

BELIEVE RANGUNA
versus
MAZVITA ADIOLA RANGUNA (NEE MWAYERA)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 20, 21, July 2017 and 10 May 2018

MATRIMONIAL TRIAL

L Uriri and P Makombe, for plaintiff
C Ndhlovu, for defendant

CHITAKUNYE J. The plaintiff married the defendant in terms of the Marriages Act [*Chapter 5: 11*] on 19 December 2014 at Marondera. The plaintiff is not in formal employment but claimed to be in the business of buying and selling anything saleable. The defendant on the other hand is a student at the University of Zimbabwe (UZ). Their marriage was soon on the rocks and on 16 July 2015 the plaintiff sued defendant for divorce and other ancillary relief. The parties had stayed together as husband and wife from 19 December 2014 to end of February 2015 when the defendant returned to the University as she was in residence. Before the semester was over the marriage was all but finished.

The circumstances of this case were aptly encapsulated by plaintiff's counsel in these words:-

“The facts appear to have been drawn out of a Shakespearean tragedy. One could easily refer to “a pair of star crossed lovers”, who unlike Shakespeare's Romeo and Juliet, do not appear to have been in love or appear to have married for the wrong reasons and never lived happily thereafter.”

This is typically a case of parties infatuated by what they perceived of the other and before they knew of the substance each was made of rushed to marry in terms of the Marriages Act [*Chapter 5:11*]. From their own description, theirs was what one may term *mahumbwe*/children's play despite their respective ages of 27 and 19 years at the time of marriage. As is the case with children's play where one plays the husband and the other the wife, when called back by their parents or at the emergence of any misunderstanding each quickly goes back to their parent's home after destroying home structures they would have

erected from whatever material. In *casu*, they had lived together for a short period during which period the defendant fell pregnant hence the birth of their child after the parties had already separated.

In his declaration the plaintiff alleged that the marriage relationship has irretrievably broken down to such an extent that there are no reasonable prospects of restoration to normal marriage relationship in that:

1. The parties have lost love and affection for each other.
2. The parties' marriage has been characterised with differences which plaintiff can no longer condone.
3. The defendant does not respect plaintiff as her husband and has on several occasions assaulted him and as such plaintiff can no longer condone such behaviour.

The defendant in her plea disputed these factors and instead contended that the breakdown of the marriage relationship is attributed to the plaintiff's infidelity. She denied ever assaulting the plaintiff. To the contrary, she tried to salvage the marriage relationship by seeking counselling for herself and the plaintiff but plaintiff dismissed those attempts.

Whilst parties were not agreed on the cause for the breakdown of their marriage, what is apparent from the facts of the matter is that the parties entered into this marriage out of ill conceived infatuation and not real love for each other at all. Each may have had their own ill conceived perception of marriage and reason for the marriage. A marriage is a lifelong commitment to each other and parties must be reminded that it is not an institution to rush into. One must take their time and know their potential partner before committing to the life long relationship.

From the pleadings filed of record it is apparent that premised on the perceived expectations from the marriage the parties would not agree on the assets of the spouses. In this regard the plaintiff alleged that the parties did not acquire any property during the subsistence of their marriage; hence there is no matrimonial property subject for distribution.

The defendant on the other hand listed at least 22 movable assets and at least 5 immovable assets which she said were acquired during the subsistence of the marriage and are thus subject for distribution. The defendant asked to be awarded at least 15 of the movable items comprising, *inter alia*, household items, 10 cattle and two motor vehicles. She also claimed an award of two immovable properties.

At the time of filing her plea she had given birth to the couple's child hence she asked for maintenance in respect of herself and the child and lying in expenses.

It is pertinent to note that the defendant's claim was not made as a counter claim but simply as a statement in response to plaintiff's claim.

At a pre-trial conference held on 21 July 2016, the parties agreed that their marriage has irretrievably broken down to such an extent that it can no longer be restored to a normal marriage relationship and that the marriage had lasted for seven (7) months only. They further agreed that defendant be awarded custody of the minor child Mukudzei Aiden Bryden Ranguna, born on 16th October 2015.

Issues referred to trial were couched as follows:

1. What property did the parties acquire during the subsistence of the marriage?
2. How should the matrimonial property be properly distributed?
3. How much should Plaintiff be ordered to pay as maintenance for the minor child?

On the trial date counsel for the plaintiff indicated that parties resolved issue number 3(captured as 1.3 in the PTC minutes) in that they had agreed that maintenance for the minor child be regulated in terms of the order of the Maintenance Court in M15/2016.

The defendant's counsel confirmed the position. This therefore left the two issues pertaining to the property acquired during the subsistence of the marriage and how that property should be distributed.

These issues arose from the conflicting positions taken by the parties where plaintiff in para 7 of his declaration indicated that no property was acquired during the subsistence of the marriage whilst the defendant in her plea had listed numerous properties both movable and immovable which she averred had been acquired during the subsistence of the marriage.

In his replication the plaintiff conceded that the property acquired during the subsistence of the marriage comprised 6x leather chairs, 1x bicycle, kitchen utensils and 2x fans. As for the rest of the property such were either acquired before their marriage or belonged to other people and was not their property.

As regards immovable property plaintiff maintained that no immovable property was acquired during the subsistence of the marriage. All the 5 immovable properties stated by defendant were acquired before their marriage and thus should not be subject of distribution.

In response to the two outstanding issues the plaintiff gave evidence and called one witness. The plaintiff's evidence was to the effect that the parties fell in love in December

2014. Before that they had known each other as friends. On 17 December he paid *roora/lobola*/bride price to defendant's parents and on 19 December 2014 they were joined in holy matrimony at Marondera magistrate's court. They started living together as husband and wife sharing bed as from that day. In February 2015 the defendant returned to UZ as she was in residence at the UZ Campus. They thus lived together in the manner of husband and wife for about two and half months before defendant returned to UZ. It was his evidence that the only assets acquired during the period their marriage subsisted comprised: - 6x leather chairs, 1x bicycle, Kitchen utensils and 2 fans. The rest of the movable assets were acquired before their marriage on 19 December 2014. He tendered documents showing that the two motor vehicles he admitted to owning were in fact acquired before their marriage.

As regards immovable properties, the plaintiff's evidence was to the effect that he acquired all the immovable properties before their marriage. To this extent he tendered the relevant documents showing that all the immovable properties were acquired before his marriage to defendant on 19 December 2014.

As for a Toyota 1st motor vehicle which the defendant contended had been bought for her, the plaintiff categorically stated that it in fact belonged to someone namely Paradzai who had brought it to their house for safekeeping and the owner has since taken it. He also alluded to the other property as belonging to his uncle Albert Moyo.

The said Albert Moy also gave evidence confirming that he had taken some of his property to plaintiff's residence for safe keeping as he was based in South Africa. He itemised those items and these included the gym equipment, 2 TV sets, a vacuum cleaner and many other items.

The plaintiff also averred that some of the movable property was acquired during the subsistence of his customary law marriage to Patience Mhlanga. The said Patience could claim her share at any time as she had not yet laid claim to assets acquired during their marriage. This marriage had apparently terminated in 2014 before the plaintiff married defendant.

The plaintiff's evidence was well corroborated regarding the period when the properties were acquired.

The defendant thereafter gave evidence. The defendant's evidence materially departed from her plea on the property in that she now conceded that all the 5 immovable properties had in fact been acquired before she married the plaintiff. She also conceded that she found a number of household assets in the house some of which was taken away presumably to Patience Mhlanga who had been customarily married to the plaintiff. She conceded in effect that some

of the property she was claiming had been there when she married the plaintiff thus contradicting her plea which was to the effect that all the property she listed had been acquired during the subsistence of the short-lived marriage.

As regards the motor vehicles defendant conceded that the Toyota Hilux and the Toyota Fortuner had been acquired before marriage. The only motor vehicle she believed had been acquired during the subsistence of the marriage was the Toyota 1st. This is the car she said plaintiff had bought for her to pacify her after she had accused him of cheating on her. The plaintiff visited her at UZ and showed her the car stating that he had bought it for her. Thereafter the defendant averred that she drove the car for about 3 weeks after which the plaintiff took it away purportedly to go and have number plates fitted onto it as it had no registration number plates. Since then she has not seen that vehicle. Besides the plaintiff's word of mouth and the fact that the vehicle had been at their residence, the defendant had nothing concrete to show that the car was indeed acquired by plaintiff.

It is pertinent to note that defendant did not deny plaintiff's assertion that other people used to bring their cars to their residence for safe keeping as their premises had space.

After the testimony as stated above it was apparent to me that the real issue should not have been on whether the property was acquired during the subsistence of the marriage. The defendant should simply have conceded from inception that most of the property was already acquired when she got married to plaintiff. In that way the real issue of whether in those circumstances she is entitled to a share in that property acquired before marriage would have been clearly identified. In my view as regards all the property acquired before marriage the real issue is whether or not the defendant is entitled to a share in that property irrespective of when and how it was acquired.

The distribution of assets at the dissolution of a recognised marriage is governed by s 7(1) as read with ss (4) of the Matrimonial Causes Act, [*Chapter 5:13*]. Section 7(1) provides that:

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

Subsection (4) thereof then provides that:

(4) 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 a 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 been in had a normal marriage relationship continued between the spouses.”

As stated in s 7(1) (a), the assets subject for distribution are assets of the spouses. These include assets belonging to either of the spouses or jointly owned by the spouses.

In *Ncube v Ncube* 1993 (1) ZLR 39 (SC) at 42B-D in considering the meaning of the phrase “assets of the spouses” in s 7 of the Act, KORSAN JA aptly opined that:

“I take the phrase ‘assets of the spouses’ to include all such property as a spouse was possessed of at the time of the distribution, and not only what was acquired by one or the other or both the parties during the subsistence of the marriage, save such assets which are proved to the satisfaction of the court to have been acquired by a spouse, whether before or during the marriage-

- (a) by way of inheritance; or
- (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
- (c) in any manner or which have particular sentimental value to the spouse.”

In *Gonye v Gonye* 2009(1) ZLR 232(SC) at 237B-D MALABA JA (as he then was) elucidated the above term as follows:

“The terms used are the ‘assets of the spouses’ and not ‘matrimonial property’. It is important to bear in mind the concept used, because the adoption of the concept ‘matrimonial property’ often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept ‘the assets of the spouses’ is clearly intended to have assets owned by the spouses individually(his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.”

It must therefore be clear that assets acquired before marriage are to be considered. The circumstances of their acquisition will be a factor in the exercise of the court’s discretion.

In so far as court is enjoined to consider all the circumstances of the case, it follows that the fact of a particular property having been acquired before marriage should not be lost sight of in the distribution of assets of the spouses.

The other factors affecting the distribution of assets as outlined in s 7(4) will equally be of guidance. The defining factors will depend on the particular circumstances of each case.

Thus in some instances the needs of the parties and the long duration of the marriage have outweighed direct contributions such that where a spouse may not have made any direct contribution they have still been awarded a half share. see *Usayi v Usayi* 2003 (1) ZLR 684(S)

In other cases the short duration of the marriage has tilted the scale in favour of the need for a spouse to have made a substantial direct contribution see *Masiwa v Masiwa* 2007(1) ZLR 167(S)

In *casu*, I am of the view that the short-duration of the marriage is such that one cannot ignore the need for defendant to have made direct contributions if she is to realise to the extent of her claim. Thus the shorter the duration of the marriage the more important it is to have made direct contributions.

The case in point is a situation where the defendant came into plaintiff's life for a short time and found him already owning all the immovable assets and the other movable assets. The question is would it be fair and just for her to prize off a valuable immovable asset out of that brief stint in which the two only had about 3 months of living together in marriage? It is common cause that during that brief marital union defendant was dependant on the plaintiff. She herself brought nothing into the marriage serve for her person and the need to be cared for. She in fact conceded that she had a blissful time being spoilt by plaintiff by going for shopping eating out etc during the honey moon period of their marriage, things that she may not have dreamt of before meeting plaintiff. Even as regards household chores for the 3 months defendant conceded they had a housemaid taking care of those chores.

I am of the view that the circumstances of this case do not justify awarding defendant any of the immovable properties.

As regards the movable assets I am inclined to accept that defendant should be content with what has been offered. She can surely not seriously expect to be awarded one of the two vehicles that the plaintiff owned prior to marriage. The Toyota 1st that she wants or its equivalent value is also untenable. Clearly even from her own evidence this may have been meant to pacify her over her complaint, if at all it happened. She did not dispute that they kept other people's cars at their residence.

Another aspect that worked against the defendant is her own failure to be candid with court. She gave me the impression that she was intent on getting as much as she could despite lack of justification. An example of this conduct is when, for instance, she claimed that plaintiff owned 20 cattle at his farm. This was contrary to her evidence in the magistrate court wherein she stated in the maintenance hearing that the plaintiff owned 60 cattle. When quizzed about this, the defendant had the audacity to say both were valid. Surely seeing 60 cattle and seeing 20 cattle when she visited the farm cannot be said to be the same. Either one or both figures are a figment of her own imagination to portray the plaintiff as an owner of such wealth.

The defendant conceded that in the maintenance court she had stated that after marriage the couple went to Monte Claire for their honey moon whilst in this court she said they went for their honey moon in South Africa. When quizzed about it she again said both statements were valid. It was not her contention that they went for their honey moon to two deferent places but once and that once was in South Africa.

As regards their relationship the plaintiff testified that they fell in love in December 2014 and in the same month married on 17 December in terms of customary law after which on 19 December their marriage was solemnised in terms of the Marriages Act. This evidence was not refuted at all. It was thus surprising that when the defendant was under cross examination she now averred that in fact they fell in love in January 2014 and married in December 2014. This was clearly intended to give some semblance of normalcy to the relationship leading to the marriage. Unfortunately she could not explain why plaintiff's version had not been challenged.

These contradictions and inconsistencies in the defendant's evidence serve to show that her demands are not justified at all. She is clearly driven by greedy or the desire to get back at plaintiff. Her purported desire to secure a future for the child was not bona fide at all as the parties agreed that issues to do with maintenance for the child will be in terms of an extant maintenance court order. Thus should any need arise to vary the order the parties are perfectly entitled to approach the Maintenance Court.

Post-divorce spousal Maintenance

Though in her plea the defendant had asked for maintenance for herself and the child, post divorce spousal maintenance was not persisted with as evident from the pre-trial conference minute. As already alluded to, that minute shows that only the issue of maintenance for the minor child was referred to trial. By implication spousal maintenance was either settled

or abandoned. I am thus inclined to hold that parties should be bound by the minute. See *Mahlangu v Dowa & Other* HH 653/16.

When the trial commenced counsel agreed that the 3rd issue on maintenance for the child had been agreed upon and it will be regulated in terms of the maintenance court order. As a result the parties in their testimony provided no evidence on maintenance. It was thus improper for defendant's counsel to ask for an order that the issue of spousal maintenance be dealt with in terms of the extant maintenance order. This issue of post divorce spousal maintenance was not before me and so I cannot refer it to the magistrate court. The issue to be referred to the magistrate court is the one on maintenance for the child. If defendant wishes to claim post divorce maintenance she surely should do so bearing in mind that post defence maintenance is no longer just there for the asking but must be justified. See *Chiomba v Chiomba* 1992(2) ZLR 197(S) and *Kangai v Kangai* HH 52/07.

Costs of suit.

The plaintiff sought that each party bear their own costs of suit. The defendant on the other hand asked for the plaintiff to pay her costs. The circumstances show that the defendant as a student was dependant on the plaintiff. Prior to that, she had been dependant on her parents. It is therefore clear to me that she certainly needed assistance. In the exercise of my discretion in this regard I will order that plaintiff as the resourced spouse meets the defendant's costs of suit.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted
2. Custody of the minor child, namely Mukudzei Aiden Bryden Ranguna born 16 October 2015, be and is hereby awarded to defendant with plaintiff enjoying reasonable rights of access to the minor child as agreed by the parties from time to time.
3. Maintenance for the minor child shall be regulated in terms the maintenance court order number M15/2016 as varied from time to time.
4. The defendant is hereby awarded the following property as her sole and exclusive property:
 - a) Washing machine;
 - b) One glass table;
 - c) Kitchen utensils;
 - d) 1 King-size bed
 - e) Bicycle and
 - f) 2 Fans.
5. The plaintiff shall retain the rest of the movable and immovable property.
6. The plaintiff shall bear costs of suit.

Makombe and Associates, plaintiff's legal practitioners
Gonese and Ndhlovu, Defendant's legal practitioners