

RACHEL CHILESHE CHIPARAUSHE (nee CHIMFWEMBE)
versus
LANGTON SIMWEMBA CHIPARAUSHE
and
JOHANNES CHIPARAUSHE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 13 & 24 May 2017

Divorce action

A Demo for plaintiff
H Mukonoweshuro, for the 1st and 2nd defendants

CHITAKUNYE J. The plaintiff and the first defendant married each other on 13 May 1976 in Botswana in terms of that country's civil marriage laws, the Marriage Proclamation [*Chapter 144*].

The parties later relocated to Zimbabwe and have been so domiciled.

Their marriage was blessed with four children who are now all adults.

The second defendant is the first defendant's nephew, born of his blood sister. He has been cited due to a property he purportedly purchased from the first defendant which the plaintiff claims is matrimonial property.

On 14 July 2005, the plaintiff sued the first defendant for a decree of divorce and the apportionment and distribution of assets of the spouses in terms of the Matrimonial Cause Act; [*Chapter 5:13*].

The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there are no reasonable prospects of restoration of a normal marriage relationship between them in that the defendant:

1. deserted the plaintiff in or about 1998;
2. has sired children out of wedlock;
3. has, on divers occasions, assaulted the plaintiff
4. has expressed that he no longer has any love for the plaintiff

5. has, through lack of sense of duty failed, neglected or refused to provide plaintiff with maintenance.

The plaintiff further alleged that during the subsistence of the marriage they acquired movable assets and an immovable asset as outlined in paragraph 8 of her declaration. She further alleged that the first defendant wrongfully, unlawfully and maliciously registered the immovable property; namely, Stand 24 Goromonzi Business Centre, in the names of second defendant when in fact and in truth it was and is still matrimonial property.

The plaintiff sought an order:

1. As against second defendant:-
 - an order declaring Stand 24 Goromonzi Business Centre as matrimonial property as between plaintiff and first defendant
2. As against first defendant :
 - (i) a decree of divorce
 - (ii) A division of the property in equal shares, failing which payment of the sum of Z\$ 560 500 000.00 (being one half share of the value of the property) with interest thereon at the prescribed rate calculated from the date of issue of summons to the date of payment, both dates inclusive.
3. As against both defendants jointly, severally and in solidum, the one paying the other to be absolved.

The first defendant conceded that the marriage relationship has indeed irretrievably broken down, albeit, not for the factors alluded to by the plaintiff. The reasons he advanced for the breakdown included that the Plaintiff, on divers occasions during the subsistence of the marriage, deserted the matrimonial home. She deserted the matrimonial home for good on 11 August 1995 and never returned. He also asserted that, through lack of sense of duty and in spite of a maintenance order against her, the plaintiff failed, neglected and refused to provide maintenance for the minor children of the marriage.

The first defendant also contended that as a consequence of the plaintiff's failure to pay maintenance he sold the immovable property, namely, Stand No. 24, to second defendant in 1995 in order to meet the school fees and upkeep of the minor children of the marriage. He denied that there was a cottage on this stand but only a house. He, however, admitted to the existence of the rest of the property as stated in the plaintiff's declaration.

The second defendant's plea was to the effect that he purchased Stand No. 24 from the first defendant and obtained cession. He thus contended that registration into his name

was lawful. He also contended that when he bought the property there was no cottage. He is the one who built the three bed roomed cottage after he had purchased the property.

On 22 November 2007, a pre-trial conference was held at which the following issues were referred to trial:

- (a) Whether it is just and equitable that matrimonial property listed in paragraph 8 of the plaintiff's declaration be divided in equal shares between plaintiff and first defendant .
- (b) Whether or not Stand No. 24 Goromonzi Business Centre is matrimonial property and what is the just and equitable manner of disposing the property.
- (c) Whether or not 2nd defendant purchased Stand No. 24 Goromonzi Business Centre and whether he made improvements as alleged or at all.

On 26 March 2008 both parties signed a document they termed Consent paper in which the plaintiff and the first defendant consented to the dissolution of the marriage

On the trial date the plaintiff amended her summons with the consent of the defendants. The amendment had the effect of substituting paras 2 (b) of the summons and the prayer with the following:

“2(b) division of movable assets listed under paragraph 8 of plaintiff's declaration in equal shares, failing which, payment of 50% of the value of the property by the first defendant.

2(c) division of Stand No. 24 Goromonzi Business Centre, Goromonzi in equal shares, failing which, payment of 50% of the value of the property, which value shall be determined by a valuator from the Master's list of valutors.”

The issues as outlined above pertain to the availability and distribution of the movable and immovable assets of the spouses.

The plaintiff gave evidence after which each of the two defendants testified. From the plaintiff's evidence and that of the 1st defendant, it is common cause that after the two of them married in Botswana they later were deported from that country and came to Zimbabwe where they first settled in Kwekwe. Whilst in Kwekwe the plaintiff was employed by the town council as a secretary whilst the 1st defendant was drawing plans for people- as self employment. As a secretary the plaintiff would also do typing work for her husband.

Later they moved to Harare where they had secured a property in Greendale. In Harare the plaintiff was employed by Scanlen and Holderness whilst he was employed by the Grain Marketing Board. The Greendale property was acquired through a mortgage bond and the money raised in Kwekwe was used to pay the requisite deposit. As both parties were in employment they serviced the bond together.

Later they sold the Greendale property and used proceeds there from to acquire a small holding in Ruwa. They both worked on the small holding for the benefit of the family. As things turned out they were still not satisfied with the small holding and opted to acquire Stand 24 Goromonzi Business Centre.

Whilst the parties were not agreed as to how the stand was acquired, it was nevertheless agreed that Stand 24 Goromonzi was intended to be the parties' matrimonial property and it was so till their separation. After acquiring that Stand, a 4 bedroomed house was built on it and that was their matrimonial house. They lived in that house till separation.

It was thus common cause that from the time of relocating to Zimbabwe both the plaintiff and the first defendant were gainfully employed or engaged in income generating activities. Neither could be said to have been merely seated at home. It is also clear that the property (both movable and immovable) in question was acquired during that period of living together.

The plaintiff further testified that besides the main house, they were also in the process of constructing a cottage. At the time of their separation the cottage had reached window level.

The first defendant, on the other hand, contended that at the time of separation no cottage was under construction.

It is further common cause that after separation in August 1995, the first defendant purported to have sold the matrimonial house to second defendant between October and December 1995- that is within a few months after plaintiff had left. He also claimed to have sold the movable assets in para 8 of the plaintiff's declaration within a few months after the plaintiff had left and soon after he had delivered what he deemed kitchen property for a wife upon divorce in terms of customary law. The first defendant claimed to have delivered three truckloads of such customary law items- also known as *Mawoko/Umai* property. When asked to list the items that filled three truckloads, the first defendant was at a loss.

The plaintiff later tendered a list of items she received which list the first defendant agreed to. That list could not by any stretch of imagination fill up three truckloads. Somehow the first defendant insisted it filled three truckloads and the truck was in fact driven by second defendant.

If, as the first defendant stated, he believed the plaintiff was entitled to Kitchen utensils only at the dissolution of the marriage then he was gravely mistaken. The era were at the dissolution of a marriage a woman was only entitled to *Mawoko/Umai* property is long

gone and it is unfortunate that husbands of the mould of the first defendant continue haunting these courts with the ghost of that era. The injustice that was endured in the past should not haunt us in a modern democratic state where equality and justice are the watchwords.

I am thus of the view that the arbitrary division and apportionment of the movable property done by the first defendant was unjust and cannot stand. In coming to this conclusion I am mindful of the reasons he gave as his understanding of culture and what he deemed his own contributions.

The movable property ought to have been divided equitably taking into account all the circumstances of the case as envisaged in s 7 (4) of the Matrimonial Causes Act.

The fact that Stand No. 24 Goromonzi was acquired as matrimonial property is common cause. The first defendant, however, contended that he disposed of the property after separation and that it is no longer available for consideration. The plaintiff alleged that the so called sale was in effect not a sale but a ruse to deprive the plaintiff of her rightful and just share in the property.

In this regard she alluded to the fact that second defendant was a nephew they had looked after from when he was of tender age (2 years) up to the time he did his apprenticeship at Mike Appel. To her knowledge he could not have raised money to buy the property as an apprentice in 1995. As far as she is concerned the first defendant simply ceded the property to second defendants in order to defeat her cause.

The first defendant's evidence on the other hand was to the effect that he disposed of the property to second defendant for value and the sale was not wrongful or unlawful.

It is trite that an owner of a property has the right to dispose of their property in a manner they desire. In cases of husband and wife relationships the same has been said. In *Isaac Sithole v Lucia Sithole* HH 674/14 at p 9 of the cyclostyled judgment I reiterated that:

“It is trite law that a wife cannot bar her husband from selling assets registered in his name more so when no divorce action requiring the distribution of those assets is instituted. However, court can intervene where a sale is not genuine but is meant to defeat the wife's cause.”

Equally in *Muswere v Makanza* 2004 (2) ZLR 262, MAKARAU J (as she then was) had occasion to deal with a situation where a husband had disposed of the house that the wife believed she had a share in. The wife had argued that the husband should not have disposed it without her consent. The learned judge at p 266 D-E stated that:

“The position in our law is therefore that a wife cannot even stop her husband from selling the matrimonial home or any other immovable property registered in his sole name but forming

the joint matrimonial estate: see Muzanhamo's case *supra*. There must be some evidence that, in disposing the property, the husband is disposing it at under value and to a scoundrel.Mere knowledge that the seller of the property is a married man who does not have the consent of the wife to dispose of the property is not enough:..”

A husband has a right to sell a house forming part of the matrimonial estate but registered in the sole name of the husband without the wife's consent. There are, however, some instances where court may intervene such as when the sale is intended to defeat the wife's just rights. In this regard the spouse seeking court's interference in the disposal must show the lack of bona fides in the disposal and that the sale was a sham or simply intended to defeat her just cause.

In *Muzanhamo & Another v Katanga and Others* 1991(1) ZLR 182(S) the court held *inter alia*, that:

“the rights as between the spouses are personal *inter se* and do not affect third parties, regardless of whether the latter are aware of the dispute.”

And further that:

“a wife cannot prevent her husband from disposing of assets unless he is thereby attempting to defeat her just rights and that”

Clearly, therefore, the existence of a dispute between spouses *per se* would not be adequate to interfere with the disposal to the third party.

If a spouse is to succeed, he/she has to show that the third party is guilty of fraudulent intent and there was intention to defeat the spouse's just rights.

In *Muganga v Sakupwanya* 1996 (1) ZLR 217(S) at 220 F-G MCNALLY JA re-stated the point in these words:

“The possibility must exist that no money actually changed hands. And even if some improvements were effected after the date of transfer (and for all we know they may have been paid by Mr. Sakupwanya) ...

I am satisfied on all the evidence that the learned judge was entirely correct in coming to the conclusion that Mr Sakupwanya and Miss Muganga conspired in a scheme to ensure that the Homefield property should be theirs after the divorce. They deliberately entered into a transaction designed to deprive Mrs Sakupwanya of the chance to claim a share in the property.”

In *casu*, it was incumbent upon the plaintiff to show that the alleged sale of the properties was not genuine but was a ruse to deprive her of her just claim.

The plaintiff testified that their marriage was characterised by physical abuse by the first defendant. This had apparently led to her leaving home on a number of occasions escaping from the abuse.

On 11 August 1995 she again left home due to severe assault by the first defendant. The first defendant later delivered to her some kitchen items she listed in the list admitted to by first defendant in about the next month after she had left. That appeared to have been her share of the matrimonial assets as the first defendant retained the other property and purported to dispose of it. According to the plaintiff, the first defendant, by delivering the kitchen items to her, acknowledged that divorce proceedings were now inevitable. In anticipation of the divorce he then distributed the assets as he did which was highly unfair to her cause.

The plaintiff testified that the first defendant registered the immovable property in the name of second defendant in an effort to distance the immovable property from distribution. In a bid to demonstrate that the registration was fraudulent, the plaintiff alluded to a number of anomalies such as the speed with which the purported sale was done and the lack of a good reason for the disposal of the property. She further argued that the first defendant's assertion that he sold the property because he had fallen on hard times was not true as, to her knowledge, the first defendant was employed and had the use of a company car. The use of a company car was prima facie proof of employment. In any case, as the wife, she knew he was employed in the company owned by his former workmate.

The first defendant on his part maintained that he had fallen on hard times hence he had to sell the property in order to pay school fees for the children and for family needs. A careful analysis of the manner in which the immovable property was purportedly disposed off does indeed raise eye brows. The first defendant did not dispute that he had the use of a company car at the time the plaintiff left. He however could not explain why, if he was not employed by that company, he had use of that company's car. The plaintiff's argument that he was still employed is more probable.

According to the first defendant, he sold the stand between October and December 1995. Both first defendant and second defendant gave that same time frame giving the impression that neither knew when the agreement of sale was entered into. Such is not the norm in the sale of valuable property whereby both seller and buyer are not clear on the date of the sale transaction.

The defendants indicated that there was no written agreement of sale. This was just a verbal agreement between uncle and Nephew with no witness to the transaction. The only person who knew about the sale, not as a witness, was second defendant's late grandmother. So, not only was the sale secretive but it was also not recorded anywhere. When confronted

with such unusual aspects for a sale of an immovable property, the first defendant had no better explanation serve to insist that the agreement was not in writing.

According to the defendants the purchase price was Z\$25 000-00 of which Z\$17 000-00 was to offset a debt the first defendant already owed second defendant. The balance was to be paid in bits by second defendant paying for Allan's school fees and giving Allan some pocket money. The balance he was to send it to South Africa where the first defendant was relocating to as of December 1995.

Under cross examination, whilst both defendants maintained that the first defendant owed second defendant Z\$17 000-00, they contradicted each other materially on the period of accrual of this debt. Under cross examination the first defendant said that the debt had accrued over a period of 5 to 6 months. Calculating the months backwards, it meant that the debt accrued in 1995. Second defendant, on the other hand, upon being cross examined as to the period the Z\$ 17 000-00 had accrued stated that it started accruing from early 1994 to mid 1996. Upon being asked how he had come to know that it had accrued to a figure of Z\$17 000-00 since they were not recording the borrowings, second defendant for the first time stated that he had been recording the borrowings in a diary. This diary was apparently not available. Clearly this was an afterthought.

Another point of inconsistency is that whilst in their evidence the defendants were in unison that second defendant had loaned the first defendant a total of Z\$ 17 000-00 and so most of the purchase price went towards offsetting that loan, neither of them had mentioned this aspect of a loan and offsetting of the loan using the property in their pleadings, instead they had just stated that the property was sold as the first defendant was hard pressed for money.

The aspect of being hard pressed for money to meet school fees and other needs was again not in tandem with the so called sale as no money was in fact exchanged at the time of the sale by which the first defendant could have paid for these needs. It was not the first defendant's position that he was hard pressed to repay second defendant's debt but to pay school fees and upkeep costs of the minor children as the plaintiff was not contributing towards their maintenance.

It may also be noted that the loose arrangement the defendants alluded to left a lot to be desired as a bona fide sale. Neither could be certain that the full purchase price had been paid as some of the money was to be paid into a CABS account for school fees for Allan, some to be paid as pocket money and no record of such was kept, and the other portion was

to be sent to South Africa; and again neither could say how much was sent to South Africa as no record was kept.

Another aspect of inconsistency pertains to the cottage. The plaintiff testified that as of August 1995 when she left, the cottage at Stand 24 Goromonzi Business Centre had been built up to window level. The two defendants, on the other hand, contended that no cottage had been built to any level. Second defendant seemed to suggest that he only started building the cottage after the approval of the building plan in 2005. Neither defendant could explain why the plaintiff would insist on this cottage if it had not been there in 1995.

The issue of the cottage would not have been material but for inconsistencies revealed by evidence on it. Instead of conceding the obvious, second defendant went on to produce a building plan as confirmation that he only started the construction of the cottage after the approval of that plan. Unfortunately, there are unexplained anomalies on that plan that can only point to it being a doctored document.

A careful examination of that plan shows that the Stand for which it was drawn is a 50m by 50m Stand which implies a 2500 square metres Stand. Second defendant, on the other hand, stated that Stand 24 Goromonzi is a 2000 square metres in size. That anomaly in the size of the stand was not explained.

Further, the stand number on the upper and lower sides of the site layout plan is deleted and a new number '24' endorsed. However, on the right hand side of the site layout plan the number '154' is endorsed. It would appear that the deleted stand number was in fact 154 throughout and in the process of deleting the correct number, whoever was deleting the original number and replacing it with 24, inadvertently omitted to delete the stand number on the right hand side. I did not hear the defendants to state that stand 24 was originally 154.

I am of the view that the authenticity of this plan is questionable. The anomalies point to a document that was clearly tampered with.

Another aspect not consistent with the defendants' case is that the summons was issued on 14 July 2005 and the plan they tendered is dated 11 August 2005 and 11 August 2006. This would imply that the plan was submitted and/or approved after the summons had been issued. If the cottage was only constructed after the approval of the plan, how did the plaintiff know that such a cottage was in the offing so as to include it in the summons as something that was there when she left the stand? It was clear to me that the defendants concocted the story of the cottage not having been there at the time the plaintiff left the

matrimonial home. The only reasonable inference that can be drawn from such conduct is that the two defendants were colluding to deny the plaintiff what is justly due to her.

The net effect of the above anomalies is that the claim by the defendants that stand 24 was sold in a bona fide sale transaction is not credible. The defendants, as uncle and nephew, simply colluded to ensure the stand was registered in the name of second defendant as soon as plaintiff had been given what the first defendant deemed she culturally deserved as a wife at the dissolution of a marriage so as to distance it from any possible claim by the plaintiff. It was in that same spirit that the first defendant claimed to have sold the other movable assets within a few months after the plaintiff had left.

I am of the view that the fact that the assets were alleged to have been disposed off soon after the separation should not deprive the plaintiff of a meaningful share thereof. Indeed the first defendant tendered documents of court cases he brought before the courts of law claiming custody and maintenance, but in my view those may not have much relevance. The issue of custody was in 1990 after plaintiff had left due to marital problems. The issue of maintenance was after the plaintiff had now left for good in 1995. If this was meant to buttress the assertion that he was hard pressed for money to look after the children, this only arose after he had already disposed the property. If he had disposed the property for value, he ought to have used these proceeds for the children but, alas, he did not. The maintenance order is dated 27 October 1995 a period he was already busy disposing the property according to his story.

Having concluded that plaintiff is entitled to a meaningful share the issue becomes what is the just and equitable distribution of the assets and in what manner.

In terms of her amended claim, the plaintiff's claim in respect of the movable property was for a division of movable assets listed under paragraph 8 of her declaration in equal shares, failing which, payment of 50% of the value of the property by the first defendant.

In respect of Stand 24 Goromonzi her claim was couched as follows:

Division of Stand No. 24 Goromonzi Business Centre, Goromonzi in equal shares, failing which payment of 50% of the value of the property, which value shall be determined by a valuator from the Master's list of Valuators.

The distribution of assets of the spouses at the dissolution of a marriage is governed by s 7 of the Matrimonial Causes Act, [*Chapter 5:13*]. In the exercise of the powers bestowed on it, an appropriate court exercises wide discretion.

It terms of s 7 (4) of the Act court is enjoined to consider all the circumstances of the case and to endeavour as far as is reasonable and practicable to place the spouses and the children in the position they would have been in had a normal marriage relationship continued between the spouses.

In *casu*, it is common cause that both parties were in gainful engagements and thus directly and indirectly contributing towards their matrimonial estate. It is also a fact that their marriage was saddled with marital problems such that the plaintiff ran away from the matrimonial home on a number of occasions. Though the first defendant wanted to use the running away as evidence that the plaintiff did not contribute much and did not care much for the children, he could not succeed because he conceded that the plaintiff's absences from home were a result of violence in the home. Under cross examination he indicated that the plaintiff had deserted the family about 10 times. He, however, could not with certainty count the 10 times. It was, nevertheless, put to him that the cause for the plaintiff to run away from was his physical abuse of her and his response was that:

“It takes two to tangle. When you say can I have a glass of water and she says forsake.”

This was an admission of the constant violence in the home as the cause for the plaintiff to run away from home. When she ran away on 11 August 1995 it was to be for good.

In terms of the Matrimonial Causes Act the assets to be considered in the distribution are assets owned or held by the spouses individually or jointly as at the time of the dissolution of the marriage. In *casu*, though the first defendant alleged that he had disposed the movable assets I ruled that that was intended to deprive the plaintiff of her just share. Whilst the plaintiff, on her part, delayed in instituting divorce proceedings for a period of 10 years, that should not prejudice her.

If at all the assets in paragraph 8 are no longer available to be valued the first defendant must still be ordered to pay plaintiff some value in lieu of her share in those assets. Accepting that just because defendant said the property is no longer available and therefore plaintiff should lose out would only work to encourage persons in the mould of the first defendant to quickly dispose matrimonial assets and plead that the assets are no longer available for distribution as soon as spouses go on separation.

The values plaintiff had given in the summons were in Zimbabwean currency and those are of no relevancy now. No effort was made to ascertain the values of the items after

dollarization. I will thus indicate which items plaintiff should be awarded and whose value she should be paid if the first defendant is unable to deliver the assets.

On the immovable property, that is still available and can be valued. I am of the view that taking into account all the factors including, the needs of the spouses, the direct and indirect contribution by the plaintiff to the marital estate and the duration of the marriage, it is only just and equitable that plaintiff be awarded a 35 percent share of the value of the property; Stand 24 Goromonzi Business Centre.

The plaintiff did not seek the disposal of the property but that she be paid her just share. It is thus upon the first defendant to pay the 35 percent share.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted
2. In addition to the property already in her possession, the plaintiff is hereby awarded the following movable property:
 - (i) Kelvinator Stove;
 - (ii) Fridge
 - (iii) Double bed and headboard;
 - (iv) Dining room suite (8 seater table and chairs and two side boards.

The first defendant is awarded the rest of the movable property as his sole and exclusive property.

Of the movable property awarded to the plaintiff, should the first defendant fail to deliver such within 30 days from the date of this order, the plaintiff shall be entitled to the replacement value of the items in question in their second hand state. The parties shall agree on comparable items and have such valued by a dealer in second hand items of such a nature. Should the parties fail to agree on such a dealer one shall be appointed for them by the registrar of the High Court.

3. The plaintiff be and is hereby awarded a 35 % share in the immovable property namely Stand number 24 Goromonzi Business Centre, Goromonzi whilst the defendant retains 65% share.
4. The parties shall appoint a mutually agreed valuator within 30 days of this order failing which the Registrar of the High Court is hereby directed to appoint a valuator from his list of independent valutors to value the property.
5. The defendant shall bear the costs of valuation.

6. The first defendant shall pay plaintiff the 35% value of the property within 6 months from the date of receipt of the valuation report, or within such longer period as the parties may agree.
7. Should the defendant fail to buy out plaintiff within the period stated in clause (6) above, the property shall be sold to best advantage by an estate agent mutually agreed by the parties. Should the parties fail to agree on an estate agent, one shall be appointed for them by the Registrar of the High Court from his list of Estate Agents.
8. The net proceeds from the sale shall be distributed in terms of the sharing ratio of 35:65 as between the parties.
9. Each party shall bear their own costs of suit.

Chihambakwe Mutizwa & Partners, plaintiff's legal practitioners
H. Mukonoweshuro & Partners, defendants' legal practitioners.