

ELLEN O LOCK (NEE FISCHER)
versus
ALAN C.P.I. LOCK

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 27, 28 and 29 June 2016 & 27 September 2017

Civil Trial

Advocate De Boubon, for the plaintiff
D Tivadar, for the defendant

NDEWERE J: Plaintiff and defendant were married to each other on 28 March, 1998 in Macheke, Zimbabwe. Plaintiff was 23 and defendant was 35 at the time they got married.

Three children were born to the marriage, namely, Rebecca Emily Lock (born on 19 March 1999), Olivia Sophie Ingram Lock (born on 2 October, 2000) and Jeremy O Neill Lock (born on 25 November, 2002). Plaintiff had a son from a previous relationship, Richard Anthony Lock (born on 2 January, 1997), who was adopted by defendant and who is now a major, but is still attending University in the United Kingdom.

On 4 February, 2015, the plaintiff issued summons claiming a decree of divorce, custody of the minor children, maintenance of US\$1 300 per month per child, payment of all costs incurred for medical and dental treatment of the minor children and Richard, payment of all direct and indirect costs of secondary and tertiary education of the minor children and Richard and an order “for the equal division between plaintiff and defendant of their matrimonial assets in Zimbabwe, United Kingdom and elsewhere.”

In his plea filed on 28 May, 2015, the defendant, in para 6, stated thus; Ad para 8

It is agreed that the “matrimonial estate” be divided equally.

On 14 October 2015, the parties concluded the following Joint Pre-trial Conference minute:

Issues

- 2.1 What is the correct level of maintenance payable to the defendant in respect of the minor children and Richard and the period for which such is to be paid?
- 2.2 What constitutes the matrimonial estate that is to be divided equally between the parties and how is that division to be undertaken?
- 2.3 What order should be made in respect of costs of suit?

Before the trial started, the parties were agreed that the marriage had irretrievably broken down. The parties also agreed on custody being awarded to plaintiff with defendant having the rights of access as stipulated in his plea. On maintenance, although the plaintiff did not provide a schedule of the children’s expenses and did not give proof of her own income in relation to her contribution to the children’s maintenance ,during the trial, the defendant agreed, whilst giving evidence, to continue paying \$1300 per minor child as maintenance and agreed to retain the plaintiff and the minor children on his medical aid scheme. On the maintenance of Richard, the plaintiff accepted, through her lawyer, that Richard would have to separately claim from his father should he fail to adequately maintain him while at University. This means the whole of issue 2.1 was resolved during the trial.

As regards issue 2.2, a dispute remained over the distribution of the assets and payment of secondary school and tertiary expenses. The defendant said he would need rental income from their property investments to sustain payment of the educational costs and any distribution of the property investments would affect his capacity.

Issue 2.3 is straight forward and need no further elaboration.

Issue 2.2 was the real dispute throughout the trial. It can be noted that throughout the pleadings, the parties were referring to “matrimonial assets” in para 8 of the summons; “matrimonial estate” in para 6 of the plea and “matrimonial estate” in para 2.2 of the joint Pre Trial Conference minute. This point to the fact that the parties were looking to the assets they acquired during their marriage. These are the assets which they agreed to distribute 50/50. In my view, there is no conflict between the parties’ desire to look to what they acquired during their marriage and the provisions of s 7 of the Matrimonial Causes Act, [*Chapter 5.13*] which refers to the assets of

the spouses. The assets of the spouses, in this instance would be limited to the assets which the spouses acquired during the marriage; while they were spouses in the marriage, because that was the intention of the parties as indicated in the summons, plea and joint PTC Minute. While the legal position as given in *Ncube v Ncube* 1993 (1) ZLR 39 (SC) and *Gonye v Gonye* 2009 (1) ZLR 232 is correct, what distinguishes the current case is the specific intention of the parties to limit their 50/50 distribution to matrimonial assets. This means that if the defendant is able to prove that an asset was acquired before the marriage, or is exempt in terms of the law, then such an asset shall be excluded in view of the plaintiff's claim in the summons. Although the legal position is settled as argued by plaintiff's counsel, it is the plaintiff who chose to limit herself in her claim and pleadings. She cannot abandon that position in the absence of appropriate amendments to her pleadings.

In distributing the property, the court relied on values given in exh 2. The values of land, buildings and motor-vehicles were agreed between the parties as indicated in exh 2. Since there was no evidence that any of the property was subjected to proper accounting and auditing, the court had no basis to question the values agreed by the parties in exh 2. Consequently, the court relied on those values. There was a variance in the value of farm assets and Lozino assets but no concrete evidence of the actual value was given by either party to warrant a departure from the values quoted in exh 2.

Defendant's evidence was that he acquired No. 6 Valyonga, in 1997 before he was married. He said construction started in 1998. Defendant wanted the 6 Valyonga land to be excluded from the matrimonial estate. However, the defendant did not give the exact date of the purchase of the Valyonga land, or an agreement of sale for the transaction. Written agreements of sale are a legal requirement when land is being sold; yet the defendant did not confirm the date of acquisition of the land by producing the agreement of sale. It is common cause that the parties were married on 28 March, 1998. If the defendant wanted the Valyonga land excluded from the matrimonial assets the onus was on him to prove that the land was acquired before the marriage. His bare assertion is not enough.

The only documents which defendant availed to the court about the Valyonga land were a quotation for the house dated 30 September, 1998, after the marriage and a deed of transfer in favour of Tangerine Investment dated 14 April, 1999, again after the marriage. Since plaintiff has

claimed 50% of the whole of Valyonga, in the absence of proof that the land was acquired before the marriage, the court has no basis to exclude it from the matrimonial assets. The land of 6 Valyonga shall therefore be counted as part of the matrimonial assets. As regards development of Valyonga, defendant submitted that he used some of his pre-marital savings to construct the matrimonial home. However there was no clear evidence on the movement and utilization of funds in his accounts. The court had no basis therefore to conclude that pre-marital savings were used to construct Valyonga.

Defendant did not want the immovable properties distributed. He wanted them to remain with the Trusts for the benefit of the plaintiff and the children. That cannot be. As plaintiff correctly pointed out, when parties divorce they need a clean break from each other. Besides, no Trust documents were produced to confirm ownership of the properties by Trusts. The evidence availed to the court was that defendant dealt with the properties as if they were his own to the exclusion of the plaintiff. So to avoid future disagreements on the utilization of the properties and income therefrom, it is best that all the property be distributed upon divorce.

Plaintiff's submissions were that she be awarded three properties. I do not think this will be a fair distribution, given the fact that two of the properties were investments for the family. In my view, it is fair to give each of the parties one of the investment properties.

The parties have four properties. It is common cause that defendant occupies 6 Valyonga. Defendant said the property is owned by Tangerine Investments (Pvt) Ltd, which in turn is owned by a Trust for the benefit of the parties and their children. No Trust documents were produced to confirm that the property belongs to a Trust. In the absence of proof of ownership by a Trust, the court will treat it simply as property belonging to the parties. As correctly stated by KUDYA J in *Beckford v Beckford* 2006 (2) ZLR 377, the courts draw adverse inferences against the spouse who has used complex corporate undergrowth to hide matrimonial assets. In my view, the failure to provide documentation to prove Trust ownership of the property is evidence of the effort to confuse issues by hiding the property behind a vague Trust. However, since the defendant is residing at 6 Valyonga that property will be awarded to him.

It is common cause that plaintiff is in occupation of no. 10 Redhill, (also known as Kew Drive). The Defendant said this property was acquired by Lightvale Investments, (Pvt) Ltd which in turn is owned by Lightvale Trust for the benefit of the parties and the children. However, no

Trust documents were produced to confirm the above ownership. In the absence of proof of Trust ownership, the court will simply consider the property as an asset of the parties. Since the plaintiff is in occupation of that property together with the children, it will be awarded to her.

Two other immovable properties remain available for distribution. Aboynne Drive is said to be owned by Matlock Trust for the benefit of the parties and the children. The parties agreed that it was acquired as an investment. Once more, no Trust documents were availed to the court to prove the ownership by a Trust. In the absence of proof of Trust ownership, the court will simply consider it as an asset of the parties and distribute it to the plaintiff. The basis for awarding it to the plaintiff is because it appears to have a higher value and since defendant was awarded 6 Valyonga with a higher value the first time, it is only fair to award the property with a higher value to plaintiff to reduce the gap in values awarded.

The fourth property is Harry Pichanick. Defendant said it is owned by Furchner Investments (Pvt) Ltd and the defendant is the sole beneficiary. This property can remain with the defendant as the sole owner.

On motor vehicles, the parties agreed that plaintiff will get the Prado valued at \$15 000 whilst the defendant gets the Land Cruiser Pick up, valued at \$30 000.

As regards the figures on farm assets and off shore assets, there were variances here and there, but they were not huge. The court has therefore maintained its reliance on the values given in exh 2 because the variances were bare assertions, without documentary proof.

On the defendant's claim of having inherited £16 000, the court noted that no clear evidence of the inherited amount and how it was used was given. It was noted that there was no asset in the matrimonial estate which could be traced to the inheritance. The evidence around the inheritance issue proceeded thus;

“Q. How are we to know £16 000 was an inheritance?

A. That is what I was told.

Q. Why did you say it was a payment from a Trust?

A. I was confused.

Q. When did your father die?

A. Early 2000

Q. Where is his will?

A. I don't have it

Q. Where are the Estate accounts?

A. I don't know

Q. So we do not know the terms of the will and the distribution?

A. No"

As pointed out in *Moore v Moore* 2012 (1) ZLR 476 at 481, the onus to show that an asset was inherited is on the spouse alleging such inheritance. The defendant did not satisfactorily discharge that onus. Given the above evidence, the court has no basis to make a finding that £16 000 was inherited.

Defendant made an issue about the \$160 000 compensation for Leyland Farm. The evidence adduced in court did not indicate how the \$160 000 was used for the benefit of the matrimonial estate. The mere receipt of an amount of money is not proof that the money enhanced matrimonial assets.

Plaintiff made allegations of abuse of offshore funds by the defendant. The court did not place much weight on those allegations after noting that the offshore funds were the ones being utilised by the defendant to take care of Richard's expenses overseas. Those allegations did not affect the distribution.

Consequently, in order to achieve the 50/50 agreed to, the rest of the assets on Exhibit 2 (after land and motor vehicles) are to be distributed as follows; \$678 981 shall be awarded to the plaintiff while \$103 981 shall be awarded to the defendant, bringing up the total share to each of the parties to the value of \$1 663 981.00

If the defendant forgoes the amount of \$103 981 due to him at the point of distribution this reduces his liability to the plaintiff by \$103 981. This means the cash balance due to the plaintiff shall be \$575 000.00

Since the parties have shared the matrimonial assets 50/50, and will each now be receiving some income from the properties awarded to them, both parties shall contribute equally to the minor children's secondary and tertiary education. It is noted that Rebecca Emily Lock, born on 19 March 1999, had become a major at the time of writing this judgment, thus leaving two minor children for purposes of maintenance.

Accordingly, it is ordered that;

- a. A decree of divorce be and is hereby granted;
- b. Custody of the minor children, namely Olivia Sophie Ingram Lock, born on 2 October 2000 and Jeremy O'Neil Lock, born on 25 November 2002 be and is hereby granted to the plaintiff;
- c. The defendant shall be entitled to rights of access in respect of each minor child at all reasonable times, such to include but not to be limited to:
 - i. Each alternate weekend commencing at the end of the child's school activities on Friday and terminating at the commencement of school on the following Monday morning;
 - ii. Each alternate half term school holidays commencing at the termination of the school day on the last day immediately preceding the half term holiday and terminating at the commencement of school on the first day following the half term holiday;
 - iii. Each alternate public holiday commencing at 1 pm, or at the time of the termination of the child's school activities on the day immediately preceding the public holiday and terminating at the commencement of school or at 8am on the day immediately following the public holiday if such day is not a school day;
 - iv. Each child's birthday in alternate years so that all children may celebrate each child's birthday with the defendant in such alternate years;
 - v. One half of each school holiday as agreed with the plaintiff, failing such agreement, for alternative halves;
 - vi. Each alternate Christmas and New Year period, which period shall commence at 12noon on 23 December and terminate at 12noon on 2 January in each such period;
- d. The defendant shall maintain the minor children of the marriage as follows:
 - i. By payment to the plaintiff each month of the sum of US\$1 300 for each child, such payment to continue until the child turns 18 years or becomes self-supporting;

- ii. By ensuring that each minor child is a beneficiary of a medical and dental aid scheme paid for and maintained by the defendant;
- iii. By payment of all expenses incurred in respect of the medical and dental treatment of each minor child;
- e. Both parties shall contribute equally to the secondary and tertiary education of their minor children till they reach 18 years or become self-supporting.
- f. The matrimonial estate of the parties shall be divided and distributed in accordance with s 7 (1) (a) of the Matrimonial Causes Act [*Chapter 5:13*] as follows:
 - i. The defendant shall, subject to subparagraph ii below, at his expense transfer to, or cause to be transferred to, the plaintiff the two immovable properties situated at
10 Redhill Road, Highlands, Harare
22 Aboynne Drive, Highlands, Harare
 - ii. Any liability in respect of capital gains tax arising from the transfer of any of the aforesaid properties to the plaintiff shall be shared equally between the plaintiff and the defendant;
 - iii. The defendant shall, at his expense, cause to be registered in the name of the plaintiff the Prado motor vehicle, registration number AAR5574;
 - iv. The defendant shall pay the plaintiff into an account nominated by her, and subject to any exchange control laws applicable in Zimbabwe, the sum of US\$575 000. The parties shall agree on a payment plan for this amount within 30 days from the date of this order;
 - v. The plaintiff shall retain as her personal property all movable property presently in her possession; and
 - vi. The defendant shall retain as his personal property all other property forming part of the matrimonial estate.
- g. The defendant shall pay the costs of the plaintiff on the ordinary scale.

Atherstone & Cook, for the plaintiff's legal practitioners
Gill, Godlonton & Gerrans, for the defendant's legal practitioners