

REPORTABLE (64)

DORICA MUZONGONDI
v
CALISTO MUZONGONDI

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & PATEL JA
HARARE, JULY 16, 2015 & OCTOBER 20, 2017

F. M. Katsande, for the appellant

B. T. Munjere, for the respondent

GOWORA JA: The parties were formerly married in terms of the law; they are no longer married having been divorced by the High Court on 3 February 2013. This is an appeal against part only of a judgment granting the decree of divorce.

The parties concluded a customary union in 1995 and on 31 March 2000 their union was formally solemnized in terms of the Marriage Act [*Chapter 5:11*]. The union did not produce any issue.

On 8 April 2011, the respondent, alleging irretrievable breakdown of the union, instituted divorce proceedings. At a pre-trial conference held before a judge in chambers, the parties agreed that the marriage had broken down irretrievably and that a decree of divorce should be issued by consent. They also agreed that the respondent should be ordered to pay the sum of

USD 20.00 per month to the appellant as maintenance. The distribution of the movable assets of the parties was agreed between the two.

The parties were unable to agree on the manner of distribution of the two immovable properties, being Stand 6071 Unit J Chitungwiza, and a stand in Norton as well as an F13 pick-up truck, which were held over for trial. Also for determination before the trial court was whether an undeveloped stand in Kwekwe Marshlands formed part of the matrimonial assets of the parties and was therefore liable for division, apportionment or distribution in terms of the Matrimonial Causes Act [*Chapter 5:13*], 'the Act'.

The trial court made a factual finding that the Kwekwe Marshlands stand constituted matrimonial property. It then proceeded to dispose of the dispute as follows. The respondent was awarded the Kwekwe Marshlands stand, a 70 per cent share in Stand 6071 Unit J Chitungwiza and the F13 pick-up truck. The appellant was awarded the undeveloped stand in Norton as well a 30 per cent share in Stand 6071 Unit J Chitungwiza.

The appellant was aggrieved and has noted this appeal on a number of grounds. Essentially, the appellant seeks to challenge the exercise of discretion by the learned judge in the manner in which he disposed of the dispute with regard to the immovable assets.

In his disposition, the learned trial judge properly took into account the duration of the union of about fifteen years. The trial judge gave due credit to the appellant for the role that she had played as wife to the respondent. Indeed, the respondent himself said in evidence that the

appellant had performed her wifely duties and had contributed by caring for his welfare and wellbeing. He also considered that she had provided other contributions which according to the respondent had contributed to the matrimonial estate. Nevertheless, the respondent was unable to credit her for contributing to the matrimonial estate on the premise that she was not gainfully employed during the marriage. He offered her a 30 percent share of the matrimonial home in Chitungwiza and the undeveloped stand in Norton.

The trial judge took the view that the appellant had not directly contributed to the matrimonial estate and awarded her the property that the respondent had offered her in his claim. Aside from the issue relating to the contribution, the trial judge gave no other reason for his disposition of the assets. In the view of the learned trial judge, an award of the Norton Stand and a 30 percent share in the matrimonial home would meet the justice of the case.

The exercise of discretion by an appropriate court as required in terms of s 7 of the Act has been the subject of scrutiny by the courts within this jurisdiction. It is trite that in giving effect to the broad discretion bestowed to it under s 7(1) the court must have regard to the factors set out in s 7 (4) which are:

- (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.

The Act further provides that 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.

In *Gonye v Gonye* 2009 (1) ZLR 232, at 236H-237B, MALABA JA (as he then was) remarked:

“It is important to note that a court has an extremely wide discretion regarding the granting of an order for the division, apportionment or division of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the 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 rights claimed by the spouses under s 7(1) are dependent upon the exercise by the court of the broad discretion”.

As a consequence, in the exercise of its jurisdiction in making an order for the division, apportionment or distribution of matrimonial property under the Act, a court is enjoined to have regard to all the circumstances of the case. *In casu*, the learned trial judge was alive to the need to

have regard to the factors set out in s 7(4). The court was alive to the fact that the appellant was not employed and had never been formally employed during the union. The court commented:

“The above guiding factors make it clear that the indirect contributions must be considered in the distribution of assets between the spouses. The issue might thus be what weight to put on such indirect contribution. This will of course vary from case to case. There may be cases where the indirect contribution is not considerable. And also cases where indirect contribution is very significant.”

It is appropriate to have regard at this stage to the *dicta* in *Gonye’s* case (*supra*). The discretion enjoyed by an appropriate court under s 7 is extremely wide and a court should be loath to fetter that discretion. In such exercise, every factor referred to in s 7(4) is important in the determination of the disposition of the matrimonial estate. That is to say, that weight should be placed on all the factors such that the exercise of discretion should not appear to be based on any one factor to the exclusion of others.

Needless to say, the exercise of a discretion must be concomitant to the power to exercise such a discretion. This power is to be found in s 7(1) and (2), which read:

- (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.
- (2) An order made in terms of subs (1) may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between the spouses and may in particular, but without prejudice to the generality of this subsection—

- (a) order any person who holds any property which forms part of the property of one or other of the spouses to make such payment or transfer of such property as may be specified in the order;
- (b) confer on any trustees of any property which is the subject of the order such powers as appear to the appropriate court to be necessary or expedient.

In the exercise of the discretion referred to in the above provisions, it is important that an appropriate court not lose sight of the overriding principle enshrined in the provisions, that at the end of the day the court is enjoined to ensure that in its disposition of the matter, it is bound to achieve equity between the parties. As a result a lot of authorities, in construing the provisions of s 7 as a whole, refer to the need to achieve an equitable distribution of the assets of the spouse's consequent upon the grant of a decree of divorce.

Therefore, it is not surprising that the provision itself has specified, in no uncertain terms, those assets of the parties which may not be subject to division, apportionment or distribution under the section. This exclusion is to be found in subs 3 which reads:

- “(3) The power of an appropriate court to make an order in terms of paragraph (a) of subs (1) shall not extend to any 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 an 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 and which have particular sentimental value to the spouse concerned.”

Having made a finding that all the property being claimed by the parties to the dispute before it was liable to division, apportionment or distribution in terms of the Act, it behoved the court *a quo* to make a specific finding on whether or not it should make a disposition in respect of each of the items being claimed, the rationale behind its finding and the manner of disposition.

This the court did not do. It merely remarked that the indirect contribution by the appellant would justify an award in respect of the Norton Stand and a 30 percent share in the house in Chitungwiza, which was the matrimonial home of the parties.

The parties' customary law union was concluded either in 1994 or 1995. Prior to that the parties had cohabited from about 1990. It is common cause that neither party had, at that stage, any property worthy of mention. Whilst the respondent had acquired a degree in Agricultural Engineering the appellant had no skills. It was due to the encouragement and efforts of the respondent that she went to school and acquired a certificate as a tailor.

In 1995 or 1996 the parties acquired the stand in Chitungwiza, on which was a dwelling comprising three small rooms. It is not evident whether or not it had ablution facilities. It is logical to assume that it had. As at the time the matter was heard, the parties had improved it considerably to such an extent that they are in a position to rent out part of the dwelling to tenants. It is from these rentals that the appellant is earning a living. It is also this property that the appellant sought as her portion from the matrimonial estate.

In addition to the above property the parties also acquired two undeveloped stands, one in Kwekwe Marshlands area and the other in Norton. Both bear the name of the respondent. Apart from the acknowledgment by the parties of the purchase of the stands, no other details were furnished to the court with regard to the proper description, correct location, extent or value of the properties in question. Despite the absence of these material details, the court *a quo* was disposed

to order a distribution of the immovable properties. I am not convinced that this was the correct manner of dealing with such a contentious issue.

However, the difficulty that I see in the manner of disposition is related to the absence of reasons by the court *a quo*, apart from a vague reference to the duration of the marriage and the parties' respective contributions to the matrimonial estate. It seems that in disputes of this nature trial courts place undue emphasis on the parties' contributions to the exclusion of other factors. The ambit of s 7 as a whole must be considered and given effect to in the determination of the dispute at hand. In my view, a court that merely focuses on a number of issues without regard to the requirements set out in the section as a whole is guilty of a misdirection.

In casu, it was evident that whilst the respondent was well educated and in gainful employment, the appellant was devoid of any skills that would enable her to obtain gainful employment. At the time of divorce, she was aged 45 and it was accepted that her chances of remarriage were non-existent. She said that her inability to bear a child made it difficult for her to get a companion willing to commit to marriage. The respondent on the other hand was already in a relationship from which he had a child.

Over and above this, the respondent admitted that the appellant had played her role as a wife. His evidence was that she had contributed immensely in looking after him, cooking for him, washing his clothes and making sure that he went to work looking presentable.

That a wife's indirect contribution to the family cannot be disregarded is beyond question. It is evident that the court *a quo* was alive to the weight to be placed on such contribution in considering the apportionment of the assets of the parties. The court had regard to the *dicta* by ZIYAMBI JA in *Usayi v Usayi* 2003 (1) ZLR 684, wherein at 688A-D, the learned judge stated:

“The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as a wife, mother, counsellor, domestic worker, housekeeper, day and night nurse for her husband and children? How can one place a monetary value on the love thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and the creation of an atmosphere therein from which both husband and children can function to the best of their ability? In the light of these and many various duties, how can one say, as is often remarked: “throughout the marriage she was a housewife. She never worked”. In my judgment, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the “direct or indirect contributions 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”. A fair approach is set out by Professor Ncube in his book *Family Law in Zimbabwe*.”

I respectfully agree with the comments of the learned judge. In my view, the above *dicta* set out the correct approach to be followed by an appropriate court in the admittedly difficult task of determining the respective contributions of the parties. Had the learned judge followed this approach he would not have been misdirected. He chose to overlook not only the authorities but the clear provisions of the Act.

As stated previously, the appellant is unlikely to remarry. She has no means to acquire any property due to her lack of skills. She was awarded an amount of USD 20 per month as maintenance which would not enable her to meet her personal expenses let alone provide her with

the means to acquire any property to live in. It would also be unlikely in the circumstances that she would be able to raise sufficient funds to construct a dwelling on the Norton stand.

The ambit of the Act as a whole is to leave the parties in a position that they would have been had the marriage relationship continued. Sadly, in this case, it is evident that the respondent has been left in a much better off position than the one he would be in if he and the appellant were still married. The appellant on the other hand is worse off. She is now homeless. She cannot under any stretch of the imagination buy or construct a dwelling. She will be unemployed and will thus be rendered destitute.

In my judgment, the learned judge in the court *a quo* failed to properly exercise his discretion under the Act. He failed to consider all the factors upon which such an enquiry should be made. More importantly, he made dispositions on immovable properties in the absence of any proper valuations of the said properties. The prejudice, especially to the appellant, cannot be gainsaid. It is only proper therefore that the matter be remitted for a proper consideration of the dispute in terms of the Act and for the adduction of evidence on the values of the properties in dispute.

Accordingly, it is ordered as follows:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* is hereby set aside.

3. The matter is remitted for a proper consideration of the matter in accordance with the provisions of the Act and for the adduction of evidence on the values of the immovable properties.

GARWE JA: I agree

PATEL JA: I agree

Katsande & Partners, appellant's legal practitioners

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