MARILYN CHIHOTA (nee MOSHA)
versus
KURAUWONE NDAKASHAYA FRANCIS CHIHOTA

HIGH COURT OF ZIMBABWE
TSANGA J
1, 6, 10, 20, 23 November 2023 & 9 April 2024

Civil Trial

H Nkomo, for the plaintiff
F Mahere, for the defendant

TSANGA J: In this divorce trial, the main issue centres on whether plaintiff is entitled to a 50% share of immovable property known as 316 Ard Na Lee Close, Glen Lorne, in Harare. The claim is against the back drop of nearly four years of marriage to the plaintiff. The parties married in November 2017 and the separated in September 2021.

Both plaintiff and defendant are professionals in the real estate field and met in 2015 in Botswana at a business convention, she being from Tanzania and him from Zimbabwe. She was living and working in Botswana then as a principal evaluator for a leading estate agency whilst he was moving between Zimbabwe and South Africa. They married formally in South Africa on 21 November 2017. On that day, before the registration of their marriage and at the behest of the defendant, the two had signed an ante nuptial contract whose purpose was essentially to exclude community of property in their possession or expectancy. The agreement was also clear that neither would be answerable for the debts of the other before or after the said marriage. There was to be no community of profit or loss and each was to bear the losses happening to him or her. Inheritances were equally excluded. However, as the marriage was in South Africa, the contract included a clause that "the accrual system[1] referred to in Chapter 1 of Act 88 of 1984, the Act)

[1] The accrual system is a deferred community of gains. HR Hahlo *the South African law of husband and wife* 5th Ed (Cape Town Juta 1985) at page 304 states that:

(but excluding any amendments therefor) shall apply to the intended marriage between the said husband and wife". The construction of the agreement would be governed and regulated by the laws of South Africa.

Specifically excluded from accrual on the defendant's part, was his half share in a property acquired from his previous marriage and the entire share capital of a company called *Breeze Court Investments 55 Proprietary Limited.* On the plaintiff's part, all the property acquired by her was equally excluded and in particular 50% of the share capital in a company called *Nopix Ventures Proprietary Limited* registered in Botswana, as well shareholding in *Norpix Properties LCC* registered in Tanzania. Shares in *Umoja Fund Limited PLC Unit Trust Scheme*, Tanzania were also excluded.

It is common cause that although they married in South Africa, the parties never lived there, having agreed that settling in Zimbabwe would enable defendant to be close to his then ailing parents. When the plaintiff first moved to Zimbabwe in September 2017, the *lobola* proceedings having been done in July of that same year in Botswana, they had started off staying with the defendant's parents.

It is further common cause that the defendant found job in Zimbabwe and that the property in dispute was bought entirely by him using a loan from his employer for the purpose. It is also not in dispute that the title deed is in his name. The house was purchased in May 2018 and they moved later that year after some renovations. She had one son of her own and he had two from his previous union who later joined them from South Africa.

Plaintiff says she played a significant role in effecting the renovations. However, it is the extent of that role which is in dispute and also whether the entire factual spectrum gives rise to her fifty percent claim.

Plaintiff's oral evidence on her contributions

Zooming in on the house, she stated that she had advised on what kind of house to buy. The house was in the defendant's name because it was bought with a loan from the employer which

"During the subsistence of a marriage, it is out of community of property and community of profit and loss. Each spouse retains and controls his or her own estate but on dissolution of the marriage the spouses share equally in the accrual or growth of their estate have shown during the subsistence of the marriage."

was deducted for repayment from his salary. On renovations, her evidence was that house required paint work, electric checks, and a thorough clean up. The garage doors were also not working and the cottage was in dire straits. She was in charge of the renovations and had hired workmen who included the plumber. She had equally been responsible for getting quotes. She had also chosen paint colours. The landscaping was under her charge.

Financially, she had bought some flower pots using her own money. At home she was also responsible for buying dry groceries in Botswana as she was still doing valuations there at the time. When she moved to Zimbabwe, the bulk of her furniture had gone to Tanzania. They had had to acquire furniture. She had contributed to holidays. Her husband's two sons had joined them from South Africa in 2019. She would help in taking them to school.

She explained that by 2019 they had already been to two counselors. She had, however, moved out of the home in September 2021 to go and live in Marlborough where she currently resides. She had financed her own move. She now works for Pam Goldings and earns US$3 500.

In cross examination, she admitted that she receives commission on top of her salary for every house she sells and agreed that her earning capacity for the coming years would be considerably high as she is 44 years old. She has not claimed maintenance. She admitted that she does not wish to share any of her properties or any other assets or debts. She further confirmed that no point did she contribute anything to the purchase price or repayment of the loan for the house. As for the renovations, she confirmed she had no receipts to prove her contributions and admitted that largely he would put money into her account for the purpose of paying for items needed, though she had paid for paint for the front porch. She confirmed in cross examination that no more than ten litres of paint had been used for the purpose. Her contribution for paint and flower pots was put at no more than US$500 which she did not challenge. On landscaping, she admitted that this had been done through the gardener whom she supervised. Both had been responsible for paying the gardener. Having told the court that she gave defendant her salary, she conceded that this was only once when she gave him an amount of US$1000 having deducted household expenses. She was not privy to how he had spent. She agreed that the intention of their pre-nuptial contract was to keep their property separately, albeit stating that her understanding was that they were entering into an accrual system which for her meant whatever they accrued together would be shared. She admitted that technically the Glen Lorne property had not been acquired together.

She further admitted that the court had not been furnished with a computation of value of assets or liabilities of either party or in essence that no accrual compilation had been done. Her re-examination essentially re-emphasized that the property she was not willing to share had been acquired by her before marriage.

The defendant's evidence

He stated that he had identified the property in dispute through an agent and it was after an agreement had been signed that he had advised his wife about it. He confirmed his employer funded the purchase and that further renovation costs would be funded by a loan for which he would be responsible. He described the renovations needed as being largely aesthetic as there were no structural changes. Drawing down from the loan, he had paid for the guest toilet cistern which needed replacing and had also paid for the kitchen remodeling, shower heads and faucets. Pelmets had also been replaced and the ceiling termite proofed. He also said he had paid for the additional paint job for the kitchen, dining room, bath and domestic quarters.

Regarding the plaintiff's contribution towards painting the porch, he explained that she had been frustrated at the lack of availability of financing for it and had taken it upon herself to complete the job. His estimate was that the ten litres of paint would have cost her no more than US$100 whilst her flower pots and plants would have been no more than US$500 to US$600 dollars at most.

His own contribution towards the running of the home had been payment of school fees, school uniforms, consumables such as power and insurance. He had also paid for plaintiff's travels to Botswana as well as for her professional fees as an estate agent here in Zimbabwe. He would also buy fresh produce for the house. He had also covered fees for his step son since the contributions by the father of the child were at best intermittent. However, he stated that due to dollarization of our economy the plaintiff had indeed also stepped up by contributing to fees for his son through top ups of fees shortfalls when needed. With regards to being given his wife's salary, he emphasized that this once and was done symbolically as her first salary.

They had both contributed to movable which the plaintiff had taken upon her departure, leaving him a bed and deep freeze. She had also taken his culinary set of knives which he had acquired as part of his pleasurable hobby as a recreational cook.

As for the renovation project management this was not a solo effort as he would intervene occasionally to ensure the budget was not exceeded. He told the court that he is currently self-employed and at the time of the trial, his gross earnings were US$12 000 for the year. He said he is currently in debt to the tune US$80 000 and referred to some statements. Further to that he also has obligations for his two sons school fees one of who is in a school for children with special needs and another who is about to go to University. As for the house, he highlighted that it is a legacy to be left to his children hence why he had created the *Chihota Family Trust*. As for the ante nuptial contract which he had entered into with the plaintiff prior to marriage, he stressed that the intention had been to keep their estates separately. He firmly emphasized his objection to her claim on the basis that she had not contributed anything financially to the property and that she fully acknowledged this. Moreover, she had taken all movables. She retained her earning a capacity. As such he saw it fit and equitable that he retains the immovable property which he bought.

In cross examination, he acknowledged the care the plaintiff had given to his late parents though highlighting that they were two domestic workers and two gardeners also at their disposal. He also clarified that in total US$420 000 had been advanced by his employer, made up of US$320 000 towards the purchase price; US$30 000 towards transfer fees and US$30 000 towards renovations. He also acknowledged her contributions towards beautifying the garden, explaining that she had the eye for it. He disputed though that she had single handedly been the financier for the landscaping. He also disputed that the Trust had been formed to avoid sharing of property emphasizing that the donation had been done prior to filing of the divorce papers. He stressed that it is not equitable for the plaintiff to claim 50% of the property more so given the short duration of the marriage.

The submissions

Against the backdrop of the above factual evidence, Mr *Nkomo* for the plaintiff, submitted that she deserves to be awarded 50% as she made both direct and indirect contributions towards the purchase of the matrimonial home in the manner outlined. He also questioned defendant's indebtedness to the tune claimed of US$80 000 on the basis that the documents he produced were not addressed to him. He further questioned the transfer of the house to the Trust in that the Deed

of Transfer remains in his name. In addition he questioned his claim that he is liable to pay at least US$16 000 towards his sons fees given his earnings.

As for the ante nuptial contract, he argued that it was not part of the defendant's plea and that its use had come as an afterthought. He therefore argued that the cocktail of factors outlined in s 7(4) the Matrimonial Causes Act [*Chapter 5:13*] should thus be used to assess what is fair and equitable in terms of her direct and indirect contributions to the matrimonial home. He particularly emphasized that it would not be just or equitable to grant the defendant a 100% claim to property which he acquired within marriage and that it would set the jurisprudence of this country back by years were such a request to be granted. Equally underscored was that the court has wide discretion to achieve the fairest possible settlement and that it was immaterial who had bought that property. (*Shenje* v *Shenje* 2001 (2) ZLR 160). Her indirect contributions were argued to be invaluable. (*Usayi* v *Usayi* 2003 (1) ZLR 684 (S); (*Ntini* v *Masuku* 2003 (1) ZL 638 (H)). She had also sacrificed her life in Botswana to settle in Zimbabwe where she was now living in rented accommodation. All said and done, her contributions were said to justify her 50% claim.

Ms *Mahere* zeroed in on the following as justifying the full retention of the home by the defendant in terms of what is fair and just under the circumstances; the defendants financial needs and obligations including his ballooning debt and school fees bills; the non-effect of divorce on the plaintiff's standard of living; the direct purchase of the property by the defendant; his indirect contributions to the running of the home and the sentimental value of the property. Also emphasized was the duration of the marriage said to be very short. Equally important was said to be that common intention of the parties to maintain separate estates as confirmed in an ante nuptial agreement as well as the non-registration of the Glen Lorne property to include the plaintiff's name.

As for the standard of living of the family in particular, plaintiff was said to be no worse off by renting as she was in the same position she was when married which was that she was living in a property to which she did not have title. Moreover, in terms of direct contributions, the house had been fully paid for by the defendant. It had also not been registered in both names envisaging an intention to share. *Mhangami* v *Mhangami* HH 523/21. She emphasized that the defendant was the registered owner of the property with real rights. *Takafuma* v *Takafuma* 1994 (2) ZLR 103.

She also submitted that plaintiff having taken all the movables including a motor vehicle more than made up go for anything she deemed due to her. As for the donation of the property to the Trust she argued that even though the property was still in defendant's name, a Trust Deed had been placed before the court in evidence showing that the Trust was constituted on 20 October 2021. As such she insisted that the beneficiaries of the property are the defendant's two sons who are beneficiaries of the Trust. She drew on 7(3)(c) of the Matrimonial Causes Act as allowing the court to take into account the manner in which an asset may have sentimental value.

As far as indirect contributions are concerned she stressed that it is in particularly lengthy marriages where the courts have tended to award 50 % of a home. *Usayi* v *Usayi* above; *Chigunde* v *Chigunde* HH 121/15; and that in this instance the contribution was nowhere near as to justify 50% award as in that case. She further submitted that by virtue of s 7(5) of the Matrimonial Causes Act, the court may in accordance with a written agreement between the parties make an order which relates 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.

Her emphasis, however, was on the courts discretion whether or not to make such order founded on the agreement.

In response to Ms *Mahere*'s submissions regarding the ante nuptial contract which the parties entered into by the parties in South Africa, Mr *Nkomo* further submitted that though envisaging that the marriage would be out of community of property, clause 5 specifically stipulated that Chapter 1 of Act No. 88 of 1984 (accrual System) would apply to the marriage of the parties. That in his view also further justified the plaintiff's quest for 50% of the home acquired during marriage.

ANALYSIS

First and foremost, this court is satisfied that the marriage has irretrievably broken down. The defendant was domiciled in Zimbabwe soon after marriage and continues to be so. Therefore in dealing with this divorce, it is the Matrimonial Causes Act which applies as the divorce is sought in this jurisdiction. Suffice it to say that the application of the South African Act as captured in the ante nuptial contract was on the understanding that the husband's domicile was in South Africa and that South African law would apply to their marriage. In any event the plaintiff approached this court on the basis of direct and indirect contribution and not accrual. Additionally, she did not furnish the court with any computation of the alleged accrual in the form of evidence of the value of the assets or liabilities for herself and the defendant respectively. Her approach was within the framework of the Matrimonial Causes Act.

As regards 7(5) of the Matrimonial Causes Act which allows the court in granting a divorce, to make an order dividing assets in accordance with an agreement between the parties, it is necessary to state that ordinarily such an agreement would be one that has arisen specifically as a result of the divorce proceedings. In other words, it would generally be an agreement spurred by the divorce proceedings in which the parties reach consensus in relation to proprietary consequences of their divorce as well as maintenance issues thereby averting the necessity of a trial. This is in fact the provision upon which consent papers are taken into account by the courts in granting divorce on the unopposed roll. Therefore rather than the court arriving at what is just and equitable in sharing assets on divorce, the provision allows parties to agree among themselves and thereafter the court can make the agreement part of the divorce order by incorporating the agreement as part of the divorce order.

Marriages here are out of community of property unless parties enter into an ante nuptial contract to be exempt from the Married Persons Property Act [*Chapter 5:12*] as stipulated in the s 2(1) of the same. As Ms *Mahere* rightly pointed out in her closing submissions, it would be superfluous to enter into an ante nuptial agreement providing for out of community where the matrimonial domicile is Zimbabwe and where the divorce proceedings are instituted here since this is the factual position terms of the law in Zimbabwe. Since it is a requirement of s 7(4) of the Matrimonial Causes Act that all circumstances be taken into account in arriving at what is fair, this court will therefore take judicial notice of the fact that when the parties married, and their intention was to marry out of community of property.

Section 7(4) outlines the cocktail of factors to be taken into account in relation to each party relating to both their present and future needs in the division of assets and maintenance orders. They can be condensed as follows:

(*a*) the income-earning capacity, assets and other financial resources of the parties
(*b*) the financial needs, obligations and responsibilities
(*c*) the standard of living of the family
(*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 such spouse or child will lose as a result of the dissolution of the marriage;
(*g*) the duration of the marriage

Regarding each spouse's income earning capacity, both are highly qualified professionals with post degree qualifications in their fields of endeavour. The plaintiff is employed in a steady job with a very comfortable earning capacity where in addition to her salary she gets commission for her sales. The defendant says he is self-employed though indebted but he too is able to look after himself.

Their financial needs and obligations are also likely be similar. She has her own child from a previous union and he has two children. The defendant points to the pending fees for his older son going to University as well as his younger son also schooling in South Africa. The plaintiff has a son at St Georges College an elite private school in Harare. Both spouses will be saddled with educational expenses for their offspring for some time to come. Where they choose to educate their children is a pointer to what each think they can afford in joint partnership with the other parent for that child. I would generally say they are at par even if the defendant has one more child when compared to the plaintiff. Neither have a responsibility to each other's children though during their time together the plaintiff says she assisted with the fees when there was a shortfall due to the volatile exchange rate. The defendant on his part says he paid fees for the plaintiff's son because the father of the child was erratic in his support. It is therefore safe to say that each contributed in equal measure during the marriage.

As for responsibilities regarding the debts outlined as owed by the defendant, this court on a balance of probabilities has no reason to disbelieve the defendant that he is owing money and is the one in debt compared to the plaintiff. She was clear she wants nothing to do with his debts.

As for their standard of living, they led a comfortable life together but there is no indication from the evidence that their lifestyle was any more comfortable than that which they led before they met each other. They were both professionals, each with the capacity to adequately take care of themselves. That aspect, in my view will not change. They are middle aged with at least two decades ahead before the ravages of aging begin to slow them down. They are in good physical and mental health, at least as at the time of this hearing.

The direct and indirect contributions

Direct and indirect contributions are the pivot upon which this case rests. Taking into account direct and indirect contributions as factors to be considered means there is no gendered discrimination in the manner the work is to be viewed. In other words, it is not just financial contributions that have meaning but non-financial contributions as well. Indeed the thrust of the present approach to family law in this jurisdiction is distinctly to view marriage as a partnership first and foremost as opposed to a business. In the recent case of *Fadzayi Usayi* v *Leornard Usayi* SC 22/24, for instance, JUSTICE MATHONSI as the lead judge had this to say on this partnership thrust:

> "The sooner married couples realise that marriage is not a business arrangement where they come together in matrimony for convenience to acquire property separately while keeping receipts and other documents for future use in court, the better for everyone. The courts recognise that parties come together in Holy Matrimony for their common good and the good of their children. It is both the direct and indirect input of the spouses which leads to property acquisition."

And also that:

> "There has to be an obvious and compelling reason for the court`s departure from the overarching principle of equality in the sharing of property."

Such compelling reasons would evidently arise from the application of the range of factors as outlined above that are statutorily mandated to be considered by the court in sharing property as outlined in the Matrimonial Causes Act. Therefore although marriage is a partnership there may be a justifiable reason in any given case for departing from awarding an equal share of the property when the evaluative approach emanating from each of the mandated factors that are to be taken into account in distributing assets on divorce is brought to bear upon the facts of each case.

It is also a fact that although our Constitution in its national objectives leans towards equality of rights and obligations and requires the state to take measures to protect children and spouses in the event of dissolution of marriage, the Matrimonial Causes Act has not been amended to state categorically that property sharing is fifty-fifty on dissolution of a marriage. The current approach is for courts to utilize the mix of factors that are to be considered in dealing with property distribution. Whilst there has been a commendable and discernible trend of treating spouses as equal in the sense of each receiving a fifty-fifty share particularly in lengthy marriages, (see *Mhora* v *Mhora* SC 89/20), ultimately it would be for the legislature to out-rightly impose a fifty-fifty sharing for all marriages should that be seen as a fit consequence of equality in marriage or the partnership thrust. That seems unlikely since in particularly short marriages it would mean reaping where one clearly did not sow. The courts have remained guided by the considerations outlined in deciding what is fair and just between the parties, thus allowing each case to be dealt with on its own merits.

Indeed also significant in disputes of this nature, particularly with regard to fifty percent share claims is the requirement that the length of marriage be considered in putting a spouse where they would have been had the marriage continued. This stems from the fact that in a short marriage there may not have been sufficient time to pool resources together in the acquisition of property such that separate property over the years becomes less so. It is mainly with lengthy marriage that the court definitely seeks to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.

In *Masiwa* v *Masiwa* 2007 (1) 167 (S) at 173 G-H the court had this to say on the duration of a marriage:

> "In considering matters concerning direct and indirect contributions in marriage, the question of the length of time during which such contributions were made is, in my view, pertinent. This is particularly so where, as *in casu*, one party's initial contribution far outweighed the other party's. In this case the appellant made no direct contribution to the deposit and mortgage repayments. From the evidence, her ability to match, both in cash and kind, the financial contribution made by the respondent, was undermined by two factors. These were, firstly, her relatively low income and, secondly and more seriously, the short duration of the marriage. **Had the marriage endured longer than it did, there is no telling how much she might have been able to add to the value of her contributions.**

The court in that case also highlighted that the shorter the marriage, the more important it is to have made direct contributions. In the above case the parties were married for two and half years. Significantly the house had been registered in both names evincing from the very onset an intention to share. The High

Court had awarded a sum which was equivalent to 20% of the value of the house. On appeal the Supreme Court awarded her 30% on the basis of her direct and indirect contributions. Case law does indeed show that in cases where women have contributed indirectly over long periods of time, courts have been more likely to take their contributions as constituting an equal contribution.

In this instance, as regards the direct and indirect contributions which are core to the arguments in this case, it is not in dispute that acquirer and financial purchaser of the property in question was entirely the defendant. If the plaintiff had wanted to make more significant contributions to the actual purchase of the house or repayment of the loan there is no doubt that she could have. They were both professional earners. It is also not disputed that unlike in the above case the deed in this this instance is entirely in his name. The court also takes judicial notice of the fact that this was a marriage where the parties had had that conversation about being married out of community of property and even actioned their sentiments.

To the extent that the plaintiff contributed, it has been admitted that during the time they lived with defendants parents, which appears to have been a period of at least a year, she did help look after them. Once they moved to their own house, they both contributed to their monthly sustenance as a family. He provided shelter and expenses such as electricity, she helped pay for groceries, they both did school runs. She was not the sole financial contributor to the monthly running of the home. However, she most likely contributed more in the day to day running of the home as most women are likely to find themselves doing. Regarding renovations to the house her role was largely supervisory rather than financial.

Whilst the property under dispute was indeed acquired by the defendant through his employer and paid solely by him as opposed to using any money from the marital partnership, a key point to consider is that the house was also acquired as a family home with the intention that they would live in it which they did. It certainly was no acquired as a business venture. It was also not acquired so it would benefit his two sons, however strongly that sentimental value later came into the picture. With respect to the donation to the Trust, there is no doubt that this only came about in 2021 and whilst the Trust exists, the defendant's move to donate the property to a Trust soon after the plaintiff moved out was motivated by the desire to avoid the property being considered as an asset of the spouses during divorce. For purposes of considering whether the

plaintiff is entitled to a share, the property is therefore treated as belonging to the defendant. He conceded, in any event, that it remains in his name.

The issue is whether it ought to make a difference that the house was acquired with the intention that the defendant and the plaintiff would live in it as a family home. I think it does make a difference for the duration their partnering survived. Much of the "weightlifting" that women do in a marriage however short the marriage, needs to be acknowledged otherwise women are simply reduced to housekeepers and pleasurable objects for men. However, the total factual and legal scenario does not justify a claim to fifty percent of the value of the property particularly when regard is taken to the short duration of the marriage.

Taking into account that the plaintiff also has no desire to share in the defendant's debts accumulated during the marriage and that she has already received virtually all the movables including the motor vehicle, and, further taking into account that her direct contributions in the acquisition of the property in question were minimal, what would be fair and just under the circumstances as her entitlement is 20 % of the value of the property less the value of the debts owed by the defendant which this court accepts as US$80 000.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. The plaintiff is awarded 20 % of the value of the property after deducting US$80 000 for debts owed by the defendant.
3. Both parties being in the property business, in the event of lack of agreement on the current value of the property, both parties shall have the property evaluated by a evaluator of their choice to ascertain the current value of the house and the plaintiff's share of 20 % less US$80 000 for debts owed by the defendant.
4. In the event of lack of agreement on an evaluator the Registrar shall appoint one from the list of professional evaluators.
5. Both parties shall contribute equally to the evaluation if needed.
6. Each party shall pay their own costs.

Mhishi Nkomo Legal Practice, plaintiff's legal practitioners
Manyangadze Law Practice, defendant's legal practitioners