DISTRIBUTABLE (28)

Judgment No. SC 32/03
Civil Appeal No. 362/02

CHARLES MUNHENGA v MARTHA MUNHENGA

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, JULY 24 & NOVEMBER 6, 2003

L Mazonde, for the appellant

N S B Nyamusamba, for the respondent

GWAUNZA JA: This is an appeal against an order of the High Court by which, in addition to a decree of divorce being issued, the respondent was awarded all the parties' movable property as well as 35% of the market value of the parties' matrimonial home. The property, according to the order, was, for the purpose of assessing its value, to be evaluated by an evaluator agreed upon by the parties or, failing such agreement, by an evaluator selected from the Sheriff of Zimbabwe's panel of evaluators.

At the appeal hearing, the appellant abandoned the part of the appeal relating to the movable property, leaving only one issue for determination, that is, the apportionment of the parties' immovable property.

The following is common cause. The parties started living together around 1990 and then contracted a civil marriage in 1991. In 1980, before these

events happened, the appellant had acquired a residential stand in Harare and proceeded to build, firstly, a slab for a seven-roomed house, and thereafter a four-roomed dwelling. An additional three rooms were added to this dwelling after the parties' marriage. The respondent, who was gainfully employed as a State registered nurse, contributed not only to the construction of these three rooms but also to the plastering, electrification and security walling of the entire property. She also bought a security gate which, however, she took with her when the parties separated in April 2001.

In the court *a quo* the appellant initially claimed the immovable property as his sole property, but later indicated he would offer the respondent 10% of its value. His contention was (a) that the property was acquired before his marriage to the respondent and did not form part of the matrimonial assets; (b) that such property was registered in his name alone; and (c) that, in any case, whatever direct or indirect contribution the respondent had made was directed only towards the three rooms added to the property. He conceded she had paid for the "durawall" and security gate. The respondent, for her part, counter-claimed for 50% of the value of the property in question.

The learned judge *a quo* was satisfied, given the parties' earning capacity and the various contributions made to the matrimonial estate, that each party had contributed equally insofar as their respective resources permitted. The learned judge noted as follows at p 6 of the judgment:

> "Although the plaintiff attempted to paint himself as a man of substantial means and the defendant's contribution to have been minor, the evidence before me points at meaningful and substantial contributions by the defendant,

> and that without her contribution the plaintiff may well not have achieved the status he did. At one stage during the course of his evidence-in-chief the plaintiff actually confessed that neither of them earned more than the other as his pay was dependent upon the amount of money his co-operative would have earned in any given month and that at times he would earn more and at other times she would earn more."

In awarding the disputed 35% share in the matrimonial home to the respondent, the learned trial judge also took into consideration the following factors -

(i) the construction of the three rooms and development of the whole property in general, and the respondent's contribution thereto;

(ii) that the respondent, as the custodian parent, would need to accommodate herself and the children elsewhere; and

(iii) that the appellant, on the other hand, had since the parties' separation remained in, and alone enjoyed the full benefit of, the matrimonial home.

The appellant asserts that the respondent's contribution was only in respect of the additional three rooms and that, therefore, to award her a 35% share of the whole house is "unfair, inequitable and tantamount to allowing her to reap where she did not sow".

Mr *Mazonde*, for the appellant, correctly submits that s 7 of the Matrimonial Causes Act [*Chapter 5:13*] enjoins the court to "endeavour as far as is reasonable to place the parties and the children (my emphasis) in the same position they would have been had a normal marriage relationship existed between them".

This provision directs the relevant court's attention to the needs of not just the divorcing couple but their children as well.

In casu, the respondent was given custody of the three minor children of the marriage. She and the children moved away from the matrimonial home and have since that time lived in rented accommodation. The appellant was, on the other hand, left in residence and later rented the property out, a circumstance that enabled him to earn an income which it is not disputed he did not share with his estranged family.

It is submitted for the respondent that she hoped to apply her share of the value of the matrimonial home towards the acquisition of accommodation that would enable her and the children to continue living as nearly as possible according to the standard they had been accustomed to.

It is difficult to fault the respondent's intention in this respect.

The respondent has shown, as the appellant has conceded, that her contribution to the development of the matrimonial home was not insignificant. If this fact, as it must *in casu*, is considered together with the children's entitlement to a life as close as possible to the one they were accustomed to before their parents' separation, there is little doubt that an award to the custodian parent, i.e. the respondent, of 10% of the value of the matrimonial home would be manifestly inadequate.

Given these two major considerations, i.e. the respondent's contribution and the children's entitlement to a comparable standard of life, I do not find that an award of 35% is, to use the appellant's words "on the high side". To the contrary, I am satisfied that such an award adequately meets the justice of this case.

One other matter merits consideration. The appellant contends that because the property in question was acquired before his marriage to the respondent, it does not form part of the matrimonial estate and should be excluded from the division. This argument, I find, ignores two important factors.

Firstly, while the land, slab and four rooms were acquired and built before the marriage, the addition of three rooms, the plastering of the whole house, the electrification and security walling were all effected after the marriage and with the not insignificant contribution of the respondent. The property that the appellant acquired before his marriage to the respondent had therefore, by the time the marriage came to an end, appreciated considerably, and in a permanent way, in value. An award that ignores the respondent's contribution in this respect would result in the appellant enjoying an unfair material advantage over the respondent.

Secondly, the issue of the property having been acquired before the parties' marriage is not relevant to the consideration of the children's entitlement to a life as close as possible to the one they were accustomed to, as required by s 7 of the Matrimonial Causes Act. *In casu*, apart from maintenance, this entitlement translates

to an award to the custodian parent of an appropriate share in the net value of the matrimonial home.

Taken together, I find these considerations serve to fortify the finding already made, that an award of 35% of the net value of the property in question is fair and just under the circumstances of this case. I am satisfied the learned trial judge properly exercised her discretion when she arrived at this percentage.

The appeal must, therefore, fail. In the premises, it is ordered as follows –

"The appeal is dismissed with costs".

SANDURA JA: I agree.

MALABA JA: I agree.

Musunga & Associates, appellant's legal practitioners

Gula-Ndebele & Partners, respondent's legal practitioners