Judgment No. SC-18-08
Civil Appeal No. 32/06

ETWIN MACHIBAYA v KUDAKWASHE MACHIBAYA

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, JUNE 2, 2008 & MAY 19, 2009

J B Wood, for the appellant

F G Gijima, for the respondent

ZIYAMBI JA: The respondent sued the appellant in the High Court for an order of divorce and other ancillary relief. The appellant counterclaimed for divorce and sought, *inter alia*, the following relief, namely –

> "(g) that within 14 days of the date of the decree of divorce the plaintiff shall sign all documents and do all such things as are necessary:-
>
> (i) to transfer to the defendant his entire shareholding in Gainsland Investments (Pvt) Ltd ('the company')
>
> (ii) to transfer the Chinhoyi property into the children's names."

This appeal is against paragraphs 7, 8, and 9 of the order of the High Court which read as follows:

> "7. The plaintiff is awarded 60% and the defendant 40% of B3465 Chikonohono Township, Chinhoyi.
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> 8. The plaintiff is awarded 60% and the defendant 40% of the shares in Gainsland Private Ltd.

9. The plaintiff is given the first option to purchase the defendant's shares in the Chinhoyi and Borrowdale properties withing 60 days of the date of divorce failing which the properties will be sold by an Estate Agent on the Master's panel, to the best advantage, and the proceeds shall be shared between the parties in their respective shares in Gainsland Pvt Ltd., Harare and B3465 Chikonohono T/ship, Chinhoyi."

The appellant contended that in making a distribution of the matrimonial property the learned Judge did not take into account certain relevant considerations and, in particular, did not take into account three properties owned by the respondent so that when all is taken into account the final order made by the learned Judge is manifestly unjust having regard to the fact that the respondent would end up with six properties while the appellant has none and would be seeking accommodation to house the children and herself.

The facts as found by the learned Judge are that the parties were in a customary union from 1992 when the respondent made partial payment of *lobola*. The remaining *lobola* was paid in 1996. Thereafter the parties had two children. The marriage was solemnized in 2000.

During the subsistence of the marriage, the appellant was a teacher and the respondent was an engineer. The matrimonial assets of the parties comprised of various immovable properties to the purchase of which the appellant made no direct contribution but her earnings as a teacher were used to supplement the household income for the maintenance of their children as well as the extended family of the respondent who were living with her. The respondent resigned from his employment with the Ministry of Transport in 1995 and went to Mozambique where he was employed and from whence he visited the family occasionally. The matrimonial home was formerly in Hillside but the family later moved to No.86 Piers Road, Borrowdale ("the Borrowdale house").

The parties separated in 2003, by which time the immovable matrimonial assets comprised of a house in Chinhoyi being no. B3465 Chikonohono Township; a house in Letombo Park, Harare, a house in Hillside, Harare and, on the appellant's evidence, two flats being nos. 16 and 17 Winchester Court, Avondale, Harare ("the Winchester flats").

The respondent resides at the Letombo Park property when he visits Zimbabwe from Mozambique. His relatives are presently living in the Borrowdale house while the appellant and the minor children live in rented accommodation pending the conclusion of the divorce proceedings. Thereafter she will require accommodation for herself and the minor children. The sole issue to be determined by this Court is whether the learned Judge erred in making the order that she did in respect of the immovable property.

In making a distribution of matrimonial property upon or after divorce a court is guided by subs (4) of s 7 of the Matrimonial Causes Act [*Cap 5:13*] ("the Act") which provides as follows:

> "(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following -
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> (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;
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> (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
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> (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;
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> (d) the age and physical and mental condition of each spouse and child;
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> (e) the direct and 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.'

Having taken account of the factors set out in subs 4 (a) to (g), the court is enjoined to ensure that as far as is reasonable and practicable and, having regard to their conduct, is just to do so, that the parties are able to enjoy the same standard of living as they enjoyed during the subsistence of the marriage.

The learned Judge reasoned as follows:

"As a starting point, the Chinhoyi property is the plaintiff's property but the court is enjoined to look at the factors listed in s 7(4) of (the) Act in arriving at a just and fair settlement. I will also be guided by the remark made by GILLESPIE J in Shenje's case (supra) at p 163G that '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 parties were married for a period of three years but they lived together for a total period of 10 years. The defendant is currently living in rented accommodation which is being paid for by the plaintiff. This arrangement will cease upon the granting of the divorce. The defendant will need accommodation for herself and the children. Going by their standard of living, she will need accommodation in the low density suburbs. From the evidence before me regarding the defendant's, means, it is clear that the defendant will not be in a position to buy a property in the low density suburbs."

At p 12 of the cyclostyled judgment the learned Judge said:

"The defendant admitted that she did not contribute directly to the purchase of the Chinhoyi property and she did not pay nor contribute towards her shares in Gainsland Pvt Ltd. She confirmed that she was a student most of her married life on either half or three quarter salary. She contributed indirectly by looking after the family single handedly whilst the plaintiff was in Mozambique. She also looked after the plaintiff's brothers and sisters. She would buy groceries for the family although she would be assisted by the plaintiff.

> Adopting the approach in *Takapfuma's case*, the Chinhoyi property is his and Gainsland Pvt Ltd is 'theirs'. The court will take into account that the plaintiff also has the Hillside property which the defendant rejected in an out of court settlement.
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> Taking into account all the circumstances of this case, I will award the parties their respective shares in the company. The Borrowdale house is the only asset of the company. The net effect is that the plaintiff is awarded 60% and the defendant is awarded 40% of the value of the Borrowdale property. I will give the plaintiff the option to retain the Borrowdale property. Taking into account the indirect contribution of the defendant to the Chinhoyi property, that the defendant will need to purchase a house to live in and that the plaintiff will remain with the Borrowdale property and the Hillside property, I will award the plaintiff 60% of the Chinhoyi property."

It was submitted by the appellant that the learned Judge omitted to take into account the factors set out in s 7(4)(a) of the Act in that the court did not take into account all the assets which the respondent has. Further, it was submitted that despite the citation by the learned Judge of *Shenje's*[1] case, she did not follow it and in the end gave an order which was manifestly unjust having regard to the circumstances of the parties.

In making an order in terms of s 7 of the Act, the court exercises a discretion having taken into account the factors listed in s 7(4). This court will only interfere if the discretion was not properly exercised, for example where the court failed to take into account some relevant consideration. See in this respect, *Barros & Anor v Chiponda* 1999 (1) ZLR 58 (SC) 62G-H.

Of the factors listed in (a) to (g) of s 7(4) of the Act, only (e), the contributions of the parties, appears to have concerned the court *a quo.* The other factors, if considered, were not mentioned, nor does it appear that any endeavour was made to place the parties in the position directed by the legislation.

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[1] *Shenje v Shenje* 2001 (2) ZLR 160 (H)

Before the divorce, the appellant held as her assets, 40% of the shares of Gainsland (Pvt) Ltd, a company whose sole asset is the Borrowdale house and collected the rentals for the Chinhoyi house. She had no need of accommodation as she resided at the Borrowdale house. The respondent held the house in Letombo Park, Harare, a house in Hillside, Harare, a 60% share in Gainsland (Pvt) Ltd and the Chinhoyi house. He lived and worked in Mozambique and, on his visits to Zimbabwe, he would reside at the house in Letombo Park with his other wife.

The respondent's earnings are in United States Dollars but the Court could not ascertain the extent of his income as he produced no evidence thereof and was, in the Court's view, untruthful as to the state of his finances. The Court found the appellant's evidence to be the more reliable. Accordingly, it would be fair to say that the respondent owns, in addition to the properties already mentioned, ("the Winchester flats"). The respondent's assets in Zimbabwe would therefore comprise of 5 houses and a 60% share in the Borrowdale house. He did not take the Court into his confidence regarding the ownership of house in which he lives in Mozambique.

It was submitted on behalf of the appellant that, in the likely event that she was forced to sell her shares in the properties to the respondent, the proceeds would not suffice to enable her to purchase a house of an acceptable standard, judging by what she was accustomed to during the marriage. It was further submitted on behalf of the appellant that she should have been awarded the matrimonial home, at the very least until the children reach the age of 18 years.

Section 7(4)(a) requires that the assets which each party has should be taken into consideration in making a distribution. The learned Judge made no mention whatsoever of the Letombo Park property or the Winchester flats which are assets owned by the respondent. The failure to take into account these assets is a misdirection entitling this Court to interfere.

The submission by the appellant that the order of the court in the circumstances is manifestly unjust would appear to be not without substance. It appears that little if any consideration was given to the fact that the appellant and the minor children of the marriage would have no accommodation once the divorce was granted. Whatever the conduct of the parties, the respondent has an obligation to provide accommodation for his children. (See s 7(4)b)). The fact that the appellant and the minor children of the marriage are now living in rented accommodation paid for by the respondent should have raised questions in the mind of the trial court as to where they would reside once the arrangement "fell away" as it was put by the court *a quo*. Accommodation for the appellant and the minor children after the divorce is a material consideration in the court's endeavour to place the spouses as far as is reasonably practicable in the position directed by the legislation. The effect of the order made by the court *a quo* is to place the appellant in a worse position than she would have been had the marriage continued.

There is no doubt that the financial contributions of the parties are a significant factor to be taken into account in a distribution of the matrimonial assets. Indeed, the fact that the respondent in this case chose not to squander his earnings but to invest in immovable property is most commendable. However these contributions should

be assessed in the light of the other factors outlined in s 7(4), with the object of giving effect to the legislative intent in this regard namely, to place the parties as near as practicable in the position they would have been had the marriage continued. The clear intention was to ensure that the parties are placed in that position so as to avoid unnecessary suffering or deprivation by reason of the divorce. In this regard the following remarks by GILLESPIE J in *Shenje v Shenje* 2001 (2) ZLR 160 (H) at p 163A are pertinent:

> "The task of assessing a fair division of the property can be difficult enough when appropriate evidence is led of the wealth, assets and means of the parties. It is potentially much more difficult when a party seeks to conceal his circumstances. The various suggested approaches to a division (a 'one-third rule' or a 'his, hers, theirs' approach) are rendered useless where one does not have any clear idea of what is available for distribution. This, incidentally, also shows the dangers of relying upon any such approach without due advertence to the considerations specified in the Act. For it is to s 7(4) of the Matrimonial Causes Act [*Cap 5:13*] that one must turn to identify the fundamentally correct approach to any property division order. This approach, as the section cited shows, is to endeavour:
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> "…to place the spouses and the children in the position they would have been in had a normal marriage relationship continued between the spouses."
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> This might seem to be a paradoxical objective, given that the marriage relationship will not continue and that some circumstances, such as joint property ownership or continued dependence may, but need not necessarily, be inconsistent with the newly sundered relationship. The paradox, however, disappears when one considers the corollary of the objective, which is to ensure that neither party suffers a loss or any prejudice in consequence of the divorce that can reasonably and fairly be avoided.
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> In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantages, to the extent they are not inevitable, of becoming divorced.

> The factors listed in the subsection deserve fresh comment. One might form the impression from the decisions of the courts 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 the seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps it is time to recognize that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties' needs are met than that their contributions are recouped."

Turning to the instant case, it is common cause that the parties were used to a high standard of living. The matrimonial home was situated in the up market area of Borrowdale. The appellant, by virtue of the court order, would be obliged to sell her minority shares to the respondent and the proceeds thereof would not suffice to enable her to meet the finances necessary for the purchase of a house of the standard to which she was accustomed during the subsistence of the marriage.

The respondent, on the other hand, is left with 60% of the Borrowdale house; the Letombo Park house where he lives with his present wife; 60% of the Chinhoyi house; the Winchester flats and the house in Hillside.

Had the marriage not broken down, the appellant and the children would have continued to live in the Borrowdale house. The respondent has not offered to be responsible for the provision, for the appellant and the minor children, of adequate and suitable accommodation.

In my view a fair order in the circumstances would be to allow the appellant to reside in the Borrowdale house until the children attain the age of 18 or become self-

supporting whichever occurs sooner. Thereafter, the house shall be sold to best advantage and the proceeds shall be divided between the parties having regard to the percentages awarded to each.

Accordingly, the appeal is allowed with costs.

The order of the High Court relating to the immovable assets is set aside and replaced by the following -

1. The appellant is hereby awarded:
   - 40% of the shares in Gainsland (Private) Limited.
   - 40% of house no B3465 Chikonohono Township, Chinhoyi.
2. The appellant shall have the right to reside in the Borrowdale house until the minor children attain the age of 18 or become self-supporting whichever occurs later. Thereafter, the house shall be sold and the appellant shall be awarded 40% and the respondent 60% of the proceeds thereof; or the respondent may, if he so wishes, and if the parties agree, purchase the appellant's shares therein at the prevailing market value thereof.

CHEDA JA: I agree

MALABA JA: I agree

Honey & Blankenberg, appellant's legal practitioners

F G Gijima & Associates, respondent's legal practitioners