

REPORTABLE (33)

MARIAN CHOMBO
v
IGNATIUS CHOMBO

SUPREME COURT OF ZIMBABWE
MALABA CJ, HLATSHWAYO JA & UCHENA JA
HARARE, OCTOBER 12, 2017 & JULY 06, 2018

Ms B. Mtetwa, for the appellant

T. Mpofu, for the respondents

UCHENA JA: This is an appeal against the decision of the High Court dated 2 July 2014 granting the respondent's claim to the farm he is leasing from the State.

The appellant was the respondent's wife. Their marriage was solemnized on 21 May 1993 in terms of the Marriages Act [*Chapter 5:11*]. Due to differences, which the respondent considered to have led to the irretrievable break down, of the marriage he in September 2009 issued summons in the High Court against the appellant claiming a decree of divorce and ancillary relief. The respondent alleged that the marital relationship between him and the appellant had irretrievably broken down to such an extent that there were no prospects of the restoration of a normal marriage relationship. The appellant initially entered an appearance to defend arguing that there were prospects of a restoration of a normal marriage relationship. The parties later agreed that a decree of divorce should be granted by consent. On 31 August 2012 the High Court granted them a decree of divorce in terms of a consent paper.

The consent order resolved the proprietary consequences of their divorce except the issues relating to the distribution of their rights in Allan Grange Farm which the respondent is leasing from the State. The issues were captured in para 8 to 8.3 of the consent order granted by HLATSHWAYO J (as he then was) as follows: -

- “8. It is recorded that paragraphs 3, 4 and 5 do not reflect a final settlement of the proprietary consequences of the marriage and the parties to that end agree as follows: -
- 8.1 Defendant shall be entitled to remain in occupation of that portion of Allan Grange Farm (the Farm) for a period of 9 months from the date hereof, and shall during that period investigate such alternatives as may be available to her.
- 8.2 If the parties have not settled their differences in relation to the farm, then at the expiry of the said period of 9 months either party shall be entitled to apply to the Registrar of this Honourable Court for this matter to be tried on the issues set out in para 8.3 hereof.
- 8.3 The issues for trial shall be: -**
-Whether defendant is entitled to any rights in respect of the Farm.
-What constitutes a fair and equitable distribution of the rights held by the parties in regard to the Farm.” (emphasis added)

Paragraph 8.3 sets out the issues which were to be determined through the trial which took place before the court *a quo*.

The period within which the appellant was allowed to remain on the farm lapsed. The parties failed to resolve their differences in terms of clause 8.2. The respondent requested the registrar of the High Court to set down the matter for trial on the unresolved issues relating to the distribution of their rights in the farm. At the trial, it was agreed that the parties had conducted their business on the farm since 2002. The respondent had initially been allocated the farm through an offer letter and together with the appellant they proved to the acquiring authority that they are serious farmers after which the respondent was given a 99-year lease. The lease was registered with the registrar of deeds in terms of s 65(1) of the Deeds

Registries Act [*Chapter 20:05*]. It was registered in favour of the respondent through a Notarial Deed of Lease dated 15 May 2007. The lease was registered during the subsistence of the marriage. During that period the parties were jointly conducting their farming businesses on the farm.

Upon separation they separately embarked on individual farming activities on the same farm. The appellant raised chickens and pigs on one portion of the farm while the respondent concentrated on crop production on the other portion. On signing the consent paper, they agreed that the appellant would remain in occupation of a portion of the farm she was using for a period of 9 months.

At the trial the issues before the court *a quo* were: -

1. Whether the appellant was entitled to any rights in the farm and
2. What constitutes a fair and equitable distribution of those rights.

The parties led evidence to substantiate their positions. The respondent wanting all rights in the lease to be awarded to him led evidence to the effect that rights to the farm were allocated to him through the lease agreement. It was argued on behalf of the respondent that the farm does not form part of the assets of the parties capable of distribution in terms of the Matrimonial Causes Act [*Chapter 5:13*]. On the other hand, the appellant wanted the lease or a portion of the farm where she was conducting her farming activities to be awarded to her. She viewed the farm as part of their matrimonial property.

After hearing the parties' evidence the court *a quo* found for the respondent. It found that the farm does not belong to the parties but to the government which leased it to the

respondent. The court found that because of the 99-year lease, the parties have personal rights to the farm and as such the farm does not form part of the matrimonial assets of the parties which is capable of distribution on divorce. Aggrieved by the decision of the court *a quo* the appellant appealed to this Court.

Although the appeal was premised on several grounds, it raises two issues: -

1. Whether in terms of the Matrimonial Causes Act, the parties' rights in the leased farm can be distributed on divorce.
2. If they can be distributed what would be a fair and equitable distribution of those rights.

Mrs *Mtewa* for the appellant submitted that the court *a quo* erred by failing to make a distinction between the farm and the spouses' rights in the leased farm being an asset of the spouses. She submitted that the spouses' rights in the 99-year lease are an asset of the spouses. I agree.

Mr *Mpofu* for the respondent without disputing that the spouses' rights in the 99-year lease are an asset of the spouses submitted that the appellant shot herself in the foot by seeking to be awarded a portion of the farm measuring 400 hectares of the farm or the whole farm. That submission is answered by the consent order granted by HLATSHWAYO J (as he then was) on 31 August 2012 which in para 8.3 clearly states the issues which would be referred to trial if the former spouses failed to settle on the issue of the distribution of their rights in the farm. The court *a quo* should have been guided by the issues before it instead of abandoning

them because of what the appellant subsequently sought to be granted. It should further have been guided by the circumstances of the parties and the law.

It is not in dispute that the farm was leased to the respondent by the acquiring authority. That was an executive decision which the Court cannot interfere with. Re-allocating the farm or any part of it would be irregular as it would amount to the court usurping the executive powers of the Acquiring Authority.

Although the farm was initially allocated to the respondent, through an offer letter, the respondent has since been granted a 99-year lease. The court has authority to distribute the value of the parties' interests in the 99-year lease which was registered in the Deeds Registry through a Notarial Deed of Lease. It is a long term lease which encumbers or limits the rights of the owner and affords the lessee limited real rights. It is enforceable against third parties and entitles the lessee to use and enjoy the property till the end of the lease period, when all rights to the property will revert to the lessor.

What is important to note is the effect of a registered long lease. The effect of registering a long lease is to give the lessee limited real rights which are capable of enforcement against the whole world. W. E. Cooper; *Landlord and Tenant*, Second Edition at pages 276-277 commented on the nature of the lessee's rights in a long lease, as follows:

“A lessee is also entitled to have the lease registered against the title deeds of the property. When he is given occupation or the lease is registered the lessee acquires a real right. Once his real right is so constituted the lessee can enforce it against the whole world. Consequently, upon being given occupation or the lease being registered, the lessee should be entitled to eject a trespasser.”

In the case of *Heynes Matthew Ltd v Gibson N.O* 1950 (1) SA 13 (C) at 15,

DE VILLIERS J.P said:

“When once the lessee has been granted a lease of more than 10 years then certain legal qualities attach thereto. One of the legal qualities that attaches to it is that, being a lease in *longum tempus*, it requires to be registered to bind third parties. **Registration really may be said to be equivalent to full delivery to the lessee of the rights granted to him by the lease. He is entitled therefore to whatever advantages flow from a lease of this description.** One of the advantages is that upon due registration he is protected for the term of the lease against all third parties.” (emphasis added)

It is clear from the above that once a long lease is registered, it confers limited real rights to the lessee. The real rights are an asset of the parties which must be distributed by the courts. What cannot be denied from the facts of this case is that the appellant having been the spouse of the respondent when the lease was acquired and registered has interests in the benefits which flow from the lease. The parties were benefitting from farming on the leased land. They each had an expectation to continue to benefit from their farming activities for the duration of the lease. That expectation is like a pension a long term one. That brings the parties interest in the lease within the ambit of s 7 (4) of the Matrimonial Causes Act.

It is not an issue that the Acquiring Authority owns the farm which it allocated and subsequently leased to the respondent for his and his family’s benefit. On page 1 of the lease agreement the word “lessee” is defined as follows:

“In relation to any person who holds land under this lease, lessee shall mean that person and his spouse or spouses jointly.”

There is therefore no doubt that the appellant has rights and interests in the farm as a joint lessee by virtue of her being the respondent’s erstwhile wife. It is clear that the lease

was granted for the respondent's and appellant's benefit. The use of the word "jointly" means they were both intended to benefit from the farm.

The Acquiring Authority however, has the exclusive right to allocate or lease the farm. In terms of para 29 of the Lease Agreement:

"No variation or amendment of it is valid unless it is put in writing and signed by both parties".

This means any variation including that of adjusting the order of lessees must be in writing and signed by the Acquiring Authority and the respondent. The courts cannot create a contract for the parties.

There are however benefits and advantages which flow from the lease, which are capable of being distributed by the courts in terms of s 7(4) of the Matrimonial Causes Act which provides as follows: -

- "(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 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 been in had a normal marriage relationship continued between the spouses.** (*emphasis added*)

In terms of s 7 (4) the court *a quo* was required to “have regard to all the circumstances of the case” including those mentioned in s 7 (4) (a) to (g). The use of the word “shall” in s 7 (4) makes it mandatory for a court to take into consideration every circumstance of the divorcing spouses.

The circumstances mentioned in s 7 (4) (a) to (g) must also be taken into consideration. The fact that the court *a quo* found that the appellant should leave the farm means that her income earning capacity will be affected as she will not be able to continue with her farming projects on the farm. That should have been taken into consideration in distributing the value of the parties’ rights and interests in the farm. The loss of an income earning capacity has an effect on the appellant’s financial needs and standard of living. These should have been taken into consideration in considering the position the appellant would have been in if a normal marriage relationship had continued between her and the respondent.

The benefits flowing from the lease will exclusively accrue to the party who will remain in occupation of the farm if they are not distributed. In terms of the provisions of s 7 (4) (f), the court is entitled to consider the value of “any benefit” a spouse will lose on divorce in distributing the matrimonial property of the spouses. The court *a quo* failed to consider and distribute the value of the benefits which flow from a registered long lease which confers real rights. It is the value of those benefits and advantages which are distributable in terms of s 7(4) of the Matrimonial Causes Act.

In this case there is evidence that the parties were benefiting from their farming projects. The party who will leave the farm as a result of the divorce will lose those benefits while the party who remains on the farm will continue to enjoy its full benefits. It is therefore just and equitable that the value of those benefits should be taken into consideration in distributing the assets of the divorcing spouses.

The rights in the lease accrued to the appellant by virtue of the fact that she was married to the respondent. She in fact contributed directly and indirectly to their being able to qualify for the 99-year lease. The rights and benefits the respondent derives from the lease are a necessary consideration in the distribution of the assets of the spouses. The lease forms part of the assets of the spouses but was allocated in such a way that it cannot be taken away from the respondent who signed the lease agreement, through a court order and be awarded to the appellant who is a lessee by virtue of her having been the respondent's spouse at the time the contract of lease was signed.

The distribution of the assets of the parties through the consent paper did not take into consideration the parties' interests in the value of the benefits attached to the farm. The value of the leased farm to the parties should be considered in distributing their assets to ensure that the respondent does not benefit unjustly at the expense of the appellant. In terms of the provisions of the Matrimonial Causes Act, the court must 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 had a normal marriage relationship continued between the spouses. The court should therefore take into consideration the position the parties

would have been in if they had continued farming on the leased farm, if their marriage had not irretrievably broken down.

The lease constitutes part of the assets of the spouses and should have been taken into consideration in terms of s 7 (1)(a) of the Matrimonial Causes Act which provides as follows:

“7 Division of assets and maintenance orders

(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.”

Assets of spouses’ means all the assets owned by either spouse at the time of divorce individually and those owned jointly. They include assets acquired by either spouse before the marriage or during the period of separation. (*See Gonye v Gonye* 2009 (1)) ZLR 232 (S). The 99-year lease is an asset of the spouses. Notwithstanding that the court cannot reallocate or lease the farm it can however take into consideration the value of the benefits which flow from it (into account) and make the necessary adjustments when distributing the other assets of the spouses or directly distribute the value of the spouse’s rights and interests in the farm.

I am aware that the other assets of the spouses were distributed through the consent order. It is therefore no-longer possible to take the value of the spouses’ interests and benefits from the leased farm into consideration in the distribution of their assets. It is however still possible for the court *a quo* to hear evidence on the value of the parties’ rights and interests in the leased farm to enable it to determine their value and order the party who will remain on

the farm to pay the party who has to leave the value of his or her share of the benefits, taking into consideration the provisions of s 7 (4) of the Matrimonial Causes Act.

The court *a quo* erred in failing to appreciate that although the granting of the lease was in the domain of the executive, the lease had value attached to it which the courts are entitled to distribute between the spouses. The issue of distribution of the value attached to the 99-year lease was before the court *a quo* which did not take it into consideration in distributing the assets of the spouses. It is important to stress that s 7 of the Matrimonial Causes Act requires the courts to take into consideration all the circumstances of the spouses' case in distributing their assets. The consent order granted by the court did not take into account the parties rights in the leased farm. The court *a quo* which was seized with the issue of the distribution of the parties' rights in the farm should have taken them into consideration and distributed them.

The appeal has merit and must be allowed. The case should be remitted to the court *a quo* for it to consider the value of the parties' interests in the leased farm to enable it to distribute such interests between them.

It is therefore ordered as follows: -

1. The appeal is allowed with costs.
2. The decision of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for it to determine the value of the spouses' rights in the farm and equitably distribute such value between them.

MALABA CJ

I agree

HLATSHWAYO JA

I agree

Mtewa & Nyambirai, appellant's legal practitioner.

Venturas & Samukange, respondent's legal practitioner.