ROSE SEHLISELO SITHOLE (nee Mpofu)
versus
JOHN SHADRECK MATHONGONYAMA SITHOLE

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 14,20,21 and 28 April, 2005 and 28 September 2005

Divorce Action

Mr *Warara* for the plaintiff
The defendant in person

KUDYA J: The parties were married at Bulawayo on 14 June 1969.[1] They were blessed with 5 children, all of whom were majors by the time the matter was heard.

At the pre-trial conference held on 11 February 2005, the sole issue for determination revolved on the distribution of the immovable property, being Stand 707 Mabelreign Township but commonly known as 3-40th Avenue Haig Park Mabelreign, Harare.

The plaintiff instituted divorce proceedings on 9 September 2002. It is common cause between the parties that the marriage relationship has irreitrivably broken down to such an extent that there are no reasonable prospects of the restoration of a normal marriage relationship between them.

The plaintiff was the sole witness in her case. In addition, she however produced 6 documentary exhibits. Likewise the defendant was the sole witness and he produced 5 documentary exhibits.

THE BREAKDOWN

The long and short of the plaintiff's evidence on the breakdown of the marriage was that the defendant was physically and verbally violent towards her and the children of the marriage, was unfaithful to her and in the process sired a child with another woman during the subsistence of the marriage and in addition, drunk alcohol in excess. She laid the blame for the failure and breakdown of the marriage on the defendant.

In her detailed testimony, it emerged that in 1970 she fell pregnant and abandoned training as a nurse at Mpilo Hospital, Bulawayo while in the second year of her studies. She became a full-time housewife. In 1976, the defendant, who was a policeman, was transferred to Harare. It was in Harare that the incidents which eventually led to the failure of their marriage started, grew and flowered.

[1] Marriage Certificate - Exhibit '1'

She related how in 1985 he battered her. She was hospitalised. On discharge she went and sought refuge with a cousin in Warren Park, before proceeding to Bulawayo. The two reconciled. In 1986 she joined the Ministry of Education, Sport and Culture. By then, the defendant always came home, in the early hours of the morning, dead drunk. If she delayed in unlocking the door for him, he responded by battering her. He broke one of her fingers and ruptured both her eardrums. She instituted divorce proceedings, which she later withdrew.

In 1993, because of his persistent conduct, their first son, who was then in his fourth year of study at the University of Zimbabwe, poured hot porridge on the defendant as the defendant was asleep in bed. He did this to avenge the ill-treatment the defendant was subjecting her to. The defendant received 20% burns which are scary to look at. These burns are captured in the photographs produced as Exhibits 6, 7, 8 and 9. The defendant was hospitalised for 31 days. On one of these days, when he was on his way to recovery, he used a knob-kerrie (the defendant said it was a walking stick) to bash her on the head. She was then hospitalised in the same hospital, but in different wards, for19 days. The defendant was not permitted to visit her. On her discharge from hospital, she left the matrimonial home and never returned. There was then an existing peace order against him which she obtained in 1993.

It was her evidence that she has not shared board or bed with the defendant since 1993. All attempts to reconcile them, by his relatives and members of her church, failed. From her detailed testimony, which the defendant did not challenge, notwithstanding the exhortations by the court to do so, it was clear that her marriage was brutal, unenjoyable and a veritable living hell for her and their children.

In his testimony, the defendant confirmed that the plaintiff often left the matrimonial home and went to Bulawayo to live with her brother many a time during the 24 years they lived together before she left for good in 1993. He stated that in 1978,the year he joined Art Corporation from the police, she sued him for divorce. In 1983 she again left him and sued for divorce. She did the same in 1985 and 1993. He thus confirmed her testimony that all was not well in their marriage. He also confirmed how he was burnt by their son with hot porridge. He, however, alleged that it was with her connivance, even though he only reported his son as the assailant, to the police. He admitted that he assaulted his wife with a walking stick in 1993 while in hospital but averred that it was only because his son evaded the blow which accidentally landed on the plaintiff.

He confirmed that after plaintiff left him in 1993 he moved in with a certain woman whom he impregnated in 1995 resulting in the birth of a son in 1996. He is presently living-in an

adulterous relationship with her at her flat, where he moved in, in 2002. He was convicted and sentenced to pay a fine of $200.00 at the Harare Magistrates Court in 1994 for the assault on the plaintiff which occurred in hospital.

It was clear to me that the defendant was not disputing the basic details outlined by the plaintiff in her testimony as to the manner he treated her during the time they lived together. He however sought, unsuccessfully in my view, to deflect his wrongful conduct by seeking to blame the plaintiff for his own actions. On the evidence before me it is clear that the conduct of the defendant throughout marriage led to its breakdown. He never did challenge the plaintiff's testimony when he had the opportunity to do so.

I am satisfied that the marriage relationship between them has irretrievably broken down to such an extent that there are no reasonable prospects of the restoration of a normal marriage relationship between them.

DISTRIBUTION OF THE IMMOVABLE PROPERTY, BEING STAND 707 MABELREIGN TOWNSHIP

The bulk of the testimony of the parties centred on the distribution of the immovable property which remains the only asset in the matrimonial estate.

The immovable property in question is registered in the defendasnt's name. The presumption therefore is that it is his property.[2]

The plaintiff in her declaration *seeks inter alia*

9 "In the event of the decree of divorce being granted, it would be just and equitable for the remaining matrimonial property being number 3-40th Avenue Haig Park to be sold and the proceeds shared equally between the parties or if the property has been sold by the defendant, then the defendant be ordered to pay the plaintiff 50% of the proceeds of the house."

The onus is on the plaintiff to show, on a balance of probabilities, that she is entitled to a 50% share of the immovable property. This is especially, so in this case, where the defendant alleged in his plea that:

"3 Paragraph 7 and 8

This is admitted, save to state that all the immovable property has been disposed of and the proceeds used, save for the sum mentioned in case HC 6943/02 which amount is being held in Trust by the plaintiff's legal practitioners pending the finalization of this matter. It is just and equitable that the plaintiff be awarded one fifth of that amount and the defendant four fifths"

Paragraph 7 of the plaintiff's declaration which the defendant admitted to read:

[2] *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 106G

"7 During the subsistence of the marriage the parties acquired the following immovable property:

7.1 A house at Stand 707 Mabelreign Township also called 3-40th Avenue Haig Park, which is the matrimonial home.

7.2 A house in Zengeza, Chitungwiza which was sold by the defendant.

7.3 A butchery which was also disposed of."

THE ANALYSIS OF PLAINTIFF AND DEFENDANTS RESPECTIVE TESTIMONIES ON DISTRIBUTION OF THE IMMOVABLE PROPERTY

The plaintiff started at the beginning and gave detailed evidence. She stated that from 1969 until 1978, she was a fulltime housewife. When her husband left the police force for Art Corporation they operated a record bar and a butchery in Chitungwiza. As he was in fulltime employment, she was the one who operated the record bar and butchery. She received neither a salary nor pocket money. When she requested for these from the defendant, the answer he proffered was that these enterprises were for their mutual benefit. Her labour for feathering the family nest thus went unrewarded. At that time, the defendant was an Asset Controller at Art Corporation, and these enterprises which were opened by his capital, were each month bringing in more income into the home than was his salary. She produced Exhibit '2', a CABS Savings Passbook Account Number 01-330211-8, in the joint name of Mr and Mrs John and Rose Sithole, which was opened on 1st September 1978 and closed on 13 February 1985.

It was her undisputed testimony that she religiously banked the proceeds of these operations into the joint bank account while the defendant was the one who withdrew the deposits to use for the benefit of their nucleus family. She averred that it was in furtherance of this main objective that on 24 December, 1980 he withdrew $1000.00 ostensibly to pay for the deposit of the immovable property that they were going to purchase. She, however, agreed with the defendant that they only viewed this property in July 1981 and a deposit of $1 500.00 was made for it in August 1981, when a mortgage bond was obtained.

I agree with the contention by the defendant that this $1 000.00 could not have been used for the deposit of the immovable property, the Mabelreign property in question, as this property was only viewed some 7 months later. A major withdrawal of $2 500.00 was, however, made from the joint account on 10 July 1981. It was clear to me, however, that the point the plaintiff was too eager to make was that the defendant, as the sole withdrawer of funds, must have used part of the funds in the joint account to make part payment for the Mabelreign property.

THE BUTCHERY

She further alleged that the butchery was in her name. When she left the defendant in 1985, in her absence, he sold the butchery and its equipment. She did not know what he used the proceeds from the sale for. In his plea, the defendant admitted that he sold the butchery and its equipment. He confirmed this in his evidence in chief and under cross-examination. He however stated that as he was then still married to and living with the plaintiff he ploughed the proceeds into the daily grime of looking after the family. To my mind his explanation was an eminently reasonable one and therefore acceptable.

THE TWO CHITUNGWIZA IMMOVABLE PROPERTIES

It was common cause that in 1977, and in Chitungwiza, the parties were allocated number 4 Bise Crescent in Zengeza 1 on a home ownership scheme. According to the defendant it was a core house which could not accommodate all the property which the family had by then accumulated. They were permitted by the relevant Municipality to rent from it number 4730 Unit 'C', Seke. The plaintiff alleged that these were both their properties which the defendant disposed of to Mr Makoni, who had been a police officer together with the defendant and Mr Paleni, a friend of the defendant's brother. She did not know the modalities pertaining to the disposal of these two houses, but firmly believed that he sold them for his sole benefit.

The defendant explained that in 1984/85 the Chitungwiza Municipality wrote to him advising him that they were selling the two Chitungwiza houses to sitting tenants as he owned 3 houses contrary to the prevailing municipality policy. He alleged that notwithstanding that he had paid 50% of the $50 000 cash for the Zengeza house he lost out completely. Mr Makoni had promised to repay him the 50% share from the net proceeds of an anticipated sale of the property, after it basically became Mr Makoni's property. He alleged that he also lost out on the Seke property to Paleni who went to the United States of America. He did not know what he did with the property.

He could not produce the letter in question. He seemed to have forgotten that in his pleas he admitted to selling the Zengeza property. After all it was a homeownership scheme. It made sense that he would dispose of his rights and interest in it. He even attempted to mislead the court that the two eventual beneficiaries of these 2 properties were relatives of the plaintiff. It seems to me that the plaintiff 's contentions that the defendant was the sole beneficiary from the proceeds of these two properties was borne out by his failed attempts to mislead the court that he derived no benefit from them. I make the finding that he was the sole beneficiary from the disposal of these two properties.

THE MOVABLES

It was common cause that she has been away from the Mabelreign property since 1993 and has never been back ever since. She only took 1 knitting machine, I sewing machine, 3 dresses and a blanket from the matrimonial home when she left. She has resided in a flat belonging to their son, situated in the avenues in Harare.

In 2002, it was common cause, the defendant disposed of all the immovables he listed in Exhibit 3. He listed this property as part of his plea for the 1994 aborted divorce action between the parties instituted by the plaintiff in case HC 844/94. He also admitted in evidence that he disposed of all the immovables listed by the plaintiff in Exhibit 4, inclusive of household effects and goods in the kitchen, dining room, sitting room, main bedroom, two washing machines and all the garden tools.

The defendant took the attitude that since the plaintiff did not show interest in the immovables for a period of 9 years, he could dispose of them because he had nowhere to keep them. He alleged that he sold them in 2002 for $190 000. He accepts that, that he was the sole beneficiary from this sale.

The court does not accept the replacement values given by the plaintiff in an addendum to Exhibit 4, as they were produced through the backdoor. In any event, the values represent new property and not the values of the property sold in the state in which it was in at the time of the sale. All Exhibit '4' demonstrates is that the defendant was the sole beneficiary of all the matrimonial movables acquired by the parties during the 24 years that they lived together. These included a Mazda 323, a Datsun 1500 and a Peugeot 404.

THE MABEREIGN PROPERTY

It was common cause that the property is registered in the defendant's name. A deposit of $1 500 was paid for this property in August 1981. The monthly mortgage repayments were paid for by the defendant without fail from then until he paid it off from the proceeds of his pension with Old Mutual as reflected in Exhibit '10' dated 4 February 1994. He paid off the remaining balance of $9 722.00. The title deeds were then released to him.

From 1981 the defendant was paying monthly instalments of approximately $108 and by the time he paid off the mortgage in 1994, the instalments had increased to $135 per month. The defendant thus made out that he paid out ($1 500- deposit + $17 700 interest + $9 722.00 final) $27 422.00. Initially he alleged that as the plaintiff was his wife, who washed for him, cleaned for him and fed him and his children, she had made some contribution worth of recognition.

Plaintiff's claim

She claimed 50% of the current market value of the Mabelreign property. She based her contributions to the purchase of the property on the initial deposit which she maintained was from the proceeds of the record bar and butchery. The defendant disputed this averment. Further she maintained that even though the defendant had the instalments deducted from his salary, by stop order, every month she too was contributing to the family income and upkeep after 1985 from her activities in the family business, the proceeds from the sale of the butchery and by way of her salary when she joined the Ministry of Education from 15 July 1986 until her retirement on 30 April 2004. She stated, convincingly, that she could afford to pay the mortgage repayments too, but it had to be done by one person, the defendant. Her income however went into satisfying the family's daily needs.

She further contented that the pension emoluments the defendant used to pay off the house were earned during the time they were still living together. His pension fell therefore into the category of family income, which would have been used by the family where they still together under one roof.

In addition, she submitted that the defendant benefitted from the disposal to his own account of all the movable and immovable assets they acquired over the 24 years they were under the same roof; except for the sewing and knitting machines, a blanket and 3 dresses she salvaged from the matrimonial house when she left for good in 1993.

She prayed for a half share of the Mabelreign house at current market prices as her just and equitable entitlement in the divorce.

The defendant's position

He accepts that she must be awarded a portion of the Mabelreign property. Initially he took the view that they purchased the property for $13 000. He paid out $9 722.00 from his pension proceeds commuted for that purpose. In his calculation it represented 70% of the total cost. He contented that because the plaintiff had made some undeterminable contribution, she was entitled to one-half share of the remaining 30%, which he paid for the purchase of the house when they were still living together. He said, in his view, she was entitled to 15% of the value of the immovable property, but however out of the magnanimity of his big heart arising from his recognition of the part that she played as his wife and mother to his children he was prepared to give her 25% of the value of the Mabelreign house.

Under cross-examination, he conceded that the total cost to him of the Mabelreign property was approximately $27 422. He further agreed that by his own argument the plaintiff contributed half of $27 422 less $9 722-) which would increase her contribution to 32%.

In the final analysis, the logical outcome of the defendant's contention seems to me to be an acceptance that the plaintiff contributed 50% to the purchase of the Mabelreign property. I say so because he is the one who introduced the principle of 50% when he used the formula he supplied in arriving at her share as one of 15%. He contented that she was entitled to one-half of what he paid for the immovable property.

It seems to me however, that the proceeds of the pension were earned at the time the plaintiff and the defendant were still residing together. In their contemplation, they were both going to benefit as a unit from the pension fund at the defendant's retirement.

THE LAW

The Matrimonial Causes Act[3] sets out in section 7(4) the considerations a court must take in dividing matrimonial assets between the parties on divorce. There is no mathematical formula, which can be used with exactitude, expressed in those provisions. They all are based on the presiding judge's value judgment and his appreciation of the particular facts laid before him.

I adopt the approach taken by KORSAH JA, as he then was, in *Ncube v Ncube*[4] that is it is not necessary to "resurrect the old spectre of guilt or innocence" and to use these to determine whose conduct was responsible for the breakdown with a view to use the answer to punish the guilty one in the distribution of assets. I will not apportion blame and use the result to distribute the asset at hand[5]. I will only use the facts presented by the parties to try

[3] [*Chapter 5:13*]
[4] 1993 (1) ZLR 39 at 41B-42D
[5] *Takafuma vs Takafuma (supra)* at 106E-F

and place the parties in a position that they would have been in had the marriage relationship continued as contemplated by them when they contracted it.

In my view, had the marriage relationship continued, the two parties would have in both their minds continued to refer to the Mabelreign property as their joint family home, notwithstanding that it was registered in the defendant's name. They were both contributing equally, the defendant initially through the provision of capital and the plaintiff through her labour and managerial apptitude, and later, both through their respective incomes from their respective jobs. In any event I cannot ignore the formula devised by the defendant which he however wanted to use to undercut the plaintiff's contribution. In the end he unwittingly recognised that she contributed in equal shares with him in the purchase and upkeep of the matrimonial property. I cannot further ignore the fact that the defendant was the sole beneficiary of the two Chitungwiza houses, and the bulk of the movables. Further, he acted out of bad faith in his attempt to dispose of the Mabelreign property, the only asset which remains in the matrimonial estate.

The cumulative effect of these considerations lead me but to one conclusion, and it is that the plaintiff has shown on a balance of probabilities that she is entitled to receive 50% of the value of the Mabelreign immovable property.

50% OF WHICH VALUE, OF THE PURPORTED SALE OR CURRENT MARKET VALUE ON DISPOSAL OF THE PROPERTY BY ORDER OF COURT

The plaintiff seeks that the house be sold through the order of this court and the proceeds be shared equally between the two parties.

Mr *Warara* for the plaintiff taking a cue from the plaintiff's oral evidence abandoned the alternative prayer in the declaration in his oral submissions. The defendant on the other hand submitted that as he had already sold the house to an innocent third party and used the bulk of the proceeds, he did not wish to prejudice the purchaser who is presently residing in the Mabelreign property and has been doing so since 2002. He produced the agreement of sale in question as Exhibit "11"

The plaintiff asserts that the property has two caveats, one registered in 1985 and another in contemplation of the present divorce action. It was submitted by Mr *Warara,* with force, that the very purpose for the existence of the Deeds Registry is to assist purchasers from being duped into buying immovable property for which title cannot be passed if only they check with the Deeds Registry before parting with their cash. The alleged purchaser permitted the defendant access to the purchase price before transfer had been effected.

In the event, it turns out that when the defendant purportedly sold the Mabelreign property, the caveats were in existence and the property could not be transferred. I am left

with the impression that the defendant hastily attempted to sell the property to defeat the plaintiff's claim to a half share in the property.

It seems to me that both the defendant and the purported purchaser acted in bad faith[6]. The purchaser cannot reasonably possibly have been ignorant of the caveat. Indeed the property has not been transferred only because the two caveats have not yet been uplifted. The purported sale cannot therefore affect the plain tiff's rights in the Mabelreign property.

It is therefore my view that the 50% share to the plaintiff is based on the value of the property from the evaluation arising from the order that I will make.

COSTS

In view of the behaviour of the defendant in disposing of the immovable properties to his own advantage and his attempt to cheat the plaintiff of her share in the remaining immovable property, I believe that this is a proper case for mulcting him with costs of suit.

CONCLUSION

In the premises,

IT IS ORDERED THAT:

1. A decree of divorce be and is hereby granted.

2. The plaintiff is awarded 50% of the net value of stand 707 Mabelreign Township, commonly known as 3-40th Avenue Haig Park Harare.

    2.1 That the parties or their legal practitioners by consent appoint an evaluator within 14 days of this order.

    2.2 In the event that the parties fail to agree on such appointment within the period stated in 2.1 above, then within 7 days of such failure, the Sheriff shall from his list of evaluators appoint an evaluator

    2.3 The evaluator appointed either in terms of clause 2.1 or 2.2 above shall evaluate and submit his report to the parties or the Sheriff within 14 days from his date of appointment.

    2.4 The costs of such evaluation are to be shared equally between the parties.

[6] *Maganga vs Sakupwnya* 1996(1) ZLR 217(S)

2.5 The defendant shall make payment to the plaintiff within 60 days of the evaluation of such amount as represents one half share of the net value of the property.

4. The defendant shall pay the plaintiff's costs of suit.

Warara & Associates, legal practitioners for the plaintiff.