

SYLVIA ROSEMARY MABVUDZA
vs
PHINEAS MABVUDZA

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 2, 3, 4,5,9,11,12 February 2004 and 9 February 2005

Civil Trial

Ms B. Mtetwa, for plaintiff
Mr Fitches, for defendant

KAMOCHA J: This is a matrimonial cause wherein it is common cause that the marriage has irretrievably broken down. The only issue for the determination of the court was agreed by the parties at a pre-trial conference before as Judge as being -

"What would constitute a fair and reasonable division of the matrimonial assets?"

The parties in this matter have come a very long way together. They have been together since 1968 when they contracted a customary law marriage which was later solemnized under the Marriage Act in 1995. They had three sons who are now adults, between 1968 and 1973. During that period plaintiff was not in formal employment but she cared for the young children.

Plaintiff's evidence was that defendant was employed as a clerk by a commercial bank at the time of their marriage and that for the first five years of the marriage she was a housewife. She however looked after the children and she would have been pregnant for most of that five year period.

In 1975 defendant went to pursue further studies in the United Kingdom leaving her with the children without any form of income as he did not receive a pension from his employers. The V.W. motor vehicle, which he owned and which it had been anticipated would be sold to raise some money for the plaintiff and children, was crashed leaving them without any income.

She told the court how she had to fend for herself and the children by doing crochet work which she sold at Fife Avenue and also by approaching the Social Welfare Department in Highfield which assisted by giving her money every month. The defendant did not send any money for the upkeep of the children and that on the one occasion when he sent clothes, he sent them to her parents' home in Headlands as he did not even know where she was.

Later defendant sent the plaintiff an air ticket so that she could join him in the United Kingdom. She went to join him and left the children with the defendant's sister. On arrival there, she found a job in Birmingham hospital where she also was entitled to accommodation.

She worked as a nurse aide and from the income she earned she was able to look after the children by sending monies to the defendant's sister. She purchased bedspreads which were sent back home for resale. She also looked after the defendant who was still a student. He used to visit her every weekend with his washing which she would do. She also took care of his other needs such as drinks, food and clothing. The defendant returned to Zimbabwe around August 1981 while she remained in the united Kingdom in order to earn money to purchase household goods such as a fridge, a cooker, washing machine etc which she shipped back home. She said the proceeds from the sale of bed spreads had been deposited into her Post Office Saving account by her sister.

On her return home she first worked at a polyclinic before she applied for a job with Grindlays Bank and started work at the bank in 1982. Her income was solely for the benefit of the family. She purchased groceries, school uniforms for the children, their clothes and some matrimonial movables. The defendant looked after the mortgage which was deducted directly from his salary and paid school fees for the children.

Plaintiff produced a bundle of documents consisting of invoices showing items she bought for the family. Amongst the bundle of documents produced are various cheques made by defendant for purchases of items that did not accrue to the matrimonial estate but which plaintiff believed were for his then mistress and the illegitimate child. The

documents also show investments that defendant had made in respect of his child with his mistress. Further, some of the documents revealed that defendant had been paying water and electricity bills for his mistress' home.

Eventually the defendant's affair was discovered. The discovery did not go down well with the defendant as expected. He then decided to withdraw virtually all of his contributions towards the matrimonial expenses and plaintiff had to meet them on her own since then. He then started removing some of the matrimonial assets from the matrimonial home such as a television set and a decoder for the satellite television. She alleged that he swore that she would never get the house and if she was looking for documents relating to the Borrowdale plot, she would only get those over his dead body.

Further, her evidence was that she was subjected to ill treatment by her husband. He would burn herbs in the house. He accused her of having stolen his property including a gun. He once brought some strangers to the house to ransack her room. He even accused her of causing illness to his out of wedlock child a matter which she reported to the police. It was her evidence that defendant even defied an order issued by a Judge at pre-trial conference by refusing to return to the decoder to the matrimonial home.

The defendant also gave evidence and was subjected to a lengthy cross-examination under which he finally saw the light and conceded that the plaintiff was entitled to a 50% share of the matrimonial home. In his plea he had tendered a 10% share. During his evidence his percentage ranged between 65/40 and 55/45 in his favour and only came to 50/50 during cross-examination. The defendant sought to paint a picture of a loving and caring husband who took care of virtually every aspect of the matrimonial home by providing all the requirements of a growing family. It was his evidence that he was the breadwinner at the time of the marriage and that for the first five years or so, the plaintiff made no direct contributions to the matrimonial estate as she was a housewife. He went on to state that he acquired a grocery shop for her to run and that she ran it for a year prior to his going to the United Kingdom in 1975. It was his evidence that the money from the said shop was enough for the upkeep of the plaintiff and the children.

He went on to state that he used to send money and clothes to the plaintiff from time to time. But when the plaintiff complained that life had become unbearable for her and the children he advised her to go back to her parental home in Headlands as he was unable to look after them whilst they remained in town. He accepted that at some time he had indeed sent some of the children's clothes to her father in headlands as he did not know where she was at that time.

Defendant accepted that plaintiff did work when she got to the United Kingdom and that she looked after him during weekends and did his laundry in addition to providing him with food and drink.

He however disputed that plaintiff used all of her income for the needs of the family alleging instead that she used to send money to her sister in Zimbabwe. He further disputed that she had purchased the matrimonial movables that were shipped from the United Kingdom when she returned home in 1981. He alleged instead that they had put their monies together in order to buy the movables and that he had in fact left her with money and had only come to Zimbabwe earlier in order to determine whether or not it was cheaper to buy such items in the United Kingdom.

He testified that on her return to Zimbabwe she started working immediately but she did not use her income for the benefit of the family and he claimed not to know how she used it since he virtually looked after every need of the family. He denied that she had in fact given him \$200.00 towards the deposit of the house. He disputed that she had made any direct contributions towards the matrimonial expenses as her attitude was that he was the head of the family and therefore had to cater for every aspect of the matrimonial expenses. He alleged that all improvements on the matrimonial home were effected by him yet he had accepted that she had worked in the United Kingdom and had used her income to look after the children, and that she had contributed towards the acquisition of the movables that were shipped from the United Kingdom. He repeatedly alleged that she had made no direct contributions towards the matrimonial estate despite his own evidence that she had run a grocery shop as far back as 1974, which constituted direct contribution.

To justify why he deprived the plaintiff her conjugal rights for over seven years he alleged that he suffered from a medical condition which made it difficult to have conjugal rights with plaintiff. He, however, wanted the court to believe that the couple occasionally had conjugal rights during the seven years. He, of course, had forgotten that he had accepted at a pre-trial conference and in a pre-trial minute that in fact there had been no conjugal rights for at least seven years prior to the institution of the divorce proceedings. The medical condition he suffered from did not seem to affect him when he was with his girlfriend whom he made pregnant and fathered a child.

He admitted that he was responsible for looking after his out of wedlock child's needs including paying rentals and buying movables which included a stove, a bed, wardrobe, a television set, clothing, groceries, educational insurance and all her other needs. He further accepted having made out cheques to the child's mothers up to the discovery of the affair.

Despite the above, defendant testified that he still wanted his family and in particular his children to have the best that he could afford and that he paid for all that, including all the children's school fees, their holidays and that of the plaintiff which he claimed he had to contribute towards when she wanted to return to Zimbabwe earlier than anticipated. It was also his evidence that it was through his efforts that the plaintiff got a job with her current employers. He went on to explain how he had used his salary throughout his working life with both Grindlays and Agribank. He claimed to have used his entire salary on his family notwithstanding his admissions that from the time he had a child with his girlfriend, he had to look after all the child's needs including those of her mother.

He also testified as to the package he had received upon retirement from A.F.C and claimed to have spent it for the betterment of the home, despite there being evidence that considerable amounts had been spent on the child and its mother.

The defendant is currently employed by Tele Access as a purchasing manager but he did not see it fit to produce his latest payslip instead he chose to produce to this court what he earned in October 2003. It was his evidence that he had sold the Peugeot motor vehicle

on the advice of his legal practitioners and claimed that it had been sold for just over \$4 million and he could not give a breakdown of how he had utilized the money and how much the balance was, where it had been invested and how much it had grown. He could not say who he had sold the car to. That then made it difficult to independently ascertain what the car was actually sold for.

His attitude as regards a fair distribution order of the matrimonial home initially was that the plaintiff was entitled to no more than 10%. He had maintained that stance in his pleadings and at the pre-trial conference stage. He, however, during the trial vacillated between percentages of 60/40 or 55/45 in his favour as he endeavoured to portray the difficulties he was likely to encounter in finding a new home given his age and medical condition. In the light of that, so his testimony went, he urged the court to give him the option to buy out the plaintiff on whatever percentage she is awarded although he claimed that he did not know how he would raise money for such buy out which would be no less than \$140 million at the ratio of 60/40 in his favour.

The long and thorough cross-examination cracked the defendant who had appeared to be a hard nut to crack. He then conceded that the plaintiff was entitled to a 50% share. He, however, still wanted to be awarded movables of higher value such as the decoder and satellite dish, the d.v.d, whilst he conceded to the plaintiff all the older items purchased in 1981 in the United Kingdom. Most of the items that he wanted to keep were bought with monies either from the children, who are in the United States of America, or were gifts from the children. He even claimed items that the plaintiff had bought after the institution of the divorce proceedings including a deep freezer that she had purchased in December 2002. His attitude was that neither party should benefit if the items are not awarded to him. Instead he preferred that they be sold so that each party would start from scratch. This is the attitude of a man who had claimed to have been a loving, caring and providing husband throughout the marriage.

He gave evidence relating to the plot in Sunridge. He told the court about how his brother had sold it and how such brother had cheated him when it came to having it replaced.

While the defendant sought to portray himself as a loving, caring and generous husband who looked after his wife's every need, the correct position reveals the opposite. He only thinks of his comfort and that is clearly exhibited by the way he wanted the matrimonial property to be distributed both immovable and movables. He had wanted his wife to be awarded a smaller percentage than his and had wanted newer movables for himself while she remained with the older ones. He had already started moving items from the matrimonial home for his comfort at his new home with his girlfriend and his daughter.

Defendant is an insensitive man. His insensitivity is demonstrated by his removal of the DSTV decoder from the matrimonial home and his failure to return it to the plaintiff for her use despite being ordered to do so by the court. He spitefully preferred to lock it up in his bedroom instead of allowing the plaintiff to use and enjoy it. Defendant even went on to repossess the mobile phone that plaintiff was using. He also deprived plaintiff conjugal rights for 7 years claiming that he was unable to consummate sex when in fact he was able to sleep with a younger woman to an extent of fathering a child and thereafter continuing with the affair.

Turning to the question of who of the two parties was more credible than the other the court has no difficulty in finding that the plaintiff was the more credible of the two. The defendant was not candid with this court. He was not prepared to lay before the court proof of his present salary. He also wanted the court to believe that plaintiff had not made any direct contribution towards the improvement on the matrimonial home notwithstanding there being documentary proof of the plaintiff's contributions towards improvements in the matrimonial home including plumbing. I have no hesitation in preferring the evidence of the plaintiff to that of defendant where ever the two versions conflict since I have found that the plaintiff was clearly the more credible of the two.

The defendant contradicted himself on a number of times as he testified and was even untruthful. He, for instance, alleged that the plaintiff had travelled to the United States of America to see their sick son only after a ticket had been sent from America, but when it was shown that the plaintiff had evidence showing the contrary, he then turned round and claimed that she had in fact bought the ticket and had been refunded. Further his claim that he had bought the Mazda 323 motor vehicle and that he had sold it and given the plaintiff the proceeds without her having bought it with a loan was shown to be false by his own witness who confirmed that plaintiff had been granted a loan of \$25 000.00 to purchase the vehicle.

The defendant used a large portion of his income outside the matrimonial estate. From as far back as 1997 he had been maintaining a full household for his mistress and child. He bought household effects for them such as a stove, a bed, a wardrobe, a television set, a fridge which item he had not listed. He did not end there. He made numerous cheques to his mistress and her relatives. He met the rentals, grocery, electricity and water bills for her. He paid the child's crèche and school fees. In addition to all these expenses he had to meet a huge debt incurred when he and his friend failed to service the loan with Scotfin. This was in addition to meeting legal costs in an action he had instituted against his brother.

The defendant was untruthful in respect of material matters in an attempt to mislead the court. He is not worth to be believed. To that extent, therefore, his suggestion that he was indigent and deserving of sympathy must be rejected. He would not have made considerable cash settlements for his girlfriend and her relatives. He would not have been able to pay for air tickets for his girlfriend's relatives.

Not only did the defendant try to pull wool over the court's eyes, he is also guilty of gross misconduct especially after the discovery of his infidelity. He completely withdrew his contribution towards the matrimonial estate. His resources were mainly channelled towards his new home – the one with his child and mistress. He received a package from his former employer yet the money was not made part of the matrimonial estate. He gave

cash gifts to his sister and donations to charity with some of it. He gave his girlfriend a sum of \$240 000.00. It seems to me that this is a proper case where scales of justice should be tipped in favour of the plaintiff in the light the defendant's untruthfulness and gross misconduct.

Consequently an award shall be made giving first preference to the plaintiff to buy out the defendant from the matrimonial home.

The parties have been married for not less than 36 years. Although the defendant would have wanted the court to believe that plaintiff made no direct contribution towards the matrimonial home the court found that she had in fact done so. He eventually conceded that she was entitled to a 50% share. She accordingly will be awarded a 50% share of the matrimonial home with the option to buy out the defendant. Each of the parties shall be entitled to a 50% share of the current market value of the stand expected from Luke.

Costs in matters such as this are usually borne by each party in that each party bears its own costs. *In casu* however, the court has found that the defendant was guilty of gross misconduct. In my view this is a proper case where the guilty party should bear the costs of suit.

In as far as the movables are concerned defendant almost conceded every thing under cross-examination. He said plaintiff should be awarded the deep freezer, fridge freezer. He offered the plaintiff a microwave provided that he was awarded the DVD. These two items were presents from the couple's children who are in the United States of America. It seems to me that it is only fair for each of them to benefit from the presents made by their children. I would accordingly award the microwave to the plaintiff while defendant is awarded the DVD.

The defendant offered the plaintiff the television set provided he got the satellite and decoder. But in the next breath he alleged that the TV was attached over a debt by a law firm known as Musunga and Associates. This allegation was not put to the plaintiff and it is very doubtful if defendant's counsel was aware of that. The defendant was a very unreliable

witness hence the allegation may well be untrue. I would therefore award him the TV. while the plaintiff gets the satellite and decoder.

Finally, it seems to me that a fair distribution of the matrimonial estate can be achieved by the following order-

It is ordered that:-

1. a decree of divorce be and is hereby granted;
2. The matrimonial home be valued or evaluated within 40 days of the date of this order by a reputable estate agency agreed on by the parties or their legal practitioners and failing, such agreement, by an estate agent nominated by the registrar of this court. The cost of the valuation to be borne by both parties in equal shares. Thereafter the plaintiff is granted leave to within 120 days of the date of the evaluation pay to defendant or satisfactorily secure payment of an amount representing 50% share of the net value of the property. Failing which the property shall be sold to the best advantage on the open market with each party receiving a 50% share of the net proceeds.
3. The stand expected from Luke shall be evaluated and sold to the best advantage on the open market with each party being awarded 50% of the net value.
4. The plaintiff shall be awarded the following movable property.
 - (a) All kitchen utensils including pots and pans, spoons, knives and forks, plates
 - (b) Deep freezer
 - (c) Fridge freezer
 - (d) Microwave oven
 - (e) Satellite, decoder and Pioneer CD player
 - (f) Stove
 - (g) Rotisserie/Roaster
 - (h) Toaster
 - (i) Washing machine

- (j) Lawn mower
- (k) Hoover
- (l) Four vases in the lounge
- (m) Corner cabinet in dining room
- (n) Iron
- (o) Main bedroom double bed and headboard and dressing table
- (p) Mazda B1800
- (q) Carpet mat in lounge
- (r) Four garden chairs, their cushions and table
- (s) Half the number of suitcases and lounge cabinet

The defendant is awarded the following:-

- (a) Bed linen
- (b) Blankets
- (c) Half the number of suitcases
- (d) Travelling bags
- (e) Sony colour television set
- (f) Four (4) garden chairs and cushions
- (g) DVD

5. Defendant shall bear the costs of suit.

Messrs *Kantor and Immerman*, plaintiff's legal practitioners

Manase & Manase, defendant's legal practitioners