**CHIPO SIBHONA (NEE MADZWANYE)**

**Versus**

**IRVINE JOE KHULEKANI SIBHONA**

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 17, 18 & 19 OCTOBER 2019 & 29 APRIL 2021

**Civil Trial**

*Advocate P. Dube* for the plaintiff
*J. Sibanda* for the defendant

**TAKUVA J:** In this matter plaintiff issued summons against defendant claiming for an order as follows:

(a) A decree of divorce;
(b) An order that plaintiff be awarded stand number 369 Beeston Road, The Grange, Harare;
(c) An order that each party keeps as his or her sole property all movable property as may be in their possession on the date of issuing summons;
(d) An order that each party bears its own costs.

**Facts**

The parties were married to each other on 21 December 1996. No children were born of the marriage. On 14 April 2016 almost 20 years after the marriage, the plaintiff instituted proceedings against the defendant for divorce as outlined above. It is common cause that the marriage has irretrievably broken down and both parties consent to a decree of divorce being issued.

At pre-trial conference, the defendant's memorandum of issues was adopted and the matter was referred to trial. The issues are;

(1) Whether the matrimonial house at stand 369 of Beeston Road, The Grange, Harare should be awarded to the plaintiff as her own; or
(2) Whether the same should be sold and the proceeds shared equally between the parties.

The onus was placed on the plaintiff to prove the 1st issue while the defendant had the duty to establish the 2nd issue. It is common cause that there is one immovable property which I will refer to as the "Grange property". It is also common cause that this property is registered in the names of both the plaintiff and the defendant and was purchased after the sale of another property which had been also registered in the names of the parties. This property shall be referred to as the Masasa Park property" in this judgment. This property was obtained by the parties through a mortgage loan from Beverley Building Society. The plaintiff resided and worked in the United Kingdom from the time of the parties' marriage in

1996 up to the year 2000 when she returned to Zimbabwe. The defendant remained in the United Kingdom. At some point in the United Kingdom, plaintiff bought a motor vehicle for the defendant to use as a taxi.

The two issues above crystalise into one issue, namely, how the Grange property ought to be distributed between the parties. Plaintiff's evidence in the main is that she was the sole contributor of the money that purchased the Masasa Park property which was later sold, and from the proceeds of which the Grange property was purchased. It was also plaintiff's evidence that she had sold a property that she had owned before her marriage to the defendant, and from the proceeds, settled some escalations on the total acquisition cost of the Grange property, which escalations were caused by hyper-inflation.

On the other hand the defendant gave evidence, in the main, to the effect that he was the sole contributor towards the purchase of the Masasa Park property. According to him, the plaintiff had no contribution. He claimed to be the one who paid the deposit required for the Paid Up Permanent Shares (PUPS) account, and subsequently paid all the instalments of the loan until the Masasa Park property was sold, and the bond cleared.

It is apparent that the court is faced with two irreconcilable and mutually exclusive versions. In such a case, the proper approach in my view is to outline the parties' respective versions and evidence on the issues in dispute before outlining the applicable legal principles.

**Plaintiff's case**

Plaintiff outlined in a chronological manner the events relevant to this case as follows:

In 1996, when the parties got married the defendant was a man of straw without any assets. At the time, he lived in the residence of his younger brother and had only a bed without a headboard and a television set to his name. They later moved to a rented house in Montrose after their marriage. Plaintiff was studying and in part-time employment in the United Kingdom. Defendant was not in formal employment, he was running a business of garbage removal in Bulawayo but had no truck.

Defendant had had some garbage containers, known as "skips" manufactured in Harare for his business. However, he had apparently failed to pay for them and the manufacturer sued resulting in the attachment of the parties' movable assets. To save the movable assets the plaintiff intervened by paying off the debt. Plaintiff testified that defendant's penury was such that he once asked the plaintiff to meet him in Zimbabwe promising to buy her an air ticket but failed to do so. Soon after their marriage, they decided to buy a property in Waterford which required them to deposit a certain amount into an account for this property. Plaintiff deposited her portion of this amount. The defendant however did not do so, instead, he withdrew the plaintiff's deposit and the parties ultimately lost that deal. Plaintiff further testified that in 1998, she purchased a dust cart for the defendant's waste removal business. Plaintiff said she paid fully for the truck and shipped it through Durban. She paid for the shipment and clearance. Defendant collected the truck and took it to Bulawayo where he tried to use it but found that there was no business in Bulawayo and he moved to Harare.

Once in Harare defendant used the truck to ferry some maize and cotton from farmers in Mashonaland to Harare. The defendant never disclosed how much money he was making from this business. In 1998, the parties decided to buy a property in Harare through a bond from Beverley Building Society. The house was in Masasa Park. While plaintiff was in the United Kingdom, defendant was responsible for making contact with the building society liasing with the developers and arranging the loan. Plaintiff paid the deposit and sent money to invest into a PUPS account as per the building society's requirements. The plaintiff sent money to the defendant for the loan repayments since his business was not successful.

Then in 1999, the defendant decided out of the blue that he was going to join her in the Unite4d Kingdom. He arrived in the United Kingdom with one of this several children, whom plaintiff had never lived with or met, a sixteen year old girl. Defendant also brought plaintiff's eight year old son.

In April 2000, plaintiff became gravely ill with a condition which causes temporary paralysis which condition doctors could not diagnose. The plaintiff's parents requested that she return to Zimbabwe and she returned leaving her child in the United Kingdom with the defendant. The child was returned to Zimbabwe some ten months later but defendant remained in the United Kingdom until 2011.

When plaintiff recovered she went and lived in the Masasa Park property. She said the house had been rented out in 1999 and the rentals went straight towards the bond payments. Plaintiff started a chicken project as she was not receiving financial support from the defendant. Sometime in 2002 plaintiff became aware of a development in the Grange area and she resolved to sell the Masasa Park property and buy a property at the Grange. Plaintiff entered into an agreement of sale of the Masasa Park property without telling the defendant because communication was extremely poor and she also felt that having paid for the purchase single handedly, she was entitled to sell the house. She contacted the defendant who agreed to sign a power of attorney to pass transfer on condition that his name should appear on the title documents of the new house.

Plaintiff was uncomfortable with this condition and only agreed after defendant threatened to report her to the police for attempting to forge his signature. The Grange property was then registered in both their names. In order to pay for escalations due to inflation, plaintiff sold her house in a part of Nkulumane in Bulawayo known as Glencara. Upon occupying the house in June 2003, she was unable to settle the transfer fees as well as arrear rates. Plaintiff said she got assistance from her brother and transfer was finalized.

The Grange property was unfinished, plaintiff began overtime to tile the floors for the bathrooms, doors and ceilings. She had a borehole drilled and fully equipped it. Plaintiff also paved the yard and had a double car carport constituted of metal bars. She put on cupboards and cabinets. All this, she did without the assistance of the defendant. In 2011 defendant came home with a "sobstory" of difficulties with his Visa. In view of his apologetic and conciliatory attitude plaintiff accepted him back with the hope that there would be better communication and support upon defendant's return to the United Kingdom. To the contrary, defendant did not communicate or send money consistently until 2013 when he came home for his brother's funeral.

It was during this visit that defendant bought a Suzuki vehicle for his own comfort and convenience. He utilized funds from his war veterans account which had accumulated for a long time of his absence. The plaintiff was never given access to this money by the defendant.

In view of the above, plaintiff offered defendant 10% of the value of the Masasa Park property based on his labour and time in running around securing a loan for the purchase of that house. Plaintiff argued that defendant did not contribute financially towards the purchase of both properties.

**The defendant's case**

Defendant told the court that when he met plaintiff he had just sold a farm he had owned in Heany Junction for $175 000,00 and from that he had purchased some skips/garbage containers for $150 000,00. He got informal employment having quit the army in 1988 without a pension. Defendant indicated that he was living at Heany Junction. They failed to buy a house after defendant withdrew from the deal presumably after plaintiff's mother referred to the property as "Chipo's house". Defendant carried out what he terms "a waste and removal business". During this period, plaintiff was in the United Kingdom studying and working part-time. Defendant's business was just breaking even and he decided to buy a truck.

He left for the United Kingdom in or about the end of 1997 and ran a taxi service with a vehicle that the plaintiff purchased for him. He operated this business for six (6) months and purchased another vehicle. In the same six months defendant said he bought and paid for the shipment to Durban of a yellow dust cart without the plaintiff's assistance. However, defendant conceded that when the vehicle got stuck at Beitbridge it is the plaintiff who paid the levies required and the truck was cleared. Defendant did not challenge plaintiff's evidence that she paid for the truck and its shipment. Business was hard to come by until he decided to convert the truck in September 1998. However, since he intended to use the truck to move produce like maize and cotton harvests, it turned out that he was already late for the 1997/98 harvesting season. In October 1998 he returned to the United Kingdom with plaintiff's consent and came back to Zimbabwe in January 1999.

Defendant left again for the United Kingdom in December 1999 with his daughter, plaintiff's son and brother. He found that his two vehicles had been towered away by the local authority leaving him with no vehicle to run his taxi business. He then hired a Vauxhall from a leasing company at a total cost of 620,00 Pounds per month excluding fuel and consumables. It was also his evidence that he earned 900 pounds per month on a good month and would use profit of 280,00 to look after his six children, paying the mortgage bond in the sum of approximately 380,00 pounds per month and sending plaintiff 100,00 pounds per month for her upkeep.

Around April 2000, plaintiff fell sick and defendant brought her home and returned to the United Kingdom where he stayed with plaintiff's child for two years. The child was returned to Zimbabwe but defendant remained in the United Kingdom to date. Whilst in the United Kingdom and in 2002, defendant learnt through his lawyers that plaintiff had in selling the Masasa Park property forged his signature. He wrote several letters through his

lawyers protesting and making it clear that he had no intention of selling his property. His lawyers advised him to sign the powers of attorney to avoid losing both properties.

He signed the power of attorney and the house was transferred to the 2nd purchaser. In his belief, the price realized that is $19 million from the sale of the Masasa Park property was enough to cover;

(a) the balance of the bond;
(b) the $10 000 000,00 (ten million dollars) that the plaintiff had taken off the 1st purchaser and squandered; and
(c) the acquisition cost of the Grange property together with all escalations.

In so far as the Grange property is concerned defendant testified that he did not make any direct contributions towards its purchase. He contributed through the Masasa Park proceeds and through the monthly support allegedly sent to the plaintiff while he was in the United Kingdom. It was defendant's evidence that in April 2015 he stopped supporting plaintiff after she mentioned divorce. He never visited her after that. Defendant conceded that between 2003 and 2009, he had no Visa and was unable to work except for piece work here and there. Defendant has permanent residence in the United Kingdom and is pensionable there.

Finally, defendant argued that plaintiff was not a credible witness and he was. He further submitted that the Grange property be sold and the proceeds thereof shared equally between the parties unless within 30 days of this order, the parties agree on a price thereof to enable the plaintiff should she desire to buy the defendant's share in such property on terms and conditions to be agreed between them. Defendant also prayed for costs of suit.

**The law**

The law in such cases is clear and is captured in section 7 of the Matrimonial Causes Act [Chapter 5:13]. The section provides that in granting a decree of divorce, judicial separation or nullity of marriage a court may make an order dividing, apportioning or distributing the assets of the spouses.

Subsection (4) provides as follows;

"(4) In making an order in terms of section (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, expected to be educated or trained;
(d) The age and physical condition of each spouse and child;
(e) The direct and indirect contribution made by each spouse to the family, including contributions made by each spouse to the family, including contributions made by looking after the home and caring for the family and every other domestic duties;

(f) The value of either of the spouses or to any child of the benefits, including a pension or gratuity which such spouse or child will use as a result of the dissolution of the marriage;
(g) The duration of the marriage.

And in so doing the court shall endeavour as fact 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 the normal marriage relationship continued between the spouses."

In *Ncube* v *Ncube* 1993 (1) ZLR it was stated that, "It is true that joint owners of property own each and every part of their property equally and therefore with equal shares in the value of the property". However, it was noted that section 7 of the matrimonial Causes Act confers on the court, in the interests of justice equity and fair play, power to take a party of a spouse's share in property jointly owned to give to the other spouse if by so doing, it would place the spouses in the position they would have been had a normal marriage relationship continued between them.

**Analysis**

As regards the evidence it is clear that the court has mutually exclusive versions concerning;

(a) The contributions of the respective parties towards the Masasa Park property;
(b) The parties' respective contributions towards the acquisition and improvements of the Grange house.

It has become settled law that;

"where the onus rests on the plaintiff … and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case anymore and they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false". See *National Employers General Insurance Co. Ltd* v *Jagers* 1984 (4) SA 437 (E) at 440E-G.

In *Tshuma* v *Dube* HB-11-18, the court stated;

"In this matter, five witnesses gave oral testimony in the court *a quo*. Their versions were aligned with the case of the party they testified for. The parties to the litigation maintained mutually destructive versions. Faced with such a situation the court was

enjoined to apply the test set out in *Stelenbosch Farmers Winery Group Ltd & Anor* v *Martell Etote & Ors* 2003 (1) SA 11 (SCA), where the court held as follows;

"The technique generally employed by courts in resolving factual disputes of this nature may be commonly summarised as follows; To come to a conclusion on the disputed issues the court must make findings on;
(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities … As to (c), this necessitates an analysis and evaluation of the probability or improbabilities of each party's version on each of the disputed issues".

**Application**

*In casu*, I must resolve two disputed issues namely;

(1) Whether the defendant contributed towards the purchase of the Masasa Park property?; and
(2) Whether defendant contributed towards the acquisition, finishing and improvement of the Grange property?

As regards the Masasa Park property the parties acquired it in 1998 when plaintiff was working in the United Kingdom while defendant was in Zimbabwe without a job. The property was acquired through the registration by the parties of a bond in favour of Beverley Building Society on the property. As one of the conditions of the bond being granted to them, it was necessary, for the parties to have some liquid investment with the Building Society deposited with it in the form of PUPS in a sum of $20 000,00. This property is important because it birthed the acquisition of the property in the subject matter of this case namely the Grange house. It was plaintiff's evidence that defendant did not contribute a cent towards the acquisition of the Masasa Park property. She alleges that it was her who provided the $20 000,00 to open the PUPS account. On the other hand defendant denied this, maintaining that it was in fact himself who opened the PUPS account after liquidating another investments that he had.

These versions are mutually destructive. Defendant submitted that this is a typical case where neither party was able to prove who provided the money for the PUPS account. Further, defendant argued that it matters not at the end of the day who provided the cash because a joint account was opened for both of them. If the money came from the plaintiff, then she donated the money so the joint account. Similarly if defendant liquidated an investment of his to donate to the joint estate the money assumed a different "identify" as soon as it entered the joint account. Defendant raised the same argument to the dispute that arose after the acquisition of the Masasa Park property, namely that an enquiry into who made the bond repayments is an exercise in futility as a determination of that issue one way or the other does not resolve what the court is being asked to resolve *in casu*.

I am not persuaded by this argument for the simple reason that it seeks to eliminate the effect of s4 (e) which enjoins a court to consider the direct and indirect contributions made by "<u>each spouse to the family</u>". I disagree with the assertion that it is not possible *in casu* to come to a conclusion one way or the other as regards the respective parties'

contributions. Admittedly, it is not the only factor that the court must consider. See *Shenje* v *Shenje* 2001 (2) ZLR 160 at 163 where the court while discussing the factors in section 7(4) stated that;

> "The factors deserve a fresh comment. One might form the impression from the decisions of the court that the crucial consideration is that of the respective contributions of the parties that would be an error. The matter of contributions made to the family is the fifth listed of seven considerations. The first four listed considerations all address the needs of the parties rather that their dues. Perhaps it is time to recognise that the legislative intent and objective of the courts, is more weighed in favour of ensuring that the parties' needs are met rather than that their contributions and recouped."

In my view the *ratio decidendi* in that decision is that all the factors mentioned in subsection (4) of s7 are relevant and equal in weight and that it will be improper to underplay or over-emphasise one at the expense of or in favour of others.

This is consistent with the position of our law, namely that prior to 1929 all marriage under general law were automatically in community of property. However past 1929, the position was reversed through provisions of the Married Persons Property Act making all marriages automatically out of community of property unless the parties enter into an ante-nuptial contract creating community of property. In community of property marriages, spouses hold equal and indivisible shares regardless of level of contribution or value of item contributed. In out of community marriages, the spouses' contributions are taken into account in determining a spouse's share in matrimonial property. The contribution may be direct or indirect. Coming back to the credibility of the parties, it is necessary to look at the parties' evidence in its totality.

MOHAMED J in *Hees* v *Nel*1974 PH F11 (T) 32 outlined a variety of factors that must be taken into consideration in assessing credibility as follows;

> "Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony (which is often a relative condition to be compared with the quality of the evidence of the conflicting witnesses) his consistency both within the content and structure of his own evidence and with the objective facts, his integrity and candour, his age where this is relevant, his capacity and opportunities to be able to depose to the events he claims to have knowledge of, his personal interest in the outcome of the litigation, his temperament and personality, his interlect, his objectivity, his ability effectively to communicate what he intends to say, and the weight to be attached and the relevance of his version against the background of the pleadings."

On the application of the tests laid down above, I find that the plaintiff's evidence is clear, reliable and straight forward. Not only is the evidence wholesome but, truthful and consistent with the objective facts. Further, on the evidence the probabilities favour the plaintiff's version in that it would be highly improbable that defendant did contribute financially to the acquisition of the two properties due to his demonstrated and proven lack of capacity, resulting from failed business ventures. It is common cause that when the parties

got married on 21 December 1996 the defendant was an unemployed divorcee. From that time up to 14 April 2016 when plaintiff instituted proceedings against defendant for divorce defendant was never formally employed.

It is accepted by the defendant that when plaintiff returned to the United Kingdom after their marriage, defendant remained in Zimbabwe. Plaintiff was employed on a part time basis and she purchased a truck for use by the defendant in Zimbabwe. Plaintiff paid for the purchase price, freight and other expenses. Defendant admitted all this including the fact that he failed to make profit from his business using the truck in Bulawayo and Harare.

It follows and I so find that when the deposit for the Masasa Park house was paid in 1998, defendant had no financial capacity to make any financial contribution. Also defendant could not have paid for the PUPS shares to facilitate the approval of the mortgage bond. I find that it was the plaintiff who was at the time employed at a care house in the United Kingdom who paid the deposit for the Masasa Park property paid for the PUPS shares and service the mortgage bond up until late 1999 or 2000 when defendant joined plaintiff in the United Kingdom.

It is again common cause that while in the United Kingdom defendant did not find formal employment instead plaintiff used her money to purchase a motor vehicle for the defendant to use as a taxi. While defendant claimed to have made money from this business, it is clear that he has nothing to show for it unless of course he kept it away from the court's glare. It is argued that when defendant moved to the United Kingdom, the Masasa Park house was rented out and the income was used to service the mortgage bond.

I find that when plaintiff said she was the "man of the house" from the onset and throughout the marriage she was telling the truth. Defendant did not deny that plaintiff used to pay his rentals in Montrose, buy him food and paid his debts to enable the Messenger of Court to release their attached household goods. Further, I have no hesitation in accepting plaintiff's evidence that when she married defendant he was a man of straw whose possessions constituted a "bed without a head board and a TV set". This court did no hear defendant denying this by disclosing what property movable or immovable he owned at the time. Plaintiff's evidence accords with probabilities in that defendant was a divorcee whose property if any may have been shared between him and his ex-wife. While in the United Kingdom, defendant occupied for free accommodation provided for the plaintiff by her employers as a condition of service.

I find therefore that the plaintiff is a credible witness in that the quality of her evidence is good. She was able to effectively narrate what happened in a consistent and objective manner.

On the other hand, the defendant gave an improbable version. He was profuse and prevaricating in his answers. Several times he openly contradicted himself. An example is when the court asked him about communication between the plaintiff and himself surrounding the improvements to the Grange house. Defendant initially said the plaintiff never told him about anything and then made a volte face. He suddenly mentioned a "sit down" which he had with the plaintiff in which the plaintiff showed him a paper with a budget and said she required $1 000,00 for it. The defendant's explanation for the

contradiction became faltering and a bit hairy. He said plaintiff did not ask him for the money and he did not offer her the money although he had it in his bank account. Instead he just left and commenced sending his 100 pounds per month to the plaintiff.

Defendant's claim that plaintiff had absolutely no contribution towards the purchase of the Masasa Park property is incredible and improbable in that it is the plaintiff's address that was put on the papers with Beverley Building Society and that the bond repayments were in Pounds, a currency the defendant did not earn at the time of securing the bond.

The following are some of the reasons why defendant's credibility is very bad.

1. The accounts he gave in his evidence in chief and under cross examination were never put in his pleadings, synopsis of evidence or to the plaintiff in cross examination to test her version which went directly to the contrary.
2. Defendant was profuse and very detailed on totally irrelevant issues. The fact that defendant was at pains to supply profuse but totally irrelevant detail was admitted by defendant's counsel who submitted as follows:

"It is not to lie or prevaricate or to a poor witness to answer questions in a roundabout way, as defendant sometimes does. It is as natural a process to him as is breathing". (my emphasis)

In my view, a witness who is at pains to supply profuse but totally irrelevant detail is a suspect witness in that he/she believes mistakenly that his/her evidence will be taken as true because of the prolix details that he has supplied, that the court will believe that he could not possibly be telling a lie, given the minute detail of the story.

3. The defendant produced the plaintiff's passbook for her Halifax Account. He however stated that his earnings went into his own Halifax Account. Defendant failed to produce his passbook despite conceeding that his account would have been able to show his earning and ability to contribute.

It is settled law that where a party fails to produce evidence that is available, and which can assist the court in deciding a contested issue, then it may be inferred that the failure to produce the evidence was due to the knowledge that such evidence does not support the version of that party.

In *De Beer* v *Road Accident Fund* (A 5026/2017) [2019] ZAGP JAC 124 (28 March 2019), the court expressed itself thus;

> [20] It is a well-established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn. In *Tshishonga* v *Minister of Justice and Constitutional Development and Anor* [17] the court held as follows;

"The failure of a party to call a witness is excusable in certain circumstances such as when the opposition fails to make out a *prima facie* case. But an adverse inference

> must be drawn if a party fails to … place evidence of a witness who is credible and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case …"

I find by party of reasoning that defendant's failure to bring his own bank records can only be understood in light of the explanation that he feared such records would damage his case. It is inconceivable that he would keep the plaintiff's records, but not his own.

It is no secret that defendant's business in Zimbabwe did not do well. He said so himself. Further, defendant admitted that he left the army in 1988 without any benefits. His war veterans pension sat untouched in a bank account while he was in the United Kingdom.

Consequently, I find that the defendant was clearly an unreliable witness. His testimony created glaring improbabilities. Accordingly, in areas where the plaintiff and the defendant's testimonies are at variance, I believe the version of the plaintiff. To the defendant's credit, I find that he contributed his time and labour in arranging the agreements and loan for the purchase of the Masasa Park house during the period plaintiff was in the United Kingdom. The defendant did not contribute money towards the acquisition of the Masasa Park house. As put by the plaintiff, defendant contributed time and "legwork" to the purchase of the Masasa Park property. Such a contribution cannot entitle defendant to 50% of the value of the property. Equally so, defendant's claim that he provided "physical intimacy" to the plaintiff which "freed her mind and enabled her to concentrate on funding money without having to worry about where such intimacy would come from cannot surely justify a 50% award of the property.

All in all I reject defendant's evidence that plaintiff was a poor witness who exaggerated her own contribution while down playing the defendant's.

As regards the second disputed fact namely whether or not defendant contributed towards the acquisition, finishing and improvement of the Grange property. It is common cause that the Masasa Park house was sold for ZWL$19 000 000,00. The purchase price for the Grange house was not ascertained. It was also common cause that the bond had to be paid off and so were the escalations due to the galloping inflation bedevilling the economy then. The Grange property was a "core house" purchased from developers. It had 4 walls, roof and outside doors, no ceiling, no fittings and no inside doors. This property was purchased by plaintiff at a time when the parties' marriage was already on the rocks due to a number of reasons, chief among them was plaintiff's conviction that defendant had abandoned her. Defendant had stopped communicating with plaintiff, was not supporting her financially and morally.

Plaintiff had just recovered from a life threatening illness and was unemployed. Out of anger and frustration, she decided on her own to sell the Masasa Park house and to buy the Grange house with the net proceeds. Defendant's argument is that the proceeds from the sale of the Masasa Park house were sufficient to pay for (1) the purchase price for the Grange, (2) the payment of the outstanding bond, (3) the escalations on the cost of building the house and (4) all the improvements at the Grange. In pushing this argument defendant went simplistic by setting the purchase price of the Grange at ZWL$1 500 000,00 which he deducted from

ZWL$19 million (the purchase price for the Masasa Park house) and arrived at ZWL$17 500 000 "change". It is this "change" that he claimed despite runaway inflation that was used by plaintiff over the years that followed to pay for the above expenses. I find this argument unrealistic and unreasonable.

In the other hand I believe plaintiff's evidence that the proceeds were not sufficient to pay for the incidental expenses after the purchase price had been paid. The grange was purchased in 2002 as a core house without "insides". She moved in with her son in 2003 and the money from tenants stopped. Plaintiff failed to pay rates, transfer fees and escalations. She had to embark on a chicken project and asking her brother for assistance until she secured a job as a lecturer at Daniko Project in 2005.

Extensive work had to be carried out after occupation of the Grange property. The following composed such work;

Plastering, ceiling, fitted cupboards in the kitchen, bedrooms fitted bath tabs, sink, floor tiles, fitted inside doors, painting, paving of the drive way, drilled a borehole and fitted it with all requisite installations, installed a solar geyser, built a durawall and installed a gate, built a double garage of steel bars. It is common cause that all these developments were done while the defendant was in the United Kingdom. Plaintiff paid for all this work as shown by exhibits 10, 11, 12, 13 14 and 15 on pages 66-75 and page 89. Plaintiff also proved that the developer demanded the payment of extra amounts as "escalations – see exhibit 4 and pages 39-42 of the record. I believe plaintiff's evidence that she paid for these expenses without defendant's assistance. Defendant concedes that other than the so called "change" he did not make any contribution. Plaintiff has lived in the Grange property since 2003 i.e 16 years up to 2019.

Surely the suggestion that defendant contributed by sending 100 pounds per month and that by doing so he contributed to the developments, cannot be given any credence. The amount even if it was contributed at all, which is unlikely is ridiculously small, considering that the plaintiff had to feed herself and pay rates and other household expenses from it. It is clear from the evidence of both parties that as early as 2013 defendant had nothing to do with the Grange property. He conceded that he stopped supporting plaintiff in or around April 2015. Further, defendant admitted that he did not contribute to the escalations in the sum of over ZWL$6 million. Without payment of these escalations, the house would not have been acquired at all. Other activities the defendant admitted not to have contributed to are:

(a) the construction of the carport
(b) the fitting of the bathrooms
(c) the tiling of the floors

It goes without saying that these activities enhanced the aesthetic feature and ultimately the value of the house. All these were carried out after August 2013.

While defendant denied that the plaintiff sold her property and used the proceeds of the sale to pay the escalations, the sale of the property was never denied. Defendant suggested plaintiff was untruthful because her property was sold before she received the call for payment of the escalations in 2003. Plaintiff's explanation that the dates might have become confused is reasonable in the circumstances because she definitely sold her house

during that period. It should be noted that there was hyperinflation at the time which had been catered for in the agreement of sale for the Grange house.

From the above, I find that defendant did not make any contribution at all towards the acquisition of the Grange house. He did not contribute money towards the purchase, or towards its improvement to its present state.

Having resolved the disputed facts, I return to the issues as stated at pre-trial conference. The 1st issue being whether the Grange property should be awarded to the plaintiff as her own. The plaintiff argued that the defendant should not be awarded any share in this property. Instead she submitted that defendant be awarded 10% of the value of the Masasa Park house based on the defendant's contributions of his labour and his time in running around securing a loan for the purchase of that house. While I agree with the level of the award I disagree that the 10% should be of the value of the Masasa Park house because it is no longer in existence. It is not just in my view to regard the value it was sold at in 2002 i.e. ZW$19 000 000,00 as its current value. Further, the proceeds were used to purchase the Grange property although the $19 million was inadequate to cover all the expenses related to the purchase. What this means is that defendant contributed his 10% to the acquisition of the Grange house. For these reasons it will not be equitable to award plaintiff the Grange property as her own leaving defendant with no share.

As regards the second issue namely, whether the Grange house should be sold and the proceeds shared equally between the parties. In my view it would be unjustified on the evidence to award the defendant 50% of the Grange property. It would be inequitable in my view for reasons stated *supra*. Also such an award would mean the sale of the house as defendant is not in a position to pay the plaintiff off. In examining the equities of the matter the court must consider the following factors;

(a) The plaintiff has invested labour, money and her very soul into the Grange house. On the evidence, she struggled to purchase it, improve it, care for it and turn it into a home all with minimal input from the defendant. At all material times defendant was away from the scene. Plaintiff considers this house her only home.
(b) The plaintiff will retire from the civil service in a few years. Upon retirement her pension would be paid in local currency and the level is determined by her contributions. Our economy is still afflicted by inflationary bouts such that it is unlikely that the plaintiff will even be able to get another house, even a humble one, should the Grange house be sold.
(c) In my view, any court ordered sale of the house portends gross prejudice to the parties in that the price will by law be pegged in local currency which continues to rapidly deteriorate. Further any purchase price will have to be held by the conveyancers pending transfer. The money will devaluate in the hands of the conveyancers and both parties will lose a house and ultimately receive way less than its actual worth.
(d) The evidence shows defendant to be a 70 year old man afflicted by the conditions of advancing age, namely high blood pressure, kidney problems and diabetes. Defendant stated that he is "unemployed" but does occasional research.

Therefore, he has no proven capacity to pay the plaintiff off her share of the house.

(e) However, defendant also has permanent residence in the United Kingdom where he is due a pension payable in a currency that is not as prone to devaluation as the local currency. The defendant is still an employed academic despite his advanced age. On a fair assessment of the evidence, one could say that the defendant has indeed taken good advantage of the gate opened for him by the plaintiff to the United Kingdom and is the party that is presently better off in terms of retirement and old age benefits. On the other hand plaintiff is left ruing her failure to seriously take defendant's advice that defendant was looking for "a hardworking woman to work and look after him." It turned out that this is exactly what happened.

(f) In light of the above, there is no equity in ordering the Grange property sold. It is however necessary to put conditions in the apportionment in a manner that the court considers fair, just and equitable in accordance with the provisions of section 7 of the Matrimonial Causes Act.

In the circumstances, it is ordered that:

i. A decree of divorce be and is hereby granted to the plaintiff.
ii. Plaintiff be awarded stand number 369 of Beeston Road, The Grange, Harare on condition the property is evaluated by a professional evaluator within 30 days of this order to ascertain its market value.
iii. The plaintiff be and is hereby ordered to pay the defendant 10% of the value of the Grange property within 30 days of receipt of the evaluation referred to in (b) above.
iv. Each party keeps as his or her sole property all movable property as may be in their possession on the date of issuing summons.
v. Each party bears its own costs.

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