CHARLES DUBE
vs
DOROTHY DUBE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 4 March and 24 April 2002

Mr *Mukwesha,* for plaintiff
Mr *Mwonzora*, for defendant

MAKARAU J: The plaintiff and the defendant were married in January 1986. They have two minor children namely Ashley born in January 1986 and Adele born November 1997. The marital relationship between them deteriorated to such an extent that on 13 October 1999, the plaintiff issued summons claiming a decree of divorce and other ancillary relief. The defendant disputed the ancillary relief claimed by the plaintiff while conceding that the relationship between them as husband and wife has broken down and that there is no prospect of reconciliation.

When the matter was called for a pre-trial conference before PARADZA J, the parties agreed to share the movables of the matrimonial estate in the manner fully described in paragraph 9 of the plaintiff's declaration. It was also agreed at that conference that the defendant would be awarded custody of the two minor children of the marriage. Rights of access by the non-custodian parent were later agreed upon prior to the commencement of trial. As part of this agreement, the defendant agreed not to take the minor children out of the jurisdiction of this Honourable Court without leave and to allow the plaintiff access to the minor children every alternate weekend and every half of each school holiday.

Thus, two issues remained for resolution by way of trial. These were the distribution of the immovable asset of the matrimonial estate and the contribution to be made by each parent towards the maintenance of the minor children. I shall deal with each in turn.

THE IMMOVABLE PROPERTY

The parties jointly own the flat in which they are residing with the minor children of the marriage. This constitutes the matrimonial home and the only immovable property in the matrimonial estate.

The facts of how the flat was purchased are common cause.

When the plaintiff and the defendant first established home together, the defendant was the registered tenant in respect of a flat in a block called Bamawa House in Harare. The newly weds took up residence in this flat. The lease continued to be in the maiden name of the defendant. The plaintiff was a student at the Harare Polytechnical College while the defendant was employed by a government ministry. Two years later, Aberfolye Estates purchased Bamawa House. Needless to say, the purchase of the block interfered with the occupation rights of the defendant under her lease agreement. Aberfolye Estates then sought to compensate the defendant for the interruption in her occupation rights. She was paid a certain lump sum with which she managed to purchase a vacant stand in Budiriro Township, which she registered in her sole name. The defendant then proceeded to solely develop the Budiriro stand by erecting a dwelling. When developments were completed, she leased out the property and collected the rentals.

Meanwhile, after leaving Bamawa House, the parties set up home in another leased flat in town. The plaintiff in due course completed his studies and became employed by the Posts and Telecommunications Corporation. The PTC Pension fund then offered flats to employees of the Corporation for rental. The plaintiff and the defendant took up one of the units. Later on, the Pension Fund offered the sitting tenants an option to purchase the flats. The plaintiff and the defendant jointly signed an agreement of sale in respect of the unit they were occupying. The asking price of the unit was $2, 000 000. The marital relationship between the parties was now strained but they nevertheless went into the transaction jointly.

A deposit of $500 000 was required together with transfer fees of $200 000. The plaintiff could not raise this kind of money. The defendant then sold her property in Budiriro and paid the $500 000 deposit together with the required

transfer fees. The balance of the purchase price for the flat in the sum of $1 500 000 was financed by proceeds from a loan secured by a mortgage bond passed in favour of Beverley Building Society. After the purchase of the property, the plaintiff became solely responsible for the mortgage repayments in the sum of $32 000 plus a levy in the sum of $8 000 each month.

The plaintiff's case is that the property be sold to best advantage and that the proceeds be shared equally between the parties.

The defendant on the other hand denies that the plaintiff is entitled to 50% of the net value of the property. Her case proceeded thus: it is not in dispute that she contributed the entire amount of the deposit and transfer fees amounting to $700 000. It is also not in dispute that the total contributed by the plaintiff by way of monthly mortgage and levy repayments to the date of trial is approximately $162 750. She has thus contributed more than the plaintiff to date and by applying simple arithmetic calculations, she should be awarded 80% of the net proceeds from the sale of the flat while the plaintiff is awarded the remaining 20%. It was argued on her behalf that if the defendant does not get the higher award in recognition of her efforts, this would discourage other women from contributing positively towards the acquisition of matrimonial assets.

I greatly sympathise with the position that the defendant finds herself in. She disposed of a personal property to jointly acquire one with the defendant. She is nursing a feeling of having lost out in the process. She asks the court to acknowledge the personal sacrifice she made towards the acquisition of the jointly owned property.

I do however, have some sense of disquiet over the approach that the defendant has taken in seeking to distribute the proceeds from the disposal of the matrimonial property. I have been urged to calculate her direct contributions towards the purchase of the matrimonial home and compare these with the defendant's before converting the two into ratios by which I should then award shares in the property. My disquiet arises from the fact that this very approach was criticised by McNALLY JA

in *Takafuma v Takafuma*.[1] The court a quo had followed this same approach in awarding Mrs Takafuma one-fiftieth of the value of one of the properties. This is what McNALLY JA had to say:

> "*The learned judge relied on the provisions of s7 (1) of the Matrimonial Causes Act 33 of 1985 and assessed her contributions towards the purchase of the Vainona property at one half of one twenty-fifth of the value of the house, or one fiftieth of $450 000 which was the agreed value of the house. This led to his award to her of $9000, as earlier indicated.*
>
> *It seems to me, with respect, that that approach is fundamentally flawed, because it does not take account of the fact that she was (and is) the registered owner of an undivided half share in the Vainona property.*
>
> *The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] is not a mere matter of form. Nor is it simply a device to confound creditors or tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered.*"

With respect, the same flaw appears in the defendant's argument.

The proper approach to adopt in cases where the divorcing spouses are joint registered owners of the matrimonial property was laid out by KOSAH J in *Ncube v Ncube*.[2] In setting out the approach that has become the approach of our courts in dealing with such properties, KOSAH JA had this to say:

> "*It is incorrect to say that the appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money's worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property.*
>
> *The proper approach is to accord her share of that property and then, taking into account all the assets of both spouses, to endeavour, as far as is reasonable and practicable and just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered in the exercise of its discretion to order that any asset be transferred from one spouse to the other.*"

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[1] 1994 (2) ZLR 103 (S), 105.
[2] 1993 (1) ZLR 39 (S).

As McNALLY JA put it in *Takafuma v Takafuma (supra)*, the question to ask in distributing property jointly owned is not how much shall I give him or her but rather how much shall I take away from her or him. The starting point is to regard each as having an equal share in the property. This, to me, represents the settled position in our law regarding property that is jointly by the divorcing spouses.

I now turn tot he facts of this matter and ask myself, should I take anything away from the one half share that is the plaintiff's by operation of law and if so, how much should I take away?

In my view, section 7 of the Matrimonial Causes Act [*Chapter 5.13*] enjoins me to endeavour as far as is reasonable and practicable, and having regard to their conduct, is just to do so, to place the parties and children in the position they would have been in had a normal marriage relationship continued between them. On the evidence led before me, I have not been persuaded that, in taking away from the one half share that legally is the plaintiff's, I will be meeting the requirements of the law.

MAINTENANCE

The defendant is praying that the plaintiff be ordered to contribute towards the maintenance of the two minor children at the rate of $86 000 per month.

Before I proceed, I need to dispose of one trifling issue. This relates to the somewhat puzzling position taken by the defendant. She prays that the plaintiff be ordered to solely contributes to the maintenance of the minor children. I say puzzling because it has been a settled position in our law that both parents have the duty to contribute to the reasonable maintenance of their children, each according to his or her means. This duty obtains even under customary law where due to the stricter observance of the extended patriarchal system of socialisation and the totem culture, children are regarded as belonging to the father's family. Mothers under customary law are still required to contribute towards the maintenance of minor children who do not bear their totems.

The two minor children's monthly expenses are given as $86 500. Included in this figure is the sum of $21 700 representing accommodation. This figure was based on the assumption that the defendant would be granted the matrimonial home against an order that she pay out to the defendant a sum representing 20% of the value of the flat. The figure claimed for monthly maintenance also includes the sums of $6 000 for medical aid and $2000 for a funeral policy. The plaintiff has indicated that he the minor children covered under his medical aid scheme that provides adequate cover. He has also indicated that he has a funeral policy that not only covers the minor children but the defendant as well. These claims by the plaintiff have not been challenged and I shall accept them as true. The rest of the monthly needs appear reasonable and I will accept them.

The total needs per month for the two minor children amounts to some $57 800. It appears fair and equitable to me that the plaintiff contributes the sum of $40 000 per month while the defendant contributes the remainder. In arriving at the above figure I have taken into account that the plaintiff earns more than the defendant although the figure of his real income is in dispute. For the purposes of this maintenance inquiry I have taken into account that in addition to his salary from Royal financial Holdings, the plaintiff has some other income in the form of drawings from Packet Stream Communications (Private) Limited. I am aware that in his evidence, the plaintiff hotly disputed this alleged additional income. Although it was clearly within his means to do so, he did not lead any evidence to show that he is no longer in receipt of drawings from this company. He was in receipt of additional income from this company at one stage. The letter written to Beverley Building Society on July 5 2001 by G A Campbell, one of his co-directors evidences this.

I have also taken into account that the plaintiff will meet the medical aid contributions of the minor children and funeral policy contributions as an additional expense of $8 000 per month.

Accordingly, I make the following order:

1. The matrimonial home is to be evaluated within 30 days from the date of this order by a reputable estate agency agreed upon by the parties or their legal

practitioners and failing, such agreement, by an estate agent nominated by the Registrar of this court;

2. The cost of the evaluation of the property is to be borne by both parties in equal shares;

3. The defendant is hereby granted leave to, within 90 days of the date of evaluation, make payment to the plaintiff of, or satisfactorily secure payment of such amount as represents one half share of the net value of the property against transfer of one half share of the property to her.

4. Failing the provisions of 3 above, the property is to be sold to best advantage and the net proceeds therefrom to be shared equally between the parties.

5. During the period running from the date of this order to the date of sale or transfer of the property (whichever occurs sooner), the plaintiff shall be solely responsible for the payment of the mortgage bond repayments and levies due in respect of the property.

6. The plaintiff shall contribute the sum of $40 000 per month towards the maintenance of the minor children until each child attains the age of majority or becomes self-supporting whichever occurs sooner.

7. The maintenance order in 6 above shall become effective on the first day of the month following the date upon which the plaintiff stops being responsible for the mortgage bond repayments and levies in respect of the property as outlined in 5 above.

8. Each party shall bear his or her own costs.

Mtombeni & Associates, plaintiff's legal practitioners.
Mwonzora & Associates, defendant's legal practitioners.