

GOLIATH MANJALA
v
SIKHANGEZILE NKALA MAPHOSA

SUPREME COURT OF ZIMBABWE

GWAUNZA JA, GOWORA JA & GUVAVA JA

HARARE, JANUARY 21, 2014

S Simango, for the appellant

W Bherebende, for the respondent

GUVAVA JA: This is an appeal against the whole judgment of the High Court dated 6 June 2013. After hearing counsel we dismissed the appeal with costs and indicated that reasons would be availed in due course. These are they.

The facts of this matter may be summarised as follows. The appellant and the respondent were purportedly married in terms of the African Marriages Act [*Chapter 238*] on 4 June 1989. Their marriage was subsequently nullified in separate proceedings in the High Court on 19 October 2011 in case number 5028/10 on the basis that at the time that the appellant married the respondent he was already married to another woman in terms of the Marriage Act [*Chapter 5:11*]. At the time when the marriage between the appellant and respondent was declared a nullity the issue of distribution of the property that they had accumulated during the subsistence of the marriage was not dealt with as it was not claimed in either party's pleadings.

Following the nullification of the marriage the appellant instituted proceedings against the respondent in the court *a quo* seeking an order for the distribution of the property. The respondent defended the action as she was of the view that the appellant's proposal on what would be an equitable distribution of property was not fair. She filed a counter claim in which she proposed how the property should be shared.

At the conclusion of the trial the court *a quo* then made the following order:

1. That No. 13 Neasden Avenue Bradfield Bulawayo be awarded to the Respondent as her sole and exclusive property.
2. That the Respondent be awarded a 70 per cent share of the remainder of lot 67 Marlborough, Harare also known as Number 3A Helena Road, Marlborough, Harare.
3. Appellant be awarded a 30 per cent share of the remainder of lot 67 Marlborough Township, Marlborough, Harare also known as 3A Helena Road, Marlborough, Harare.
4. The Respondent be granted the option to buy out the Appellant in respect of his 30 per cent share in the property, Number 3A Helena Road, Marlborough, Harare.”

The appellant, dissatisfied with the outcome, launched the present appeal. He attacked the judgment on seven grounds. These may be summarised as follows:

1. The court erred when it found that the respondent was not aware of the marriage between Rosaria Munjala and the appellant at the time they purportedly married each other.
2. The Honourable Court *a quo* grossly erred when it only paid lip service to the dictates of section 7 (4) (1) of the Matrimonial Causes Act [*Chapter 5:11*] and thus failed to distribute the assets fairly.
3. The Honourable Court *a quo* grossly erred when it ruled that house number 3A Hellena Road, Marlborough, Harare was part of the matrimonial property and that respondent was entitled to a 70 per cent share of its open market value.

The court turned a blind eye to the fact that the house was purchased from proceeds of the sale of house number 24 Eves Crescent, Ashdown Park, Harare.

4. The Honourable Court *a quo* grossly erred when it ruled that the respondent was a credible witness when in actual fact it was crystal clear during the trial that the respondent was not a credible witness. The respondent was literally lying under oath. Her evidence was marred with contradictions and inconsistencies.
5. The Honourable Court *a quo* grossly erred when it over emphasized the conduct of the appellant and consequently over punished him for the alleged conduct without considering other factors which would assist the court in striking a balance between the interests of the appellant and those of the respondent.
6. The Honourable Court *a quo* erred when it failed to appreciate that it was not possible for respondent to be able to service the loan for house number 3A Hellena Road, Marlborough, Harare because she was servicing a loan for house number 13 Neasden Avenue, Bulawayo at the relevant time.
7. The Honourable Court grossly erred when it failed to take into consideration the fact that the house in question was registered in the names of both parties.

At the hearing the appellant abandoned most of the grounds of appeal and remained with only ground number two. In my view the concession was properly made as the third to seventh grounds of appeal raise the same issue as they seek to challenge the findings of fact of the court *a quo* and the exercise of judicial discretion in the distribution of the property.

With regard to the 1st ground, where it had been submitted on behalf of the appellant in the Heads of Argument that the court *a quo* erred in finding that the respondent was not aware of his marriage to other women at the time of their marriage, I am satisfied that the appellant's counsel correctly abandoned the ground. It had been submitted that as the

respondent was aware of the position, the court erred in applying the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] (the “Act”) in the distribution of their property.

It was clear that this argument could not be sustained as it was apparent from the record that the appellant did not lead any evidence to show that the respondent was aware of his previous marriage when they “solemnized their marriage.” It was in fact the respondent who told the court that she discovered that the appellant was married to *Rosaria Manjala* in terms of the Marriage Act [*Chapter 5:11*] after they were married for 20 years. As the marriage was a monogamous one, her marriage was properly nullified. In my view, the appellant could therefore not seek to rely on facts which he had not established before the court *a quo*.

It is trite that where one of the parties to a marriage was unaware of the pre-existing marriage of the other party the marriage entered into is a putative marriage and a nullity. In the case of *Chapendama v Chapendama* 1998 (2) ZLR 18 Chuhengo J quoted HR Hahlo South African Law of Husband and Wife 5th ed at 113 in particular footnote 84 where it is stated as follows:

“to constitute a putative marriage , the marriage must be an apparent marriage which but for some impediment or other, was invalid but which one or both parties, ignorant of the impediment, believed to be valid”

In this case the parties properly married in terms of the Customary Marriages Act [*Chapter 5:07*] but unbeknown to the respondent the appellant was already married in terms of the Marriage Act to someone else. This was the impediment that invalidated their marriage. Section 7 (1) of the Act provides that the provisions of s 7 (4) of the same act apply to a marriage which is a nullity.

In these circumstances the court *a quo* correctly found that the respondent was not aware of the existence of the prior marriage and therefore found that the parties had entered into a putative marriage. When that marriage was nullified the court was enjoined to apply the provisions of s 7 (4) of the Act when it was called upon to distribute their assets.

The question for determination in this matter is whether in making the order with regard to the division, apportionment or distribution of the assets of the spouses, the court *a quo* failed to judicially exercise the discretion conferred upon it under s 7 of the Act.

In this case the evidence given by the parties demonstrated how they contributed towards the acquisition of the properties in question. The court *a quo* assessed the evidence and made clear findings of fact and the credibility of the parties. It came to the conclusion that the appellant had not been honest with the court and thus disbelieved his evidence. At p 9 of the cyclostyled judgment the court *a quo* stated as follows:

“I am of the firm view that the defendant (respondent herein) has made out a solid case for the court to move from the 50:50 share in this property. She has shown that she is the one who effectively paid for the property and effected improvements thereon. She played her part as the spouse who was employed. For the 5 years the family was in Belgium she provided for the family. When they moved to Ethiopia for the two years plaintiff (appellant herein) was with her she provided for him. In all this I did not hear plaintiff to complain about ill treatment. The plaintiff on the other hand from the inception of their relationship lied to her about his marital status. That deceitful conduct on the part of the plaintiff must surely not be ignored.”

The court therefore took into account the above factors when it considered the distribution of number 3A Hellena Road. With regard no 13 Nisden Drive, Bulawayo the court found that the property was acquired well before the purported marriage between the parties and the appellant had not contributed in any way towards its acquisition.

The appellant in his notice of appeal is seeking an order that the judgement of the court *a quo* be overturned to the following effect.

1. That stand number 13 Neasden Avenue, Bradfield, Bulawayo be awarded to the Respondent as her sole and exclusive property.
2. That the remainder of 67 Marlborough, Township, Marlborough, Harare also known as Number 3A Helena Road, Marlborough, Harare be awarded to the Appellant.
3. The movable assets be hereby shared in terms of paragraph (b) and (c) of Annexure 'A' attached to the summons and declaration.

The court *a quo* made findings of fact on which the exercise by it of its discretion turned. It also made findings of credibility on which its approach to the whole matter was made. The appellant ought to have appreciated the fundamental fact that the court *a quo* exercised its discretion on the two factors.

This is because the court made specific findings that the appellant had lied to it and would in all instances where his version was at variance with that of the respondent, settle for the version that would have been advanced by the respondent. The basis upon which the Appellant has attacked the court *a quo*'s decision is not founded on the limited circumstances under which such findings may be upset on appeal.

It was not open to the appellant to argue that the court *a quo* misdirected itself on the issues of fact which required resolution on a balance of probabilities. If a litigant lied in one material respect, the court would be entirely justified in taking the view that he has lied in all other respects and in treating his evidence accordingly. In *Moroney v Moroney* SC 24/13 it was held as follows:

“I accept that the respondent failed to truthfully and adequately explain the circumstances of how the various amounts that the respondent claimed came from Helena Limited found their way into the Standard Chartered Isle of Man Account. The court ought to have disbelieved him ...”

In *Leader Tread Zimbabwe (Pvt) Ltd v Smith* HH1311/03 NDOU J at p 7 of the cyclostyled judgment stated as follows:

“It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences maybe drawn as if he had not given evidence at all-see *Tumahole Bereng v R* [1949] AC 253 and South African Law of Evidence by LH Hoffmann and DT Zeffertt (3ed) at p 472. If a litigant lies about a particular incident the court may infer that there is something about it which he wishes to hide.”

The court *a quo* was satisfied that the appellant lied about the money that was transferred into his Beverly bank account. It was clear that he had no money as he was unemployed and it was the respondent’s money that was deposited into his account to pay for the mortgages. It was not in dispute that the respondent was working at all material times and the appellant was unemployed. The parties were living in Belgium and Ethiopia for seven years where the respondent was employed by the Zimbabwean embassy whilst the appellant was at home carrying out domestic chores. Prior to the respondents employ with the Zimbabwean embassy in Ethiopia and Belgium she was employed in Zimbabwe. According to an affidavit which was produced in evidence by the respondent which had been authored by the appellant in the case of *Constance Chasi v Goliath Manjala* M91/88 the appellant had stated the following:

“Constance Chasi [never Manjala] should wait until I have enough income to maintain my children. She is the one working who should maintain the children and not the unemployed Goliath Manjala. Does she want my only working wife to maintain both me and children whose mother is working?”

It cannot be disputed therefore that the court *a quo* took into account the fact that the respondent contributed more towards acquiring the properties that were in dispute.

Having proceeded on these clear principles and taking into account the fact that it had been lied to, the court *a quo* applied the “his” and “hers” and “theirs” principle. This principle was cast in *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) wherein it was stated at pg 106 B-D:-

“The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in a fair way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term “his”, “hers” and “theirs”. Then it will concentrate on the third lot marked “theirs”. It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked “his” plus the appropriate share of the items marked “theirs”. And the same to the wife.” That is the first stage.

Next it will look at the overall result, applying the criteria set out in s 7(3) of the Act and consider whether the objective has been achieved, namely “as far as reasonable and practicable and having regard to their conduct, if it is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued Only at that stage, I would consider taking away from one or other of the spouses something which is actually “his” or “hers”.”

In this regard the court *a quo* with the facts and evidence presented before it, made an order considering the contributions of each party towards the acquisition of the property and awarded to each having regard to what they contributed and applying the principles set out in s 7 of the Act.

In the case of *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664(S) at 70 it was held that:

“The general rule of law as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion: *Bitcon v Rosenberg* 1936 AD 380 at 395-7; *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1973] 3 ALL ER 665 (CA) at 671E-H; *CCSU v Min for the Civil Service* (*supra*) at 951A-B; *PF – ZAPU v Minister of Justice* (2)1985 (1) 305 (S) at 326E-G *Bellenden (formerly Satterwaite) v Satterwaite* [1948] 2 All ER 343 at 345 B-C”

The court *a quo* proceeded in terms of established principles and properly exercised its discretion. It has not been shown that the exercise of that discretion was so irrational that no reasonable person would have come to the same conclusion.

In applying the principles set out in s 7 of the Act it has been stated in a number of decisions that the court has a wide discretion.

In *Masimirembwa N.O. v Chipenhene* 1996 ZLR 378 at 381 C the court stated as follows with regards to judicial discretion in terms of s 7 (1) of the Matrimonial Causes Act:

“Section 7 (1) (a) does not pertain to the enforcement of strict legal rights. It is concerned rather with the exercise of a judicial power directed at achieving a result or settlement that is deemed just and equitable in all the circumstances”

Further, in the case of *Mrerwa v Mrerwa* SC 13/00 SANDURA JA stated thus with regards to the discretion of a judicial officer in terms of this section:

“It is quite clear that the section gives the judicial officer a discretion in the matter which must, however, be exercised judicially in order to achieve a just and equitable result.”

In this case the appellant has not shown that the court *a quo* failed to exercise its discretion judiciously. The decision of the court *a quo* could only be interfered with on that basis. It is not sufficient that the appellate court considers that if it had been in the position of the primary court it would have arrived at a different decision. The appellant must allege and show that the court *a quo* made an error by acting on a wrong principle, or was mistaken on the facts arrived at. See *Barros & Anor v Chimponda* 1999 (1) ZLR 58 (S). I am of the firm view that the appellant has failed to impugn the above judgment in this respect.

In view of the above the court *a quo* cannot be faulted in any way in arriving at the decision it arrived at.

In the light of the above I am therefore of the firm view that the appeal has no merit. It was upon that basis that it was dismissed with costs.

GWAUNZA JA: I agree

GOWORA JA: I agree

Nyikadzino, Simango & Associates, appellant's legal practitioners

Bherebhende Law Chambers, respondent's legal practitioners