

**SIBONGILE TEMBO**

**Versus**

**SIMON TEMBO**

IN THE HIGH COURT OF ZIMBABWE  
CHIWESHE J  
BULAWAYO 28 NOVEMBER 2003

*Miss S. Guta* for the plaintiff  
*G. Moyo-Masiye* for the defendant

Judgment

**CHIWESHE J:** The plaintiff issued summons for a decree of divorce and ancillary relief. At the close of pleadings the parties proceeded to attend a pre-trial conference under the stewardship of my brother NDOU J. The parties agreed to settle on all issues to do with the custody and maintenance of their two children and the distribution of movable property. It was also agreed that the marriage between the two parties had irretrievably broken down and that consequently a decree of divorce would be in order. The parties were however not in agreement as to the fate of the matrimonial home, namely, house number 331 Cowdray Park. It was on that issue only that the parties proceeded to trial.

It was the plaintiff's contention that she be awarded the matrimonial home to the exclusion of the defendant. On the other hand the defendant argued that it would be just and equitable that the matrimonial home be sold to best advantage and the proceeds shared equally between the parties.

In her evidence in chief the plaintiff testified to the following effect. The parties were married in December 1993 in terms of the Marriages Act, [Chapter 35]. She is a school teacher. Her husband's conduct was the cause of the irretrievable breakdown of the marriage. He generally abused and assaulted her. At some stage he had threatened to burn down the matrimonial home. Her husband would become violent when drunk and would beat her up in front of the children, using abusive language. She had on two or three occasions reported the matter at Luveve Police Station. At one point she was severely assaulted. Her ear was ruptured leading to haemorrhage. To this day her right hand ear cannot hear properly. She produced the relevant medical report which was admitted as exhibit "1". For these reasons she said the marriage had floundered. The parties have two children aged 9 and 4. The children live with the plaintiff. She says that she bought the house single handedly and for that reason she wants the house awarded to her so she can accommodate herself and the two minor children. She

purchased the house in December 1997. It is registered in her name. The defendant had chucked her and the children out of the house. He remained in occupation. She had bought the house for Z\$70 500,00. Of this the defendant had contributed Z\$6 000,00 as deposit. The balance was paid by herself. She had secured a bond in the sum of Z\$51 800,00 and had subsequently cleared the bond without assistance from the defendant. The defendant also contributed nothing in terms of electricity, water and other charges pertaining to the matrimonial home. At the time she was employed at Luveve High School as a teacher. She earned \$2 400,00 per month. On the other hand the defendant was also employed as a teacher at Townsend High School and was equally capable of meeting the expenses of the bond charges and other household necessities. The plaintiff lives at Luveve Secondary School with the children. She said that she would have nowhere to go in the event that school accommodation was withdrawn. She estimated the market value of the matrimonial house to be around Z\$15 – 20 million. She reiterated that she had bought this house with little or no assistance from the defendant, and that as the custodian parent, she needed the house to accommodate the two minor children. Moreover, the defendant had sold to his sole benefit some movable property such as the family refrigerator, radio and video cassette recorder. He had also sold building materials intended to be used to extend the matrimonial home and kept the proceeds to himself.

Under cross-examination, the plaintiff insisted that the defendant had only contributed Z\$6 000,00 to the purchase of the house. She agreed that initially the bond repayments were recovered as monthly deductions on the defendant's salary. The stop order was subsequently switched over to her account after a total deduction from the defendant's account of \$6 000,00. The defendant seemed to be in agreement with that assertion when he put it to the plaintiff that he had, in recognition of deductions now falling on the plaintiff's salary, offered to meet other household expenses. The plaintiff however insists there was no such offer and that the defendant never in fact met any further expenses. The defendant put it to the plaintiff that she had deserted the matrimonial home and secured a pistol to ensure he does not follow her. On her part the plaintiff emphatically denied doing so of her own accord. She said that she had again at that point been beaten up by the defendant and had reported to the police. The defendant had subsequently phoned her and threatened that if she did not move out of the matrimonial home he would "chop off" her head. This had angered her so much that she had sought to secure a pistol but without success. She says she never got the pistol, let alone threaten the defendant with one. The defendant told the plaintiff that he had only sold those movables which he had acquired before the marriage. The plaintiff refuted this assertion saying only the refrigerator had been bought before their marriage and even then she had contributed to its purchase. She said that the defendant had only paid the deposit and she had paid the refrigerator in two instalments. It was for this reason that she had taken it to her

sister. Asked what building materials the defendant had sold off, the plaintiff insisted it was the material “regardless of who had bought it” that they had intended to use in extending the matrimonial home. She insisted she had not deserted the matrimonial home but that he had kicked her out of it. She tacitly agreed that earlier she had moved from the main bedroom to the spare bedroom but denied moving any furniture other than the bed she herself had bought.

On being questioned by the court the plaintiff agreed that the defendant did meet some expenses during the subsistence of the marriage but that from some point he became irresponsible on account of alcohol consumption and stopped assisting her. She indicated she could be agreeable to the matrimonial home being transferred to the children provided she was granted a “usufruct” over the property. The defendant on his part maintained that he had contributed significantly and for that reason was entitled to a fifty per cent share of the matrimonial home. He said that he had put a durawall around the house, a fact acknowledged by the plaintiff. The plaintiff however said the defendant only put up the durawall after service of the divorce summons and only on the back and front of the house as the other sides had been durawalled by their neighbours.

The plaintiff did not call any other witness in support of her case. The defendant’s evidence in chief was briefly as follows. He maintained that the house be shared equally between the parties as he had contributed equally to its acquisition. He said that the couple was a family and all the property they acquired belonged to the family not individuals. He was adamant that he would not want to see other men getting into the house which he had built. He preferred that the house be sold so that he may buy another one. He said that there were no prospects of reconciliation between the parties and he would therefore have to start a new life. He admitted that he had written to the financiers to have the bond transferred to his wife’s account. Once that happened it became incumbent upon him to meet groceries and other household bills. He says he did meet the expenses. It was his wife who wanted divorce. He said in this regard she was motivated by the prospects of financial gain. He alleged that his wife was going out with another man. He denied ever attacking her person. He accused her of leaving the children with neighbours thereby neglecting their welfare. He would be happy if his wife were to pay him out by giving him 50% of the market value of the house or, alternatively, sell the house and share the proceeds equally. He confirmed having sold building materials namely, two door frames and one hundred bricks bought for purposes of extending the house. He said he sold these materials because his wife forbade him from extending the house. As a result he lost money which he had paid to the City Council when submitting the extension plan for approval. He said he used the money so received from that sale to buy clothing and utilities for the baby his wife was expecting. He also spent money buying his wife prepared meals as she was expecting and needed to be spared from the rigors of cooking meals at home. He also said that he had erected the durawall at the house on his own. He paid more than Z\$42 000,00

for it plus Z\$8 000,00 for labour making a total Z\$50 000,00. For these reasons he contended that the house must be shared equally between the parties.

Under cross-examination the defendant confirmed that the house had been registered in the wife's name because he had agreed to transfer the bond to his wife's account. He said he had contributed more than \$6 000,00 towards the purchase of the house. He said he could produce pay slips to support his contentions. He said that he was aware that the value of the bond was Z\$47 000 and admitted that with interest it could have been around Z\$51 000,00. He said he had contributed Z\$22 000,00 towards the clearance of the bond. He said that at the time the bond was transferred to his wife, the parties had agreed that he would, as a result, be then responsible for groceries, clothing and furniture. Although he did not have documentary evidence, he said that his pay slips would reflect his bond contributions and that there were delivery slips proving purchase of groceries. However, he did not have the documents to support the expenditure incurred. He said that he used to drink but had stopped some months after his wife had left the matrimonial home. He denied that he took alcohol irresponsibly and that as a result it was the wife who met all household expenses.

He insisted that he always looked after his children's interests. He admitted that he had sold some of the property such as the radio and the refrigerator. He said he sold the radio because his wife complained that the radio was noisy and that he sold the refrigerator because his wife said it was in the door's way and that each time the door was opened, it would bang on the refrigerator. He said that he shared the proceeds with her to the benefit of the whole family as the proceeds were used to buy food, to pay rentals and replace the things that the children were in need of. Asked why he had not put this to the plaintiff during cross-examination, he said that it had not been necessary to cross-examine her on issues that she had knowledge of.

Asked whether he had sold the building materials in order to fix his wife, he replied that he sold the material because he felt demoralized by his wife's conduct and had realized that having received divorce summons there would no longer be any plans to build the house. He said he had consulted her on the sale of the building materials and she had agreed that they did so. She actually went around her friends looking for potential buyers. Asked why he had not cross-examined his wife on the point, he said that he could not have possibly question her on every aspect as he had not prepared written questions. He agreed that he had sold matrimonial property but insisted that his wife had also benefited from the proceeds.

Asked as to the extent of his contribution to the purchase of the house he said his contribution was 110% and that his wife had also contributed 110% as the parties were doing things together as one. He maintained that each party's contribution was equal to that of the

other party. He said that he had durawalled the front and back sides of the house and that he had not consulted his wife in doing so. Asked if she had not told him not to improve the property, he said that she had meant extension of the house and not the erection of the durawall. He insisted that he was entitled to a 50% share of the house. He estimated the market value of the house to be in the region of 25 to 30 million Zimbabwe dollars.

Asked by the court whether he had any documentary evidence to prove his contributions, the defendant said that he had minimal communication with his legal practitioner and further that he had been ignorant of the requirement to bring supporting documents. He said that his legal practitioner had renounced agency ahead of the hearing. Asked if such documents were with the building society, he said that initially the repayments were on a cash basis and it was him paying at least for the first six months if not more. It was his wife who told him to stop these cash payments. He had stopped only to resume payments for a further two months at the behest of his wife. Thereafter the plaintiff said she would take over the repayments and that the house would be registered in her name. The stand was then transferred to the Beverley Building Society. She is the one who then signed the bond papers and the account was transferred to her name. At that stage he had already contributed the sum of Z\$22 000,00 and from that time onwards she serviced the bond.

Mr *Ncube*, for the plaintiff, argued that the house belonged to the wife because it is registered in her name. He argued further that in view of the defendant's conduct by way of irresponsible drinking, abuse of his wife and neglect of his family it would be inequitable if the house were to be shared equally. In that regard he quoted the case of *Marimba v Marimba* 1999 (1) ZLR page 88. He further argued that the admission by the defendant that he had sold the matrimonial property be viewed as a factor working against the defendant in the equitable division of the matrimonial house. In any event the interests of the children would be compromised if the house were to be disposed of. He however admitted that the defendant, whatever his shortcomings, might well be entitled to more than the 10% proposed by the plaintiff. He would however be agreeable to an arrangement wherein the house would be transferred to the children or any other alternative arrangement. The defendant did indicate he would also be agreeable to the house being transferred to the children.

It appears to me that the plaintiff's contribution to the purchase of the house has been shown to be substantially higher than that of the defendant. It is common cause that the defendant's role in the acquisition of the stand on which the house was built was crucial – he raised the initial instalments totaling \$6 000,00.

The defendant said he paid the monthly instalments at least for the first six months. The plaintiff agrees with this assertion but avers that the defendant did not maintain this cash

account for any length of time and, in any event, he was defaulting thereby putting the family's interest in the property at risk. She thereafter arranged a mortgage bond with a building society in her name. She serviced the bond by means of a stop order on her salary. That much is not in dispute. The defendant has not produced documentary evidence to substantiate his contribution after the initial payments. There is no doubt however that he has shown on a balance of probabilities, that he would have contributed something although he is unable to substantiate his contribution. He says in all, his contribution amount to \$22 000,00. The plaintiff hotly disputes this figure.

Should the defendant be penalized for abusing his wife by way of a reduction in the percentage share of the house? Whilst it is clear that he had been abusive, particularly when under the influence of alcohol, and that it was his conduct in this regard which was the proximate cause of the separation of the parties and the breakdown of the relationship, I do not believe that his conduct comes anywhere near the facts that GILLESPIE J dealt with in the *Marimba* case *supra*. In that case, the defendant had abused his wife and children for a period of 18 years. In the present case the defendant's negative conduct was only endured for two years. The level of violence and brutality in the *Marimba* case was well above what has been disclosed in the present case. Even then, the learned judge acceded to the plaintiff's proposal for an equal share of the matrimonial property. Sight must not be lost of the fact that in terms of the Matrimonial Causes Act, the major consideration in the division of property is the contribution that each party made to the purchase of the property, directly or indirectly. Where there are minor children, the division would tend to favour the party in whose custody the children have been placed. When these two factors are taken into account, I would be inclined to the view that it would be just and equitable that in the event of a divorce the plaintiff be awarded a 70% share of the matrimonial home. Whilst the Act provides that the court should "endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ...", our courts have been reluctant to penalize parties for their conduct save in so far as such conduct may affect the suitability of the offending party as a custodian of the parties' minor children or his or her suitability as a recipient of maintenance from the other party. Otherwise in the majority of cases where it has been deemed desirable to penalize a party for bad conduct it has been by way of an award of costs in favour of the offended party.

Throughout the proceedings the plaintiff's case has been shown to be clear and credible. I am inclined to believe her. On the other hand, the defendant has been less than convincing. He has however successfully shown that his contribution to the purchase of the house was at least \$6 000,00 (out of the total purchase price of \$70 000,00). This amounts to a percentage of just under 10%. The defendant has been unable to sustain his contention that he

contributed as much as \$22 000,00. In transactions of this nature it is reasonable to expect that receipts and other documentary evidence be produced. The defendant has not done so. After the bond was transferred to the plaintiff's account, the defendant does not appear to have contributed much to the other household expenses such as groceries and the children's general welfare. Instead he spent much of his money and energy on alcohol and other frivolities. It is the plaintiff who assumed both the bond repayments and the general household expenses. It is the plaintiff whose contribution has been decisively proved in this case. Her contribution might well be above the seventy per cent that I have assessed it to be. She has proposed that instead of disposing of the property and sharing the proceeds, it is preferred that same be transferred to their two minor children and that she be granted a usufruct. Initially the defendant was agreeable to this arrangement but as Mr *Ncube* (for the plaintiff) later advised, the defendant had, during an adjournment of the proceedings, indicated that he prefers that the house be sold and shared. The defendant wishes the house sold because he cannot countenance the possibility of the plaintiff living there with another man.

However, it is the plaintiff who is entitled to a lion's share of the value of the matrimonial home. For these reasons I am satisfied that it would be just and equitable that her wishes prevail.

Accordingly, it is ordered as follows:

1. That a decree of divorce be and is hereby granted.
2. That the matrimonial home, house number 331 Cowdray Park, Bulawayo be and is hereby awarded to the parties' two minor children Linda Tembo and Bukhosini Tembo in equal share.
3. That the plaintiff be and is hereby granted a life usufruct over the said matrimonial home.
4. That the distribution of the parties' movable property, the custody and maintenance of the parties' minor children and all other ancillary matters be in terms of the agreement recorded at the pre-trial conference.
5. That the defendant pays the costs of suit.

*Coghlan & Welsh*, plaintiff's legal practitioners  
*Galen Moyo-Masiye & Partners*, defendant's legal practitioners