REPORTABLE ZLR (5)

Judgment No. 15/09
Civil Appeal No. 68/06

MASIYIWA CLEOPAS GONYE v STELLA MARIS GONYE

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, MARCH 25, 2008 & APRIL 2, 2009

*O Takaindisa*, for the appellant
*J R Tsivama*, for the respondent

MALABA JA: This is an appeal against part of the judgment given by the High Court on 22 February 2006 in an action for a decree of divorce and ancillary relief commenced by the appellant against the respondent. The question for determination is whether in making the order with regard to the division, apportionment or distribution of the assets of the spouses, the court *a quo* failed to judicially exercise the discretion conferred upon it under s 7(1) of the Matrimonial Causes Act [*Cap. 5:13*]("the Act") as alleged in the grounds of appeal.

The marriage which was dissolved by the court *a quo* on 22 February 2006 had been solemnized by the parties on 20 May 1972 in terms of the African Marriages Act [*Cap. 238*] (now the Customary Marriages Act [*Cap. 5:07*]). It was a potentially polygamous marriage relationship. For a period of thirty-five years the parties enjoyed a happy marriage relationship which was blessed with four children, two girls

and two boys. The children are all adults. In 2002 irreconcilable differences developed between the parties leading to a voluntary separation on 7 October.

On 13 April 2004 the appellant, who had taken another wife, issued out of the High Court summons commencing action in which he claimed against the respondent a decree of divorce and the division of the assets in the manner he considered would be just and equitable. The respondent conceded that the marriage relationship had irretrievably broken down. She claimed the division of the assets in the manner she too considered would be just and equitable. She also claimed periodical payment of maintenance at the rate of $2 000 000.00 per month until she died or re-married.

At the end of the trial the court *a quo* made an Order in the following terms:

> "1. That a decree of divorce be and is hereby granted in terms of the plaintiff's claim;
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> 2. That the defendant be awarded all the household movable assets except the Imperial upright freezer and a washing machine which are awarded to the plaintiff.
>
> 3. That the defendant be awarded:
>
> (a) 25% of the value of the Mazda 626 and No. 12 Lomagundi Road which shall be valued by a valuer from the Master's Office's list of valuers.
>
> (b) That the defendant be awarded 25% of the value of the Domboshava House.
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> 4. That the farm (Wonder Valley Farm), the farm equipment, farm movables including the herd of cattle be shared at the rate of 70% for the plaintiff and 30% for the defendant.

5. That the defendant is awarded 25% of the value of Wonder Valley (Pvt) Ltd.

6. That the value of the assets to be shared under 3(b), 4 & 5 shall be obtained by adding the plaintiff's and the defendant's valuation and dividing that figure by two.

7. That the plaintiff shall maintain the defendant at the rate of $2 000 000 per month until she dies or re-marries.

8. That the plaintiff is granted the option to buy out the defendant in respect of Orders 3, 4 and 5 by not later than the 30th of July 2006.

9. That the plaintiff shall pay the defendant's costs."

The appeal was noted against the orders in paras 3, 4, 5 and 7. At the hearing of the appeal Mr *Takaindisa* indicated that the appellant was abandoning the appeal against the orders in para 4 and 5. He also said that he was unable to point to any misdirection on the part of the learned Judge to support the ground of appeal against the order awarding the respondent periodical payments of maintenance in the sum of $2 000 000.00 per month until she died or re-married.

In arriving at the decision to order periodical payments of maintenance in the amount fixed, the court *a quo* exercised a broad discretion. For this Court to interfere with the exercise of discretion by the court *a quo*, it had to be shown that one of the grounds upon which an appellate court may interfere with the exercise of discretion by a trial court existed.

In *Barros & Anor v Chimphonda* 1999(1) ZLR 58(S) GUBBAY CJ at 62G-63A said:

> "These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court."

As the court *a quo* was not shown to have made any of the errors referred to in the *Barros* case *supra*, this court has no ground on which it can interfere with the determination of the question of the liability of the appellant to make periodical payments of maintenance to the respondent until she died or re-married.

The order in para 3 directing the appellant to pay the respondent 25% of the value of the Mazda 626 registration No. 843-703S and 25% of the value of Domboshava House was appealed against on the ground that the learned Judge misdirected himself in treating these assets as "matrimonial property". The contention was that the appellant acquired the motor vehicle and completed the construction of the house long after the parties had separated. The same argument was advanced in respect of Stand No. 12 Lomagundi Road, Mount Pleasant. It was argued further that the immovable property was registered in the name of a third party. The effect of the contention was that the court in the exercise of the broad discretion conferred on it under s 7(1) of the Act should not have granted the respondent the right to a portion of the value of property purchased by the appellant when the parties were on separation.

The Mazda 626 motor vehicle was, indeed, purchased by the appellant and registered in his name in 2003. He completed the construction of the Domboshava House in 2004. The construction commenced when the parties were still living together. The intention had been to use the house as a matrimonial home whenever they visited the communal area. Stand No. 12 Lomagundi Road, Mount Pleasant was purchased in July 2004. He registered the property in the name of his new wife.

It was also common cause at the trial that in 1994 the appellant formed a company called Wonder Valley (Pvt) Ltd ("the company"). The company had four shares of $1.00 each which the appellant allotted to the respondent, two sons and himself. The nominal shareholders did not pay for the shares. The object of the company was to carry on farming business on Wonder Valley Farm ("the farm"). The farm was owned by the appellant, so were all the equipment and implements used at the farm. The appellant took full responsibility of managing the farming business which involved growing cotton and maize. The respondent joined her husband at the farm in March 1987. She, however, did not play an active role in the management of the farming business. She looked after the matrimonial house and the children. She started a poultry project and generated income which she used as she pleased.

The respondent claimed 25% of the value of the Mazda 626 and the immovable properties on the ground that the money used to purchase the assets in question came from the proceeds of the farming operations. The contention was that the money belonged to the company in which she had an interest. She said that the appellant

had no other source of income besides the farming business. The appellant did not deny that the money he used to purchase the assets in question came from the sale of farm produce.

The learned Judge found that the money used by the appellant to purchase the Mazda 626, Stand No. 12 Lomagundi Road, Mount Pleasant and for the construction of the Domboshava house belonged to the company. On the basis that the respondent had an interest in the company he held that she was entitled to 25% of the value of each property. Whilst Mr *Takaindisa* argued that the learned judge misdirected himself in approaching the question of the apportionment of the proceeds used to purchase these assets on the basis that the respondent had a right to claim company property, he nonetheless confessed that he was unable to go so far as to contend that the resultant apportionment was in effect not just and equitable when viewed in a situation where the corporate veil has been lifted.

It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an Order with regard to 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". The rights claimed by the spouses under s 7(1) of the Act are dependent upon the exercise by the court of the broad discretion.

The terms used are the "assets of the spouses" and not "matrimonial property". It is important to bear in mind the concept used because the adoption of the concept "matrimonial property" often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are on separation should be excluded from the division, apportionment or distribution exercise. The concept "the assets of the spouses" is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.

To hold, as the court *a quo* did, that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under s 7(1) of the Act is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which the rights of the parties depend.

It must always be borne in mind that s 7(4) of the Act requires the court in making an order regarding the division, apportionment or distribution of the assets of the spouses, and therefore granting rights to one spouse over the assets of the other, to have regard to all the circumstances of the case. The object of the exercise must be to place the spouses in the position they would have been in had a normal marriage relationship continued between them. As was pointed out by LORD DENNING MR in *Watchel v Watchel* [1973] 3 ALL ER 829 at p 842:

> "In all these cases it is necessary at the end to view the situation broadly and see if the proposals meet the justice of the case."

Each case must depend on its own facts.

I accept the contention by Mr *Takaindisa* that having found that the money used to purchase the Mazda 626, Stand No. 12 Lomagundi Road, Mount Pleasant and for the construction of the Domboshava house belonged to the company, the learned Judge erred in holding that the respondent was entitled to make a claim to a share of company property. A company being a legal *persona* owns its own property. Shareholders do not own company property.

Whilst accepting the principle that company property does not belong to the shareholders and that only officials duly authorized by resolutions can claim company property from third parties, Mr *Tsivama* argued that this was a proper case where the circumstances justified the lifting of the corporate veil in order that justice could be done in the apportionment of the assets in terms of s 7(1) of the Act. In other words the court *a quo* was faced with the question whether the property rights, a proportion of the value of which was claimed by the respondent, in reality lay with the appellant or the company.

In the *Shipping Corp of India Ltd v Evdomon Corp & Anor* 1994 (1) SA 550(A) at 566C-E, quoted with approval by SANDURA JA in *Van Niekerk v Van Niekerk & Ors* 1999(1) ZLR 421(S) at 427H-428A, CORBETT CJ said:

> "It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law, occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. … I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs."

In *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973(2) RLR 261 the husband used the company to claim an eviction of his wife from a matrimonial house leased by the company. It was found that the company was a "one man company". The husband was its sole effective shareholder. The court was prepared to pierce the corporate veil to do justice to the wife. BEADLE CJ said that the husband owned the company and its mind was his.

The learned CHIEF JUSTICE went on say at p 267C-D that:

> "In the circumstances of this particular case it seems to me that the appellant company was nothing more than Veldman's alter ego, and that the appellant company possessed no greater rights to eject the respondent than Veldman himself possessed. … I propose to examine this application on the basis that it was Veldman himself who brought the application because I cannot see on the facts of this case how it can be held that the appellant company could have any greater rights than Veldman himself possessed."

Had the corporate veil not been lifted, Veldman would have succeeded in using the company to avoid the duty he owed to his wife to provide her with suitable alternative accommodation before evicting her from the matrimonial house.

In this case, the respondent did not take any active part in the administration of the affairs of the company. For all practical purposes the company was a "one-man company". The appellant was the sole active director. He used his own land, implements and labour to generate the income which he used to purchase the properties, the proportion of the values of which the respondent claimed. The three assets which belonged to him constituted the income producing assets. The share held by the respondent was not an income producing asset. In other words, there was no share capital invested by the respondent in the company which contributed to the production of the money used to purchase the properties in question.

Stripped of the corporate veil, the proceeds from the farming operations belonged to the appellant. The company was nothing more than the appellant's alter ego. It had no greater right to the money than he possessed.

The question is whether, considering all the circumstances of the case, the apportionment of the values of these assets ordered by the court *a quo* produced a just and equitable result. In other words, did the apportionment achieve the main purpose of the exercise which is to place the parties in the position they would have been in had a normal marriage relationship continued. I am proceeding on the basis that the proceeds from the farming operations belonged to the appellant and would have fallen within the category of the "assets of the spouses".

The Mazda 626 motor vehicle and the Domboshava house belonged to the appellant at the time the court *a quo* made the Order with regard to the apportionment of their values. The fact that the assets were acquired or created during the period the spouses were on separation does not put them outside the category of the "assets of the spouses". Mr *Takaindisa* properly conceded the fact that when all the circumstances of the case are taken into account the granting to the respondent of the right to 25% of the value of each of these assets was a proper exercise of discretion by the court *a quo*.

The 25% share in the proceeds from the farming operations which came into the possession of the appellant before he used it to purchase Stand No. 12 Lomagundi Road, Mount Pleasant would have been a benefit to which the respondent would have been entitled had a normal marriage relationship between the spouses continued. It is a benefit she lost as a result of the breakdown of the marriage. Section 7(4)(f) of the Act enjoins a court to have regard to the value of such a benefit. To place the spouses in the position they would have been in had a normal marriage relationship continued, it was just and equitable to award the respondent 25% of the value of Stand No. 12 Lomagundi Road, Mount Pleasant.

The real rights in the house vested in the new wife. The respondent did not claim a share in the house. She claimed an amount of money equivalent to 25% of the value of the immovable property. The claim did not affect the interests of the new wife in the property. The value of the property is necessary only for the purpose of fixing the amount of money the appellant would be obliged to pay to the respondent. Since the

respondent would have no right to enforce the order by executing against the immovable property owned by the third party, it was inappropriate for the learned Judge to give the appellant the right of option in para 8 to buy out the respondent in respect of Stand No. 12 Lomagundi Road, Mount Pleasant. The property does not belong to him.

The order in para 8 must be read as excluding any reference to Stand No. 12 Lomagundi Road, Mount Pleasant. It is also necessary to extend the time within which the option to buy out the respondent in respect of the other assets referred to in para 8 of the order may be exercised to 30 July 2009.

The appeal is otherwise dismissed with costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

*Scanlen & Holderness*, appellant's legal practitioners

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