GODFREY MUSORO
versus
ANESU ELIFA MUSORO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 25 July, 1 & 10 August 2022 & 11 January, 2023

Divorce Action

T Shadreck for Plaintiff
B Maruva for defendant

TSANGA J: The parties customarily married in 1998 and solemnised their marriage officially on 30 June 2005. They lived together till 2018. They had three children one of whom is still a minor having been born on 7 October 2005. The issues agreed upon are that the marriage has irretrievably broken down. The plaintiff also agrees that he ought to pay maintenance for the child but disputes the quantum. The parties also have no issue regarding the defendant having custody of the minor child.

Besides the quantum of maintenance for the minor child, the disputed issues revolve on sharing the matrimonial property. During their marriage, the parties jointly acquired a property, namely, stand 1414 of Lot 44 of Greendale also known as 30 Metcalfe Rd, Greendale, Harare, which they later sold. Plaintiff mainly denies that the proceeds used to build a residential home at Wychwood farm, Goromonzi, which the plaintiff was allocated by the Government under the land reform programme. Another bone of contention is whether the defendant should receive any rehabilitative maintenance. The defendant objects to defendant's quest for temporary post-divorce support on the basis that she is young enough to look after herself.
The contentious issues therefore referred to trial were as follows:

1. The quantum of maintenance that the plaintiff must pay in respect of the upkeep and education of the minor child Rumbidzai Musoro.

2. Whether or not the respondent is legally entitled to maintenance at law, and, if so the quantum.
3. Whether or not the defendant is entitled to 50% rights in respect of Wychwood Farm, Goromonzi.
4. Whether or not the defendant is entitled to 50 % in respect of profits accruing from the farming projects being undertaken at Wychwood Farm, Goromonzi

With regards to the third issue referred to trial, it is important to point out at the onset that at the time of the trial, this had morphed into the issue of the defendant's contributions to the improvements on the farm as opposed to the farm itself since the offer letter is indeed with the plaintiff. Indeed at the beginning of the trial, submissions were made by the defendant through her lawyer that what she seeks is her 50% contribution to the farm house in particular and that she was not averse to the farm house being valued and her being given a value of her contributions. This was with a view to settlement. The plaintiff's lawyer indicated that his instructions were to go ahead with the trial. Materially, at the trial her submissions were for the value of her contribution to the farmhouse in particular. A critical consideration in the division of matrimonial assets for the court being the value of each party's direct and indirect contributions, this court herein addresses this real issue at hand upon which evidence was led by both parties.

The evidence

The gist of plaintiff's evidence was as follows:

He is a medical doctor. He is employed by the University of Zimbabwe as a clinical researcher and he also runs a surgery for which he pays rentals of US$800 a month. He said he gets about US500.00 from the surgery and that therefore in reality he subsidises it. He put his gross earnings at US$3500.00 and a net of US$1500.00 after expenses are paid. Regarding the immovable property in Greendale which they acquired during marriage, this had been sold in 2011. With the proceeds they had bought buses at his wife's behest according to the plaintiff and had also acquired a stand in Milton Park which they had also later sold. The house had been sold then for US$160 000.00. Whilst it was not in dispute that a farmhouse was constructed at the farm, the plaintiff was adamant that none of the proceeds from the sale of the property they jointly owned had been used to construct the farmhouse. His submission was that he had in fact built it himself in 2009/2010 when the defendant was in the United Kingdom

pursuing some studies. He described the house as a four bedroomed building with a kitchen, lounge and a pantry. He clarified to the court that he had expended approximately US$20 000.00 on the farm house. As for farming activities at the farm, they had embarked on a mushroom project which needed technical expertise and hence had been a loss making venture. He had therefore resorted to leasing 6 hectares of the farm for which he said he currently gets US$1200.00 a year as rental. No current proofs of any of his earnings were placed before the court.

As for child support, he said he has been paying US$80.00 for the child and is willing to up this to US$150.00 given that he also pays US$120.00 each for two other daughters at University (one from his former marriage) excluding their fees. Since the youngest daughter had decided not to go on to study "A" levels, he is waiting for her to commence an on-line diploma in tourism for which he would also pay. When he separated from his current wife, he said he had continued to pay rentals and buy food and had been paying child support as stated above from July 2021 although his consistency was challenged in cross-examination.

As for his wife's claim for maintenance, he acknowledged in cross examination that at one time his erstwhile lawyers had offered US$300.00 as rehabilitative maintenance covering six months but said that this had not been his instruction. He admitted that when they married, his wife was working at Harare City council. As he was running a surgery at the time in Glen View, she had commenced running a salon and a butchery in the same township. To date, she is a vendor selling vegetables at a food market. He was adamant that she does not need the maintenance she counter-claimed for. He also stated in cross-examination that he is prepared to offer her a stand in Eastview. He put the value of this stand at US$12 000.00. The stand currently has a foundation. He told the court that he is also willing to put up a structure for her to the value of US$15 000.00 within a three month time frame. The minor child is also free to come and live with him.

As for the farm, he emphasised that this is state land which is owned by the state and can be repossessed at any time and that as such it is not subject to sharing as matrimonial property. He also highlighted that he does not have a 99 year lease but just an offer letter.

The defendant confirmed that she is indeed currently a vendor selling vegetables and makes between US$150.00 and US$200.00 a month. Her rentals are US$222.00 a month. She said she is assisted by relatives. She lives with her two daughters one of whom is at University. According to her an amount of at least US$250.00 as maintenance for the minor child would enable her to meet rental costs. As for the minor child's maintenance, her evidence was that

the plaintiff had only commenced paying meaningfully when they were about to come to court. Prior to that the money he was sending was no even enough to fill a paper bag with groceries. As for rehabilitative maintenance, she stated that a lump sum of US$3000.00 would enable her to start off something meaningful that would enable her to survive. She emphasised that during their time together she would also buy food, pay bills, buy clothes and fuel the cars.

She had left her formal employment in 2000 as her husband was not happy with the fact that she was working around men. She had indeed commenced a saloon next to his surgery as well as running a bottle store and butchery and a second salon. She had stopped running those businesses because her husband feared she would end up having affairs. His relatives took over management and the businesses collapsed. She said they had moved from the farm because they owed CABS money and the Bank had taken everything in 2015.

As for his income, she said he used to earn a net of US$3800.00 exclusive of outreach funds. She also claimed that when they were together he would earn at least US$6000.00 from medical aid exclusive of cash payments from his surgery. She disagreed that he nets a mere US$500.00 from his surgery.

She also said that she was responsible for various projects at the farm such the mushroom business, growing chilies, maize, and rearing cattle. It is for these that she seeks compensation.

As to how the proceeds from the sale of their joint property were used, she stated that whilst indeed they had bought two buses there was no income from them so they sold them. They had used the proceeds to construct a house at the farm. She disputed plaintiff's evidence that the house had been built during her absence in 2009 when she was in the United Kingdom. Instead, the reality, she stated, was that she had sourced the plan and bought materials for construction. There were no structures on the farm prior to that according to her. Her description of the house was that it is a five bedroomed home with a main en-suite bathroom. It is tiled all round. It has a kitchen made of hardwood and granite tops. The kitchen also has a breakfast nook. The house has a double garage. They had also constructed pigsties later converted to mushroom rooms. She estimated that the improvements effected on the farm were not less than US$100 000.00.

As for the offer of the Eastview property, that stand, she told the court is un-serviced. There is no sewer and there is no electricity. She had ascertained from the City of Harate that the value of the land was a mere US$2000.00 contrary to the plaintiff's claim that it is valued

at US12000.00. What she is therefore agreeable to is an evaluation of the improvements effected on the farm and her getting her half share.

Analysis

The quantum of maintenance that the plaintiff must pay in respect of the upkeep and education of the minor child

There is absolutely no doubt that the plaintiff is in a much better financial position to contribute more to the needs of the minor child as compared to the defendant. His offer is US$150.00 whilst the defendant would like this upped to US$250.00 to factor in part of the rentals. Given that the defendant does pay rentals and also has the added responsibility for the day to day looking after of the child, the request of US250.00 is not unreasonable or manifestly excessive as it takes into account the child's portion for rentals. . The plaintiff has a home and does not have to pay rentals. The defendant also earns far less than the plaintiff. Therefore the defendant is granted the sum of US$250.00 towards the maintenance of the minor child inclusive of rentals. He shall also meet the costs of her education when she does register for a course.

Whether or not the respondent is legally entitled to maintenance at law, and, if so the quantum.

Section 7(4) of the Matrimonial Causes Act 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) ……
> (*d*) the age and physical and mental condition of each spouse and child;

The defendant is 47 years old. She is a vendor and the plaintiff is a medical doctor. Whilst indeed the position is that long term maintenance is no longer a necessity where a spouse is capable of looking after herself, materially what the defendant is seeking is bridging maintenance to enable her to find her feet. Her present income is between US$150.00 and US$200.00 a month whereas the plaintiff put his at least US$1500.00 a month which the

defendant said was a conservative estimate. Since no record of his actual earnings were placed before the court, I tend to believe the defendant that during their marriage she had ascertained from his books that he earns much more than he cared to admit to the court.

Their marriage was a lengthy one, the formal part of it having been at the very least 17 years before the parties separated. It is also a fact that divorce generally leaves woman in worse off position that they were prior to the marriage. Her income earning capacity is definitely reduced and the plaintiff did not dispute that her income is now merely from selling vegetables. Her rehabilitative maintenance claim is US$3000.00 is calculated to cover a six months period. The court also has to take into account the life style that the parties had prior to the breakdown of their marriage. By and large they had a very comfortable lifestyle although it is not in dispute that they ran into debt impacting on that life style. A payment of US$3000.00 as rehabilitative maintenance for six months is not unreasonable in my view given the plaintiff's means and defendant's need to find something meaningful and lucrative to sustain her henceforth as a result of the breakdown of their marriage. The defendant is therefore granted a lump sum of US$3000.00.

Whether or not the defendant is entitled to 50% for her contributions for improvements at Wychwood Farm Goromonzi.

It was not disputed that what exists is an offer letter in the name of the plaintiff. In reality, the fact that one has an offer letter as opposed to a lease is of no bearing to contributions for improvements as these are determinable separate from the land. Indeed in the Supreme case of *Teejay Sibanda v Hilda Sibanda SC 7/14*, which the defendant relied on, improvements made to a farm were deemed to be a justifiable contribution under s 7 of the Matrimonial Cause's Act. The fact that improvements made happened to be on land acquired through the land resettlement programme was not a bar to the wife claiming her contribution. The court, in that case, found that the improvements made to the farm after the land had been offered by the State, could be determined separately from the value of the land and that they belonged to the parties whose family resources had been used for the purpose. In fact, the husband therein was said to have a better advantage in the long term since the offer letter remained his and he would have continued access. As the court put it:

> "These improvements, in my view, therefore rightly belonged to the parties, separately and distinctly from the land on which they were located. I do not believe that this reality is negated by the fact that the improvements happen to have been effected on land acquired through the peculiar medium of the land reform programme. The appellant, however, has an advantage over

> the respondent, in that the land was allocated to him personally, under the land reform programme. He will most likely have continued access to, and use of, the land in question, and indeed, the very improvements that are now in dispute, for a very long time, if not the rest of his life. It should be noted that the offer letter generally offers very long leases."

As regard's the wife's position the court pertinently observed that:

> "By contrast, the respondent would have, but for the law regarding sharing of property on divorce, walked away from the improvements that she, in her capacity as a wife working together with her husband, contributed in acquiring and/or effecting on the farm. It is my view that such a result could not have been in the contemplation of the law. The improvements in question should, therefore, rightly be subject to apportionment between the parties, on the same principle of law as applies to their other assets. To deny the respondent a share of these improvements, on the basis argued for the appellant as referred to above, would clearly not only visit substantial injustice on her, it would also result in the unjust enrichment of the appellant. More to the point, it would offend against the letter and spirit of s 7(3) of the Matrimonial Causes Act (*Chapter 5:13)*, which is to the effect that the court should endeavour, in determining how to apportion matrimonial assets:-
> "...as far as is reasonable and practicable, and having regard to their conduct, and is just to do so, to place the spouses in the position they would have been in had a normal relationship continued..."

The defendant's description of what was constructed was more vivid than the plaintiff. This court accepts her evidence that what is *in situ* is a five bedroomed house as described by the defendant. This court further accepts her evidence that the proceeds from the sale of the Greendale house in 2011 were indeed used to construct the house. In this case, the farm house has not been valued. The plaintiff put the value of improvements at US$20 000.00 whilst the defendant said these were closer to US$100.000.00. It is clear from the facts that what is up for contestation is not a 50 % division of the farm itself but the value of the improvements made on the farm. This court is satisfied that the improvements effected were made in 2011 when the Greendale house was sold and that the proceeds from the house which was jointly owned did in fact go towards the construction of the farm house where the parties lived until 2015. It is therefore only fair and just that the improvements effected be evaluated so as to get a proper value of her 50 % share contribution. Whilst the plaintiff offered the defendant a stand and also offered to construct a small cottage on that stand, the defendant's concerns are legitimate. The value of the stand is in dispute. The area is un-serviced. It is only just that she receives the value of her contribution to the improvements on the farm and that she uses her share as she sees fit. Since she lays no claim to the stand, the plaintiff can easily dispose of it to pay her share of contributions to the farm house.

Whether or not the defendant is entitled to 50 % in respect of profits accruing from the farming projects being undertaken at Wychwood Farm Goromonzi.

Whilst the defendant said during her stay at the farm she used to provide farm produce to retail outlets, there was no evidence placed before the court to show how much the farm generated or that it is still generating such income. The Plaintiff said he is leasing a portion of the farm. Without any form evidence to show how much is being generated, this court is not in position to meaningfully give 50% in respect of any profits from projects. What is more just in the absence of any proof of continued generation of income from the alleged projects which plaintiff says are no longer continuing would be for her to get her share of contribution to improvements on the farm. This court has also awarded the defendant rehabilitative maintenance to enable her to start her own projects.

It is ordered as follows:

1. A decree of divorce be and is hereby granted.

2. The plaintiff shall pay the sum of US$250.00 towards maintenance and rental contributions for the minor child Rumbidzai Musoro, born on 7 October 2005 whose custody is with the defendant by consent of the parties.

3. The improvements to the farm known as Wychwood Farm, Goromonzi, shall be valued by an estate agent agreed upon between the parties to determine its current market value within 30 days of this order.

4. In the event that the parties fail to agree on an evaluator within this period then, the Registrar of the High Court shall appoint a valuer from a list of evaluators for this purpose.

5. Each party shall contribute 50% towards the costs of the evaluation.

6. The defendant's 50% share of the value of her contributions, which in particular though not exclusively shall include the matrimonial home constructed thereat, shall be paid to her within a period of six months from the date of the evaluation.

7. The plaintiff shall pay the defendant a lump sum of US$3000.00 as rehabilitative maintenance.

8. Each party shall bear their own costs.

J Mambara Plaintiff's Legal Practitioners
Zuze Law Chambers: Defendant's Legal Practitioners