TSITSI MERYLIN MIDZI
versus
KUDZAI MIDZI

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 13-15 May 2015, 08-11 June 2015 14-15 July 2015,
2 & 16 February 2016, 14, 20-21 September 2016 and 2 February 2017

Civil Trial (Family)

Ms *F Mahere*, for the plaintiff
H Chitima, for the defendant

MWAYERA J: It is with a sigh of relief that this matter is finally disposed off. What started off as a simple matrimonial matter dragged on indefinitely as the parties started off parallels apart and the delay was further compounded by factors beyond human control when Mr *Mbidzo* fell ill and was hospitalised. It took months for the record to be transcribed for another counsel to appear on behalf of Mr Midzi. I must mention that at some point before the transcription of the record, Mr Matinenga was instructed and he, apart from requesting for a transcribed record, brought rays of hope in narrowing the triable issues in line with what had been suggested to parties in pretrial case management, to no avail. The matter started off with all issues as contentious. This can be discerned from the joint pretrial conference minute. Issues referred for trial were tabled as follows:

i. Whether or not the marriage relationship between the parties has irretrievably broken down.
ii. What order should be made as to custody and access in relation to the two minor children namely W born on 2 October 2005 and D born on 24 November 2008.
iii. What is just and proper maintenance in respect of the minor children
iv. What is the just and equitable distribution of the parties' movable property

v. Whether or not the following companies, namely Chitemamhiwa Investments (Pvt) Ltd and Muronga Investments (Pvt) Ltd are liable for distribution between the parties.

vi. Whether or not the company known as KFM Consultants (Pvt) Ltd constitutes matrimonial property, and if so, what is the equitable distribution thereof.

vii. Whether or not Number 103 Insnargave and Number 163117 Berry Avenue constitute matrimonial property and if so what is the equitable distribution of the same.

When the transcript was availed, the matter finally proceeded with Ms *Mahere* still representing the plaintiff while Mr *Chitima* was representing the defendant. Despite the earlier stance of contestation on all issues, the parties narrowed down contentious issues. It will not be necessary therefore to dwell on evidence which was adduced during the plaintiff's case on the status of the marriage, custody and access of the children. At the conclusion of the trial, the parties who were married to each other in terms of the marriage Act [*Chapter 5:11*] on 19 March 2005, agreed on the following –

1. That the marriage has irretrievably broken down and that this court should grant a decree of divorce.
2. That the plaintiff be awarded full custody of the minor children of the marriage and the defendant be accorded reasonable access.
3. That the plaintiff and defendant share their movable properties as per the suggested agreement.

At the conclusion of the trial the immovable property and children's maintenance remained contentious as follows:

(1) What constituted the spousal assets falling for division and apportionment

(2) What constituted equitable and fair distribution.

(3) What constitutes reasonable quantum of maintenance per month for each of the two children.

From the totality of evidence, it was apparent that there is a current maintenance court order of $1 570.00 per month in respect of the two minor children of the couple. Also clear is the fact that some of the immovable property was purchased prior to the marriage of the parties. The parties after marriage, acquired further assets and spruced up the already existing spousal assets. From

evidence adduced from both the plaintiff and defendant, the immovable property that qualified under the realm of spousal assets are as follows.

1. Stand 1631/14 Bluffhill Harare an undeveloped stand purchased by the plaintiff during the subsistence of the marriage.
2. No 7 Flushing Close Mabelreign Harare purchased by the defendant before the marriage under the company Chitemamhiwa for which the defendant is the only shareholder.
3. Flat No 103 Lisnagrave Josiah Chinamano Avenue Harare purchased in the name of the defendant.
4. No 25 Manyonga Road, Glenlone, Harare the matrimonial home shrouded under some alleged transfer to a Trustee Kutsimi.

It is common cause that in respect of properties acquired prior to the marriage namely 103 Lisnorgavie and 7 Flush close, Mabelreign the plaintiff participated in effecting some improvements. Although the parties argued about the level of contribution, it cannot be whisked away that the parties through joint effort spruced up their property. In the early stages of the marriage they stayed at the Mabelreign property. The property is registered in Chitemamhiwa Investments (Pvt) Ltd, a non-operational company. The defendant's evidence revealed that he purchased the house using his own funds with no contribution at all from Ranga his brother whom he included as a nominal share holder. The defendant testified that Ranga his brother was willing to transfer his 50% shareholding to the defendant or minor children of the parties. Ranga was not called to testify. However, it was clear the defendant had purchased the property and used the company as a vehicle of transfer as was done, with purchase of the matrimonial home 25 Manyonga Road Glenlorne. The defendant revealed his ownership and control of Chitemamhiwa to the exclusion of Ranga. Even in his e-mails to the plaintiff his wife he made it clear Ranga was not the owner of the Mabelreign house. The defendant's assertion of his control of Chitemamhiwa, was fortified by the evidence he gave, that Ranga, was willing to forgo his shares. This places the defendant central as the alter ego of Chitemamhiwa "Company" which in the strict sense was not operational. The Mabelreign property although purchased prior to the marriage qualifies as a spousal asset falling for division, apportionment and distribution. The parties both contributed in the maintenance of the property. One cannot ignore the fact that the defendant's contribution, given he purchased the house in question prior to the marriage, is quite substantial in comparison to the

plaintiff's contribution. In respect of Flat No. 103 Lisnargavie Flats the defendant acquired the flat before marriage. The parties both testified that during the subsistence of the marriage they contributed to the maintenance refurbishing and furnishing of the flat for purposes of utilizing the same as a source of income as they rented it out. The property falls in the realm of spousal asset for distribution and apportionment. Again in respect of his property, the defendant's contribution is on the high side given he purchased the property before marriage. The plaintiff's contribution in administering and maintaining the property can however, not be ignored. During the subsistence of the marriage the parties purchased the Bluffhill stand and the Glenlorne matrimonial home. The defendant, as well as the plaintiff's evidence, made it clear that the plaintiff clandestinely purchased the Bluffhill stand during the subsistence of the marriage at the height of misunderstandings between the couple of over alleged infidelity on the party of the defendant. What is crucial to note is that the stand was acquired during the subsistence of the marriage. Although it is in the plaintiff's name, it qualifies as a spousal asset for division apportionment and distribution. In the absence of evidence to the contrary the starting point is equity. The other property which falls under scrutiny is number 25 Manyonga Road Glenlorne. It is not in dispute that the property was purchased during the subsistence of the marriage, it was purchased through a company called Muronga Investments (Pvt) Ltd again used as a vehicle for purchase. According to the plaintiff's version, the parties held 50% shares each. The Muronga Company being a shelf company with Ranga Midzi and Taonga Gutuza as initial directors who transferred their shares to the plaintiff and the defendant, per exh 1 share certificates pages 90 – 91 and share transfer pages 87 to 88. This evidence was in sturk contrast with the defendant's evidence that Muronga did not transfer shares to the parties but instead transferred to Kutsimi Trust. (Share certificate p 44 and 45 exh 2).

An analysis of the evidence of both parties in respect of the Glenlorne property reveals that it is an asset which falls for division distribution and apportionment as it is the parties matrimonial home. The parties used a shelf company Muronga as a vehicle to purchase the property.

They own the property and at some stage during their marriage they discussed the issue of forming a trust in which to transfer their property for the benefit of their children. This appeared to have emanated from the fears surrounding the involvement in family and business affairs by one Ranga a brother to the defendant. Although a reading of the mails between the parties reflect

a consistent view from the defendant that the property was his and not Ranga's it seems suspicion and insecurity prevailed. The discussions of the trust formation were on the table. The parties even met a lawyer for purposes of discussing and in their emails it was apparent their common goal was to register a trust, Kutsimi, which would hold their properties. The noble idea however, never came to fruition as the property was not transferred to the trust, Kutsimi family trust. The trust took long to shape up and be registered. The parties used Muronga company to purchase the property. The original shareholder of Muronga, Ranga and Gutuza, if its accepted, the property was still in their company as they did not transfer or donate their shares to Kutsimi family trust or at least there is no evidence to show such transfer. The other version is that the property was bought through savings from the defendant and the couple used Muronga as a vehicle to facilitate the purchase. There is no evidence that was placed before the court to refute that the plaintiff and defendant owned Muronga 50% each although they argued the property had not yet been transferred from Ranga and Gutuza. The question is if the property was not for the couple then why were they discussing, having a trust, even advancing in trying to set out to transfer property which was not theirs. It is evident the Glenlorne property is the couples' matrimonial home which they intended to hold in a family trust together with their other properties. Discord in the marriage, however, took centre stage and prevailed before conclusion of the transfers into the trust. There is no evidence of unanimous decisions made by the trust. There is no evidence that the plaintiff acceded to the transfer of shares on the other hand even if the property was not transferred to the plaintiff and the defendant, there is no evidence to show that the trust purchased shares from Ranga and Gutuza, the initial directors of the shelf company, nor is there evidence to show Ranga and Gutuza donating shares to the trust and the trust in turn accepting the donation. At the end of it all, what remains clear is that the Glenlorne matrimonial home is property in which the parties have half share each based on their respective 50% shares in Muronga although clearly just like the trust nothing had been finalized in terms of paper work as at the time of trial. The parties had this weird *modus operandi* in acquiring property but nothing which disqualifies the matrimonial home from falling for distribution. The trust issue was not concluded and one cannot seek to read its existence by speculative inference that it was the parties intention.

I must mention in passing that KFM consultants (Pvt) Ltd was revealed as a growing concern, KFM is an operational and or functioning company whose inception was before the

marriage of the couple. It initially operated as City (Pvt) Ltd and currently, KFM. The plaintiff's claim for the company being the defendant's alter ego in the face of unrefuted evidence of the operations of the company cannot stand. In fact, it was revealed in evidence that the plaintiff herself as a director for KFM would be paid for use of her car and also for the time she spent at KFM. She, just like other directors, would get directors fees. KFM was portrayed as a separate legal persona and in the absence of evidence justifying the piercing of the cooperate veil, the claim of 50% sharing as if the company is part of the matrimonial estate or asset of the parties is untenable. KFM consultants (Pvt) Ltd does not qualify as a spousal asset for division, apportionment and distribution.

Having established the assets that fall for distribution, division and apportion. It is important one to take a close look at the law and facts so as to come up with a just and fair decision in the circumstances.

The division apportionment and distribution of property is governed by the Matrimonial Causes Act [*Chapter 5:13*] s 7 thereof, outline the guidelines among others to be followed by the court.

Section 7 (1) provides:

> "Subject to this section, in granting a decree of divorce, judicial separation or nullity……of marriage or anytime thereafter, an appropriate court may make an order with regard to:
> The division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other."

The use of the term 'assets of spouses' confers a broad discretion on the court to look at all circumstances and spousal assets wholistically so as to come up with a just and fair decision. The notion of spousal assets falling for consideration was adopted clearly in *Gonye* v *Gonye* 2009 (1) ZLR 232 where MALABA JA as he then was held:

> "The terms used are 'assets of 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 erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from division, apportionment and distribution exercise".

The obvious intention in using spousal assets is to ensure that no one spouse is unjustly enriched or impoverished by divorce. The distribution of the spousal assets gives the court a background of manoeuvre in carrying out the onerous task of distribution, division and apportionment of property on the back drop of ensuring that the spouses are in so far as it is

practically possible placed in a position they would have been in had the marriage subsisted. See the Gonye case *supra* also *Kwedza* v *Kwedza* HH 34/12, *Shenje* v *Shenje* 2001 (1) (2) ZLR 16, *Usayi* v *Usayi* 2003 (1) ZLR 684 and *Manyoni* v *Francisca Manyoni* HH 4/16. The underlying principle being that in division of property, the court, in exercising its wide discretion, has to come up with the fairest possible settlement, where each of the spouses is as far as practically possible, placed in a position they would have been had the marriage continued. The spirit of sharing spousal assets and even transferring property registered in one spouse to the other is well encapsulated in our constitution on protection of marriage and spousal rights during and after dissolution of marriage by either divorce or death. The legal frame work places the duty of care and equality of rights and obligations of spouses even upon dissolution of marriage.

Section 26 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 is apposite, it states:

> "The State must take appropriate measures to ensure that:
>
> (a) ……
>
> (b) ……
>
> (c) there is equality of rights and obligations of spouses during marriage and at dissolution and
>
> (d) in the event of dissolution of a marriage, whether through death or divorce provision is made for the necessary protection of any children and spouses."

The law in so for as distribution of spousal assets in concerned is settled. The ultimate result to be achieved must be just and fair in so far as it should reflect that the parties and children are placed in a position they would have been in had the normal marriage relationship subsisted. In other words in considering the wide spectrum of considerations which would encompass the notion of equity, direct and indirect contributions, protection of spouses and children and futuristic need, the pivotal goal is to ensure that none of the parties is unnecessary over burdened by hardship which comes with divorce. The aim is to achieve a fair distribution which would bring about as far as practically possible justice and equity.

Given that clear legislative and legal intention which has been ably upheld by our courts the exaggerations, underestimation, overstating, the proposed distribution patterns suggested by the parties have no legal standing. Both direct and indirect contributions of parties are of paramount importance in making a complete Matrimonial Estate. See *Ncube* v *Ncube* HB 116/15.

The wording of s 7 (4) which gives factors and guidelines to the court in the exercise of discretion is important and comes to foe. Section 7 (4):

> "In making an order in terms of subs (1) an appropriate court shall have regard to all the circumstances of the case, (my emphasis) 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, 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 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 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 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."

Looking at the whole spectrum and due regard being given to the children, it is clear the plaintiff, a young able bodied and intellectually fit woman will be the custodian parent of the two minor children. The defendant, a young able bodied and intellectually gifted man as evidenced by his enrolment for a Master's degree during the cause of trial, has business to attend to. Over and above, the minor children of the couple he also has his adult son A who is still undergoing training at university. I must emphasise A is still of school going age s 7(4) (c) ….. encapsules training which is in conformity with the Constitution s 20 (1)

The division, distribution and apportionment of property which I will come up with among the wide spectrum of considerations takes into account the children's needs holistically. Minimal disruption is to be occasioned to the minor children so that they continue to live in the environment

they are accustomed to. The defendant is going to the UK for his Masters' and as such does not require immediate attention in so far as accommodation in Zimbabwe is concerned. The plaintiff, on the other hand, is in the matrimonial home with the children and is dependent on that property for shelter. See *Kalube* v *Kalube* HH 316/16. In the circumstances of this case, it would not be just and fair to award the defendant the matrimonial home when he will be away albeit for a year and to shove and move the plaintiff and children in a manner that brings about unnecessary hardship. It is my considered view that the Glenlorne house be awarded to the plaintiff and that way the two minor children will also be cushioned. The Mabelreign property and the flat, taking note of the substantial contribution by the defendant prior to the marriage should be awarded to the defendant. That should then cover A's accommodation and the defendant's accommodation. The flat rentals will also assist the defendant with the much needed maintenance, and school fees for the children given the suggested business hardship. It is also my considered view that considering the whole wide spectrum and contributions given the defendant purchased these assets before marriage, his contribution far outweighs that of the plaintiff who having been awarded the matrimonial home of high value, should not be over awarded a share in the other two properties. The stand acquired during the subsistence of the marriage when one considered the net value of the spousal assets should be shared between the parties in equal half shares, meaning the parties are entitled 50% share value of the stand with the plaintiff being given the first option to buy out the defendant.

The parties having agreed to irretrievable breakdown of their marriage and on sharing of the movable property, that will be incorporated into the order of the court. As earlier mentioned, it is my considered view that given the life style of the parties, the existing maintenance be retained and the immovable property be shared as suggested above.

Accordingly it is ordered that:

1. A decree of divorce be and is hereby granted.
2. The plaintiff be and is hereby awarded custody of the minor children namely W born on 2 October 2005 and D born on 24 November 2008.
3. The defendant be and is hereby awarded the right to reasonable access to the minor children (in 2) by arrangement of the parties and on every alternate week-end starting on Friday after school from 1:00pm until Sunday afternoon at 500pm and for two weeks of each school holiday and alternative public holidays.

4. The defendant shall pay maintenance for the two minor children as per the current maintenance court order.
5. The defendant be awarded
   (a) All movable property at number 103 Lisnagrave, Josiah Chinamano Avenue
   (b) A double bed and television set and stand at 25 Muronga Glenlorne.
   (c) The defendant be declared the sole owner of the Honda Fit and Toyota Surf.
6. The plaintiff be and is hereby awarded
   (a) The rest of the movable property at 25 Muronga Glen Lorne
   (b) The plaintiff be declared the sole owner of two Mercedes Benz C200 and C180 vehicles.
   (c) The defendant is to hand over the registration book and sign all relevant documents to facilitate ownership of the vehicles in 6 (b) to the plaintiff.
   (d) In the event that defendant fails to sign relevant documents to effect transfer of the vehicles within 14 days of this order Sheriff of Zimbabwe or his authorised deputy shall act in the defendant's place and sign all necessary documents to facilitate transfer of the vehicles to the plaintiff.
7. The immovable property known as 103 Lisnagrave Josiah Chinamano Avenue, Harare be and is hereby awarded to the defendant as his sole and exclusive property.
8. The immovable property known as 7 Flushing Close, Mabelreign Harare be and is hereby awarded to the defendant as his sole and exclusive property.
9. The immovable property known as 25 Muronga Road Glen Lorne, Harare be and is hereby awarded to the plaintiff as her sole and exclusive property.
   (a) Consequent to (9) above the defendant shall sign all documents and take all steps to transfer his half share to the plaintiff within 60 days of the date of this order, failing which the Sheriff for Zimbabwe be and is hereby authorised to act in the defendant's place and facilitate the transfer to the plaintiff.
   (b) The plaintiff is to bear the transfer costs.
10. The immovable property known as stand 1631/14 Berry Avenue, Bluffhill, Harare is to be shared equally by the parties at the rate of 50% share each.

(a) Consequent to 10 above the plaintiff is to buy out the defendant within a period of 3 months of this judgment. In the event of the plaintiff failing to buy out the defendant in the specified period, by the defendant shall buy out the plaintiff within 3 months of the date of failure by the plaintiff.

(b) In the event that parties fail to buy each other out, the property shall be sold to the best advantage at open market within a period of 3 months from expiration of buying out period and the proceeds thereof shall be shared equally at the rate of 50% each.

(c) The property shall be evaluated by an independent evaluator appointed from the list of evaluators by the Master within 7 days of date of this order so as pave way for buy each other out and or sharing the market value by the parties.

(d) The costs of evaluation shall be borne by the parties in equal proportions.

11. Each party is to bear its own costs.

Matipano & Matimba, plaintiff's legal practitioners
Mbidzo Muchadehama & Makoni, defendant's legal practitioners