MEDIA DOKWANI
versus
TAPFUMA CHIDUKU

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 17th February 2004

Civil Appeal

Media Dokwani, in person
Tapfuma Chiduku, in person

BHUNU J: The appellant lodged her appeal out of time. Her application for condonation is not opposed and is accordingly granted.

The parties concluded an unregistered Customary Law Marriage sometime in 1973. The marriage was subsequently solemnized in terms of the Customary Marriages Act [*Chapter 5:07*] at Harare on the 24th of July 1990.

The appellant issued summons against the respondent in the Magistrates Court seeking a decree of divorce and ancillary matters.

The ancillary matters had mainly to do with the division of the matrimonial property. The couple has a child together who has since attained adulthood. The claim for divorce was uncontested. It appears that the bulk of the ancillary issues were satisfactorily resolved save for the division of the parties shares in the matrimonial home.

The appellant was awarded a 25% share in the matrimonial home. Her complaint is that she ought to have been awarded a 50% share in the property. She also complaints that the trial magistrate omitted to award her a decree of divorce notwithstanding that her claim for divorce was uncontested.

It is unfortunate and a matter of gross dereliction of duty that after presiding over a full trial the trial magistrate simply issued an order without giving reasons for awarding the plaintiff only a 25% share of the matrimonial home.

The magistrate's order simply reads:

"Defendant is ordered to give a 25% share of the value of the matrimonial home by 31st May 2001."

As can be seen the order makes no reference to the main issue of divorce. There being no decree of divorce there is no basis upon which the ancillary issues could be determined. The order is dated 27th March 2001. It appears the trial magistrate has since left service without proffering reasons for her judgment.

One cannot over emphasise the need for magistrates and indeed all judicial officers to give cogent reasons for their decisions. In the case of *S v Peter Makombe* HH 120-86 SAMATTA J had occasion to remark on the importance for judicial officers to give reasons for their decisions. In that case he had this to say:

> "Why is it necessary for the court to give reasons for its decision? I would answer that question by quoting a passage from Sir Alfred Denning. The Road To Justice, at page 29
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> "The judge must give his reasons for his decision for by so doing he gives proof that he has heard and considered the evidence and arguments that have been adduced before him on each side: and also that he has not taken extraneous considerations into account. It is off course true that his decision may be correct even though he should give no reason but in order that a trial be fair, it is necessary not only that a correct decision should be reached but also that it should be seen to be based on reason : and that can only be seen if the judge himself stated his reasons. Furthermore if his reasons are at fault, then they afford a basis on which the party aggrieved by his decision can appeal to a higher court to correct the errors of the judge below. The cry of Paul, "I appeal to Caesar represents a deep seated human response. But no appeal can properly be determined unless that appellate court knows the reasons for the decision of the lower court. For that purpose, if for no other, the judge who tries the case must give his reasons. (my emphasis)

Sir Denning with characteristic lucidity amply demonstrated the need for judicial officers to give cogent and sufficient reasons for their decisions.

It is needless to say that in this case this court sitting as an appeal court is stuck with an appeal in which the lower court has not attempted to give any reasons for its decision. In the absence of such reasons the appeal court cannot determine the correctness or otherwise of the trial court's decision.

The trial magistrate having left the bench and is no longer available to give reasons for her decision the ends of justice can best be served by quashing the proceedings and remitting the matter for a fresh trial in the Magistrate's Court in terms of section 31(1)(c) of the High Court Act [*Chapter 7:06*]. The section provides that,

"(1) On the hearing of a civil appeal the High Court -

(c) May, if it appears to the High Court that a new trial or fresh proceedings should be held, set aside the judgment appealed against and order that a new trial or fresh proceedings be held."

As I have already demonstrated, the dictates of justice demand that the proceedings in the lower court be set aside and a fresh trial be conducted.

It is accordingly ordered:

(1) That the proceedings in the Magistrates Court be and are hereby quashed and set aside.

(2) That the matter be and is hereby referred to the Magistrate's Court for a trial *de novo* before any magistrate.

(3) That as no party is at fault regarding the conduct of the proceedings there is no order as to costs.

GOWORA J agrees:.....