SMART MHONDIWA
versus
DOROTHY MHONDIWA (NEE MUDADI)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 10 February 2016 & 26 January 2017

Divorce action

T P. Mateisanwa, for the plaintiff
J.M. Bamu, for the defendant

CHITAKUNYE J: The plaintiff and the defendant married each other in terms of an unregistered customary law union in 1978. On 10 December 1990, their marriage was solemnised in terms of the Marriage Act, [Chapter 37) (now *Chapter 5:11*). The marriage still subsists.

The marriage was blessed with three children who are all now adults.

On the 12th April 2013, the plaintiff issued summons out of this court seeking a decree of divorce and other ancillary relief. The plaintiff alleged that the marriage relationship between the parties has irretrievably broken down to such an extent that there are no prospects for restoration to a normal marriage relationship in that:-

1. The parties have not been living together as husband and wife for almost twenty-two years as at the time of issuance of the summons;
2. The parties have lost love and affection for each other.

The plaintiff proposed the sharing of the movable property acquired during the subsistence of the marriage.

The defendant in her plea conceded that the marriage relationship has indeed irretrievably broken down as the parties have been living apart for the past twenty two years. The other reasons she proffered for the breakdown of the marriage were that the plaintiff engaged in adulterous relationships to an extent whereby he is currently staying with another woman as man and wife and that the plaintiff maliciously deserted the matrimonial home.

The defendant indicated that the plaintiff had omitted to mention an immovable property that the parties owned.

In her counter claim the defendant suggested that she be awarded a 75% share in the immovable property whilst the plaintiff retained a 25% share.

After the close of pleadings a pre-trial conference was held in terms of r 182 of the High Court Rules, 1971.

During the pre-trial conference most of the issues were settled with the only outstanding issue being: - Who between the parties is entitled to buy out the other's share in the immovable property?

In the pre-trial conference the parties had agreed as follows:-

1. That the marriage has irretrievably broken down and so a decree of divorce should issue;
2. That the movable property be distributed in terms of paragraph 2 of the defendant's counter claim;
3. That the immovable property, being Stand number 6785 Zengeza1, Chitungwiza, also known as No. 57 Rufaro Road, Zengeza 1, Chitungwiza be distributed as follows: the plaintiff be awarded a 65% share with the defendant being awarded a 35% share of the property.
4. That there be no order as to costs.

The matter was referred to trial on the question of who between the parties should be granted the option to buy out the other.

On the trial date the defendant changed her position, she now demanded a bigger share in the immovable property than had been agreed during the pre-trial conference. The defendant reverted to her position in the plea whereby she was demanding a 75% share in the immovable property with the plaintiff being awarded a 25% share.

Consequently the issues before me were now two, that is:-

i) What would be an equitable and just distribution of the immovable property namely; stand 6785 Zengeza 1, Chitungwiza, also known as no. 57 Rufaro Road, Zengeza 1, Chitungwiza; and

ii) Who between the parties should be granted the option to buy out the other's share in the aforesaid immovable property?

The plaintiff gave evidence after which the defendant testified. From the testimony by the parties it was common cause that the basis for each party claiming a bigger share than the other, was on the contribution towards the purchase and improvements to the property.

It was common cause that the property in question was acquired in 1977 by the plaintiff on a rent to buy basis. The memorandum of agreement of Purchase shows that it was signed in May 1977 and plaintiff had earned the right to take occupation in April 1977.

Improvements on the Stand at the time of purchase comprised a two roomed core house with a toilet and shower. The house was later developed into a six roomed house when the parties were now staying together as husband and wife.

The plaintiff's basis for seeking a 65% share was thus that he purchased the property before marriage to the defendant and when he was still married to his 1st wife. Thereafter he effected the improvements during the subsistence of the current marriage from his own resources as the defendant was not employed but just a housewife. It was also his evidence that though the parties have been on separation for 22 years he kept on supporting his family. He thus did not abandon the family to an extent whereby the defendant was forced to fend for the family on her own. It was his evidence that in consideration of the defendant's role as a wife and mother to their children and the duration of the marriage, he appreciated her indirect contribution hence his offer of 35% to the defendant. He also offered to buy out the defendant's share in the property.

The defendant's position, on the other hand, was that she deserved a 75% share of the immovable property as she believed she had 'suffered' a lot for the property.

The issue of the distribution or division of assets owned by the spouse at the dissolution of a married are governed by the section 7 of the Matrimonial Causes Act, [*Chapter 5:13*].

Section 7 (1) empowers court to distribute the assets and to even transfer assets owned by one spouse to the other. Section 7(4) then provides some of the factors to consider in the exercise of the courts discretion in distributing or sharing the assets. In that regard 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 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 for 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 the dissolution of the marriage;
> (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 their conduct, is just to do so, to place the spouses and children in the position they would have in had a normal marriage relationship continued between the spouses."

Basically court is enjoined to consider all the circumstances of the case, giving due weight to each circumstance as proven during the trial. Whilst dissolution of a marriage has its nature consequences, the negative effects of such dissolution on the parties or the children must be kept to the bare minimum hence the requirement that court endeavours to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the two parties.

The appropriate court is given extremely wide discretion in deciding on an appropriate order. *Gonye* v *Gonye* 2009 (1) ZLR 232(S) at 236H-237B.

In casu, the evidence led showed clearly that the property was acquired by the plaintiff in 1977 before the parties entered into an unregistered customary law union. So it is a property the plaintiff brought into the marriage. The marriage lasted for about 35 years, inclusive of the years on separation. It was in recognition of that duration of the marriage that the plaintiff agreed to the defendant getting a 35% share.

Whilst the plaintiff seemed sincere in his offer and reasons thereof, the defendant seemed unsure of herself. Firstly, as alluded to above, the parties had settled on a 65:35 sharing ratio presumably this was after serious discussions with able direction from the pre-trial judge. In such discussions all is laid bare for all to see and consider before coming to a compromise decision.

In deciding not to adhere to what had been agreed on in the pre-trial conference the defendant did not, however, proffer any good explanation for such change other than having had second thoughts and deciding to take her chances with a claim for the bigger share.

In a bid to wrestle a bigger share the defendant opted to alter her version of the circumstances of the marriage. For instance, whilst it had been common cause in the pleadings that the parties married in 1978 under customary law, in her evidence in court, the defendant now contended that they married in early 1977. This was clearly intended to show that at the time the property was acquired the two of them were already married. This was clearly untrue as in her summary of evidence defendant had stated clearly that:-

> "… the house was bought in 1977 and the parties were married in terms of the unregistered customary law union in 1978."

The defendant further stated that when the plaintiff told her about the stand in Chitungwiza the two of them contributed 25 dollars each towards its deposit yet in her pleadings she had only restricted her contribution to indirect contributions towards the extension of the house. She had not mentioned any direct contribution towards the purchase price.

In elaborating on the indirect contribution, the defendant stated that these comprised:

i) Cooking for the builders during winter as in summer she would be at the rural home;

ii) She would go and buy building materials using money provided by the plaintiff; and

iii) She would go and bring building inspectors.

I am of view that the defendant's version is improbable. She was just intent on exaggerating on her indirect contribution in this regard. I come to this view on the fact that from her own evidence she would only be available during winter as in summer she would be in the rural areas. I did not hear her to suggest that the building of the house, buying of building materials and inspection of the building was restricted to winter when she would be around. Clearly the buying of building materials, building and inspection went on even in her absence. These are aspects that did not depend on her presence at all.

Another aspect where the defendant was not candid with court was on how the family was provided for after the plaintiff had left the matrimonial home in 1992. The plaintiff indicated that he was providing for the family and that some rooms at the property were rented out to augment family income. He provided 25% whilst income from rentals provided about 75% of the family's financial needs.

The defendant, on the other hand, denied that the plaintiff was making adequate provisions for the family. She also said that they only had tenants for about a year and thereafter she was fending for the family on her own. It is however common cause that she was not in formal employment. In her evidence she said she only had formal employment for about 2 years out of the 22 years on separation. She also did not allude to any informal employment she engaged in to raise income for the family. Despite this lack of any other source of income of her own, the defendant maintained that she provided for the family's needs on her own. Her failure to disclose her source of income for the sustenance of the family gives credence to the plaintiff's version that there were in fact tenants on the property who were supplementing what he was providing.

When asked why she had not claimed for maintenance from 1992 till 2015 if plaintiff had not been providing for the family, the defendant found herself having to search for a reason. She came up with the following explanation for seeking maintenance in March 2015 and not earlier:-

> "It is because I used to have contact with my husband but now he was quite I had to go to court to show him that I was not a fool by being quiet."

The impression created, even from that response, is that the suit for maintenance was not because the plaintiff had not been providing, but it was because he had broken communication with her. The timing of that suit is in tandem with the plaintiff's evidence that they had had some misunderstandings between the two of them as a result of which he stopped providing what he had been proving before.

The defendant, however, conceded that the plaintiff provided school fees for their children.

It may also be noted that at the conclusion of her evidence in chief the defendant unwittingly revealed what could have been the cause of her change of mind on the sharing ratio of the property. She stated that:-

> "I want to tell the court that this property cannot be sold. This man must come back home and we look after our grand children together."

So the real issue is that she does not want the property to be sold but wants the marriage to continue with plaintiff coming back home so that the two of them look after their grand-children together. Unfortunately, one cannot use the leverage of the sharing ratio of a matrimonial property to entice the other spouse back onto her lap or to make it impossible for the property to be distributed.

I am of the view that due to the long period of separation and the fact that the parties have not exhibited any serious intention of restoring normalcy to their marriage relationship, the marriage has to be dissolved. The plaintiff insisted on the dissolution. But for the last words in her evidence in chief, the defendant had not exhibited any express desire of reconciliation. So, clearly, both parties have lost love and affection for each other. In such a situation a decree of divorce should be granted.

As regards the sharing ratio of the matrimonial immovable property I am of the view that defendant's stance cannot be sustained. I am not satisfied that she deserves a share greater than what the parties had agreed to at the pre-trial conference. Her lack of credibility on the

aspects alluded to above shows that she was just intent on taking a gamble and nothing else. That gamble has failed.

The next issue is on whom between the spouses should be granted the first option to buy out the other spouse's share. Ideally the aspect of who buys out the other should take into account the financial ability of the parties to buy out the other. It is in this respect that the spouse who is able to raise the requisite resource is preferred so as to ensure that the aspect of distribution is not unduly dragged on for too long. Another factor to consider is the needs of the parties. Where, for instance, parties are awarded shares that are equal or almost equal, either can be asked to buy out the other as long as they show that they are in greater need of the property and are able to buy out the other within a reasonable or agreed period.

Where the sharing ratio is significantly wide, as will be the case here, the one with the bigger share maybe preferred if they are able to buy out the other. I would also say that where the one with a smaller share demonstrates the ability to buy out the other and that they have a greater need for the property, they may still be considered despite the size of their share. In short, no spouse should be denied the option to buy out the other simply because of their smaller share.

In the final analysis the decision of who to grant the 1st option to buy out the other should really depend on the circumstances of each case without losing sight of the needs and abilities of the parties.

In casu, neither of the parties showed that they have ready financial resources to buy out the other despite their desire to do so. The plaintiff said he would need about a year to raise the resources to buy out the defendant's share. The defendant on the other hand said she would need about two years to raise the money, possibly from their children.

In terms of needs, the plaintiff did not seem to have a great need for the house as he seems to have settled elsewhere. The defendant on the other hand has been resident at this house since the time of marriage and would naturally be more emotionally attached to the property than the plaintiff. The defendant appears to be the one in greater need. It is my view that the defendant be granted the 1st option. I will however not grant her the two years but one and half years within which to buy out plaintiff's share. Should she fail to do so the plaintiff can exercise such option within 6 months after the defendant's failure. If neither is able to buy out the other the property will be sold to best advantage and the net proceeds distributed between the parties in terms of their respective shares.

In the circumstances it is hereby ordered that:-

1. A decree of divorce be and is hereby granted
2. The plaintiff be and is hereby awarded the following movable property:
   a) Radio
   b) Wardrobe
   c) Sewing machine.
3. The defendant be and is hereby awarded the following movable property:
   a) Fridge
   b) Kitchen unit
   c) Double bed
   d) Sofas
   e) Kitchen utensils
   f) Four plate stove
   g) Blankets and curtains.
4. On the immovable property namely Stand number 6785 Zengeza 1, Chitungwiza, also known as number 57 Rufaro Road, Zengeza 1, Chitungwiza_
   a) The plaintiff be and is hereby awarded a 65 %(sixty-five percent) share in the said immovable property whilst the defendant is awarded a 35 %(thirty-five percent) share thereof.
   b) The parties shall, within 30 days of this order, appoint a mutually agreed valuator to value the property. 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 valuators.
   c) The cost of valuation shall be met by the parties in proportion to their respective shares in the property.
   d) The defendant is hereby granted the first option to buy out the plaintiff's share of 65% in the property within 18 months, or such longer time as the parties may agree, from the date of receipt of the valuation report.
   e) Should the defendant fail to exercise the option in (d) above in the manner described, the plaintiff be and is hereby granted the second option to buy out defendant's share of 35% in the property within 6 months from the date of defendant's failure to exercise the option in clause (d) above.
   f) Should the plaintiff fail to exercise the option within the period stipulated, or such longer time as the parties may agree, the property shall be sold to best advantage

by an estate agent mutually appointed by the parties or, failing such agreement, an estate agent appointed by the Registrar of the High Court from his list of independent estate agents.

g) The net proceeds of the sale shall be shared between the parties as per their respective shares, that is 65:35.
h) Each party shall bear their own costs of suit.

Legal Aid Directorate, plaintiff's legal practitioners.
Tamuka Moyo Attorneys, defendant's legal practitioners