoint a valuator to value House number 31 Drayton Avenue, Woodville, Bulawayo. Should the parties fail to agree on a valuator one shall be appointed for them by the Registrar of the High Court from his list of independent valuers.
6. The costs of valuation shall be met by the parties as per their sharing ratio.

7. The defendant is hereby granted the option to buy out the plaintiff's 25% share in house number 31 Drayton Avenue, Woodville, Bulawayo within 12 months, or such longer period as the parties may agree, from the date of receipt of the valuation report.
8. Should the defendant fail to buy out the plaintiff within the stipulated time or such longer time as the parties may agree, the property shall be sold to best advantage and the net proceeds shared as per the parties' sharing ratio of 25:75
9. Each party shall bear their own costs of suit.

Munangati and Associates, plaintiff's legal practitioners
Legal Aid Directorate, defendant's legal practitioners.