MICHAEL PATRICK MORONEY

versus

VYVYAN JEAN MORONEY

HIGH COURT OF ZIMBABWE

MUSAKWA J

HARARE, 8, 9 and 10 June 2009 and 16 June 2010

Family Law Court

Divorce Action

M. Kamdefwere, for the plaintiff

Mrs *Wood*, for the defendant

MUSAKWA J: The parties in this matter had been married for a considerable period of time until they started living apart in 2001. At the pre-trial conference stage they agreed that the marriage relationship had irretrievably broken down. They also agreed on the division of some movables.

Referred for trial was the issue of what constitutes the matrimonial estate and how it should be divided as well as whether the plaintiff should be ordered to provide maintenance for the defendant. However, the parties, in their joint pre-trial conference minute agreed that whatever the court holds to be matrimonial property should be shared equally.

The plaintiff testified that the parties married in 1970. However, they had commenced living together in 1969. The plaintiff now resides at flat number 4 Inverurie Court, 137 King George Road, Avondale, Harare. Initially, the plaintiff was unemployed whilst the defendant was employed as a nursing sister at St Anne's Hospital.

The defendant secured a flat to rent in 1970 and the plaintiff subsequently moved in. Later they rented a cottage in Ballantyne Park. The plaintiff had now secured a job with Farmers Club. Both parties contributed towards rent and household expenses although the defendant earned more than the plaintiff. They resided in Ballantyne Park for several years until their first child was born.

The plaintiff took over the bond in respect of 46 Glenara Avenue in the early 1970's from his parents. According to the plaintiff, he got the house as part of his inheritance. Whilst he serviced the bond, the defendant contributed towards household expenses. They stayed in this house until 1977.

In 1976 the plaintiff was offered a fishing concession in Darwendale. He purchased Crebilly A farm from Mr Jock Kennedy for Z$14 000. The money was provided by his parents. He claims he did not refund them as it was part of his inheritance. He then secured a loan and established a factory.

The Eastlea house was subsequently sold for Z$46 000 and the bond paid off. The plaintiff still worked for Farmers Club whilst the defendant now worked at Dr Hamilton's surgery. The plaintiff claimed he now earned more than the defendant as he did military call-up duties. However, they combined their incomes.

The parties moved to Darwendale in 1978. The defendant left employment then. Commercial fishing had commenced in 1977. V&M Fisheries (Private) Limited was established and run as a family business in which the defendant has a fifty percent share.

When the plaintiff's father fell ill he was allowed to withdraw money from his account. Some of the money was deployed in the family business. The homestead at Crebilly A farm was built from funds generated by V & M Fisheries. Crebilly A farm is registered in the plaintiff's name. In 1989, using funds from V & M Fisheries the parties purchased Riverside farm which is registered in the defendant's name. Riverside farm was compulsorily acquired by the

government in 2000. The improvements on that farm such as irrigation infrastructure, boreholes and fencing were funded by V & M Fisheries as well.

V & M Fisheries' fishing concession was cancelled in 2009. According to the plaintiff the company no longer makes profit owing to competition from other operators.

According to the plaintiff the Lloyds account was opened in the 1980's after his parents had died. The funds came from his inheritance. Some funds were deposited into the Standard Bank, South Africa account. The account was opened when the parties intended to settle in South Africa. There is also an account with ABSA which he opened with funds from his inheritance. A third of the inherited funds remained in Zimbabwe.

An account with Standard Bank in the Isle of Man was opened in 2004. He opened it with a deposit of 10 000 pounds withdrawn from the Lloyds account. The plaintiff subsequently did some consultancy in South Africa for which he was paid R1 000 000. Of this amount, the plaintiff transferred the equivalent of 83 000 pounds into the offshore account.

The crocodile business was conducted under V & M Fisheries. They exported skins and the proceeds thereof were deposited in a foreign currency account. This money was used for V & M Fisheries business. According to the plaintiff in 2001 most farmers left the farms and there was a food and power deficit. He sold 29 breeders. There were 559 hatchlings of which some died.

Jewellery valued at 25 000 pounds was bequeathed to the defendant by the plaintiff's mother. It was initially kept in a safe and subsequently exported to England. Part of it was stolen and the agent's father paid a sum of 5 000 pounds which was deposited in the Lloyds account.

Part of the income generated by V & M Fisheries was used on holiday by the family. They travelled to the United States of America, United Kingdom, South Africa and Israel. He also paid for their son's university fees and purchased a motor vehicle for him.

The flat in which the plaintiff resides was purchased for between 23 000 pounds and 25 000 pounds. It was acquired from proceeds of the offshore account he opened in the Isle of Man. It is registered under Showbel Investments of which the plaintiff is the majority shareholder. The plaintiff also purchased a generator and a Nissan double cab vehicle.

The plaintiff also testified about setting up a company called Ultra Light Aviation. He purchased the first plane using money from his inheritance. He subsequently sold the company to his son. He also bought a yatch which he subsequently sold. Under cross-examination the plaintiff conceded that as part of her indirect contribution the defendant maintained the home and took the children to school. She also maintained the company's records and took fish deliveries to town. Both the plaintiff and the defendant visited Israel in 1985 where they learnt fish breeding.

The plaintiff also confirmed that Crebilly A farm was not acquired by the state. He conceded that compensation in respect of acquisition of Riverside farm be paid to the defendant. Concerning the defendant's jewellery he testified that a total of 9 000 pounds was received and deposited in the Lloyds account. He also offered the defendant US$5 000 by way of a lump sum.

On the other hand the defendant testified that she now resides with her daughter and son in-law. She helps her son in-law with his business and also helps with the grandchildren. She quit nursing in 1978.

She disputed that the Eastlea house was inherited by the plaintiff. Rather, it was a donation to them to help them get started in life. The bond was serviced from their salaries. The money to purchase Crebilly A Farm was borrowed from the plaintiff's parents. She was very much involved in the fishery business. They purchased Riverside farm for the family although it was registered in her name. They leased the farm and the proceeds went to V & M Fisheries. When the plaintiff was involved with Ultra Light Aviation she looked after their business at the farm.

The defendant confirmed that money from property inherited by the plaintiff was ploughed into the fishery business, Riverside farm and the crocodile business. She was involved in the crocodile business between 1994 and 2002. The last records regarding the crocodiles were prepared by their son and she confirmed them. According to the defendant the breeders laid between 500 and 600 eggs and they sold about 400 crocodiles yearly. She was not consulted when the crocodiles were sold. She thus claims half the value of the crocodiles.

In respect of the jewellery the defendant stated that it was exported without her consent. It had been bequeathed to her by her late mother in-law. The money earned from the jewellery was not accounted for.

Basically the defendant was of the view that after thirty years of marriage she deserves more than the US$5 000 that was offered by the plaintiff. She prefers the flat and the plaintiff can retain Crebilly A farm. Regarding her maintenance she could not come up with a figure as she said she wanted to think about it.

Gelen Michael Moroney who is a son of the parties testified on behalf of the defendant. He grew up at Crebilly A farm. After attending university in South Africa he returned in 1991 and resided at Riverside farm until 2000. He assisted in farming operations until the formation of Ultra Light Aviation. After leaving Riverside farm he went to Crebilly A farm for two months which he would subsequently visit from Victoria Falls. It was also his evidence that between 2002 and 2004 he introduced the plaintiff to a representative of De Veres & Partners. This was in connection with the opening of an account into which proceeds from the crocodile business would be deposited.

Glen Michael Moroney further stated under cross-examination that between 2000 and 2004 he worked at Crebilly “A” Farm. Between 400 and 600 crocodiles were sold per year. Up to 2000 crocodiles were sold to a company called Niloticas. In 2004 some hatchlings were sold to a buyer in Banket whilst some breeders were sold to Mr Nesbitt. He also stated that crocodiles can be fed once in two months, hence there would not be many fatalities.

In determining this matter I will take into account that the parties are agreed that the household effects at Crebilly "A" Farm should be shared equally. The plaintiff also undertook to maintain the defendant on a suitable medical and dental aid scheme and to meet related shortfalls until she remarries or dies. The plaintiff did not dispute that the defendant should claim the entire compensation on improvements made to Riverside Farm. The parties also agreed that V & M Fisheries be wound up and the proceeds shared equally.

I will also take note that although maintenance for the defendant was made an issue by virtue of her plea she did not lead sufficient evidence on which a determination can be made. It is not sufficient to state that she is no longer employed and that she has no prospects of ever being employed as a nurse. In short, no evidence was led regarding what her basic needs amount to. In addition she claimed to have sustained impaired vision as a result of a traffic accident but she did not lead evidence on the extent of such disability.

The defendant also sought to be awarded the value of her jewellery that the plaintiff allegedly exported to the United Kingdom without her consent. This issue only arose during trial. There was an attempt to seek an amendment to the defendant's plea by making a counter-claim by the defendant's counsel in her written submissions. I agree with the plaintiff's counsel's submissions that this is impermissible. Whilst the issue was dealt with during the course of trial, an amendment to pleadings cannot be made by way of closing submissions.

The plaintiff's counsel cited the well known case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) as authority on the approach to be made in making an award on assets following a divorce. In that case McNALLY JA had this to say at p 106 –

> "The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term "his", "hers", and "theirs". Then it will concentrate on the third lot marked "theirs". It will apportion this lot using the criteria set out in s 7(3) of the Act. Then

> it will allocate to the husband the items marked "his", plus the appropriate share of the items marked "theirs". And the same to the wife. That is the first stage.
>
> Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, "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 ...".
>
> Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually "his" or "hers".

Using the above approach, the following property falls under the category of 'his'; Crebilly 'A' Farm, flat number 4 Inverurie Court, King George Road, Avondale, Kipor generator and Nissan double cab vehicle. Riverside Farm constitutes 'hers' (the defendant). Then V& M Fisheries (Private) Limited constitutes 'theirs' as both parties have equal shares in the company.

However, the above distribution would not be equitable in the circumstances as the defendant would not be placed in the same position she would have been had a normal marriage relationship continued. In apportioning these assets the court has to take into account the provisions of s 7 (4) of the Matrimonial Causes Act [*Chapter 5:13*] which read that-

> "(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following—
> (*a*) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
> (*b*) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
> (*c*) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
> (*d*) the age and physical and mental condition of each spouse and child;
> (*e*) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
> (*f*) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;

(*g*) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct,is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses".

Although both parties are no longer employed, it is not in doubt that the plaintiff has better resources. Although he claimed that the money that he used to open the Lloyds account came from his inheritance, he was not able to specify exactly how much that was. In any event, the estate of his late father was wound up in local currency and it is not clear how he converted it to foreign currency and hence externalized the funds. The same applies to the export of crocodile skins. The proceeds appear to have been externalized. Although he claimed that proceeds from the export of crocodile skins were ploughed back into the business, no specific breakdown of these transactions were given. The plaintiff appears to have been quite capable of maintaining records of his transactions as evidenced by his bundle of documents which for some reason do not reflect the earnings from the crocodile business. It seems money from the plaintiff's inheritance got mixed with earnings from the business and other sources. The distinction between what constitutes inherited funds and income from other sources is blurred as a result.

The financial needs of the parties are balanced in favour of the plaintiff if one takes into account the resources available to them. The court will have to consider what to take away from the plaintiff and award to the defendant. This is in accordance with ss (1) of s 7 of the Act which states that-

"Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—

(*a*) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;

(*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".

In making an order in terms of ss (1) the court is enjoined to take into account the provisions of ss (4). Going by the ages stated in the marriage certificate, the plaintiff and the defendant are now 63 years and 64 years respectively. They would be pensioners now. I have already pointed out that the plaintiff has better financial resources and it will be equitable, in the court's discretion to order that part of those resources be transferred to the defendant. It is also noted that in his testimony the plaintiff offered the defendant US$5 000. He has about 61 000 pounds in his offshore account in the Isle of Man. The Standard Bank account South African account has a balance of R11 500 whilst there is about 3 000 pounds in the Lloyds TSB account.

The court will also take into account the duration of the marriage which in this case lasted thirty one years before they separated. There is no doubt that the defendant made considerable indirect contributions to the development of Crebilly 'A' Farm during the course of the marriage. In the first place she quit her nursing job to devote to the fishing operations and family commitments. Prior to that they used to pool their earnings together in order to meet their financial obligations and household needs. Whilst the plaintiff claimed that the money used to set up the farm came from her parents for free, the defendant stated that it was in fact a loan which they repaid in the first few months. The defendant's testimony on this aspect was not challenged. The plaintiff also testified that he used part of his inheritance to develop the farm without giving a breakdown of any specific funds. If he did use part of his inheritance for that purpose it was for the benefit of the entire family. In any event Crebilly 'A' Farm homestead was developed from funds generated by V & M Fisheries in which both parties have equal shares.

Taking into account the duration of the marriage and the defendant's indirect contribution to Crebilly 'A' Farm it is equitable that she be awarded a fifty percent share. This takes care of the fact that she is only getting compensation in respect of improvements to Riverside Farm which was acquired by the state. In addition, the defendant has no home to retire to in her old age. I have taken into account that the flat was acquired by the plaintiff after the parties had separated.

In the result it is ordered as follows-

a) That a decree of divorce be and is hereby granted.

b) That compensation for improvements to Riverside Farm shall be payable to the defendant.

c) That the plaintiff be awarded flat number 4 Inverurie Court as his sole property.

d) That V & M Fisheries (Private) Limited be wound up with the proceeds being shared equally between the plaintiff and the defendant.

e) The Kipor generator is awarded to the plaintiff.

f) The parties shall keep the motor vehicles and any other movables in their respective possession as their sole property.

g) The defendant is awarded a fifty percent share in of Crebilly 'A' Farm.

h) The movable property in Crebilly 'A' homestead shall be shared equally between the parties.

i) The plaintiff shall maintain the defendant at his cost on a suitable medical and dental aid scheme and pay all shortfalls until the latter remarries or dies.

j) The amounts in the following bank accounts shall be shared equally between the parties- Standard Bank, South Africa, ABSA and Lloyds Bank.

k) Within three months of the granting of this order the plaintiff shall pay the defendant an amount of 10 000 pounds.

l) Each party shall bear their own costs.

Muringi Legal Practitioners, for the plaintiff

Atherstone & Cook, the defendant's legal practitioners.