

**Kerina Mike
Versus
Charles Mike**

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 12,13, 27, 29 September and 11 January 2006

Miss *Gwaunza*, for the plaintiff
Mr *Gijima*, for the defendant

BHUNU J: After having heard some considerable amount of evidence in this matter, I realised that the defendant had previously been my lodger way back, more than 10 years ago. I had virtually forgotten all about it and could not immediately recognise him. It was the constant mention of the defendant's name, which revived and conjured up my memory.

Upon realising that I had previous dealings with the defendant I drew that factor to both counsel's attention in my chambers. After consultation with their clients both lawyers indicated that their clients had no problem with me presiding over the trial to finality.

Just to clear the air and fortify my position, I consulted the Judge President. The learned Judge President indicated that as judges who live in society we are bound to preside over cases of people whom we know and have previously interacted with. He drew an analogy of a chief who presides over matters which concern his subjects almost on a daily basis.

Having searched my conscience I am convinced and satisfied that I can do justice between the parties without any fear of being swayed by my prior involvement with the defendant.

That being the case I now turn to determine the matter on the merits.

The parties contracted and solemnized a Civil Marriage on the 13th of march 2004. The marriage was still born and doomed to failure right from its inception.

It was the product of an immoral if not adulterous association which commenced during the subsistence of the defendant's marriage to his late wife.

The parties met at church and married after the death of defendant's late wife. The period as to when they met and fell in love is in dispute.

The plaintiff said that she met the defendant on the 26th October 2003 and they started dating in November 2003. On the 21st January 2004 he paid lobola for her. The marriage was then solemnized on the 13th March 2004. The courtship had the blessing and involvement of their church pastor who chastised them not to be seen together in public until they had formalized their relationship through marriage.

The defendant's story is that he met and fell in love with the plaintiff at church sometime in July 2001 during the subsistence of his marriage to his late wife. They kept the illicit relationship a closely guarded secret until the demise of his late wife in December 2002. The parties then concluded a civil marriage on the 13th March 2004.

Hatendi Muzonzini is a carpenter who was subcontracted to put up the roof at the plaintiff's property. He started work in 2002. The plaintiff called him as her witness. This witness testified that the plaintiff introduced the defendant to him in October 2003 as he was working on the garage roof. He was certain of his facts because it is the defendant who paid him for his labour.

As previously stated it was the plaintiff's evidence that when he fell in love with the defendant the church pastor chided them for being seen together in public. It is inconceivable that the church pastor could have adopted that attitude had there been no legal or social impediment to their affair. The probabilities favour the defendant's version that their association started as an adulterous affair which was kept a closely guarded secret. This explains why most of the plaintiff's witness were unaware of the affair prior to the solemnization of the marriage on the 13th March 2004. Upon marriage the defendant moved in with plaintiff. Hardly a month later the marriage was however rocked by serious allegations of infidelity and financial disputes. The controversies calumniated in the plaintiff fleeing the matrimonial home within 7 months of the marriage.

It is not necessary to go into the details of the marital controversies. Suffice it to say that the marriage has irretrievably broken down.

Indeed the evidence before me establishes that the marriage has irretrievably broken up beyond repair. It can no longer be saved.

What remains to be done is the distribution of the matrimonial estate an issue which is hotly contested but has narrowed down to a fight for the alleged matrimonial home.

As the couple had no offspring together and each is capable of maintaining himself or herself the dispute has zeroed in on the matrimonial home at stand 87 of stand 54 Winchendon Township.

The property is registered in the name of the plaintiff. The starting point is therefore that it is her property. The defendant however claims an 80% share of the property. He later revised his claim downwards to a range between 50-55%.

The defendant is the registered owner of a house in Highfield, a farm and a house in Hatfield. He is also a businessman. He operates a lodge and is into private investigations business. These immovable properties are his. He admitted that the applicant made a partial contribution to the acquisition of the farm.

The plaintiff has not claimed any of the properties registered in the defendant's name.

Asked why she had laid no claim to the defendant's property she elaborated that she was bound by the agreement they made at the time of marriage.

She testified that it was agreed between them that either party would keep whatever he or she acquired before the marriage for his or her own children.

It was further agreed that the defendant being the head of the family it was his primary responsibility to find a suitable matrimonial home for the family. Because the defendant could not immediately find suitable accommodation the plaintiff agreed to temporarily accommodate him and his children from the previous marriage while he looked for a suitable matrimonial home for the family. I believe her. Her refusal to benefit from the defendant's considerable properties and businesses can only be consistent with her explanation. The defendant was unable to advance any reasonable explanation as to why the plaintiff did not seek to benefit from his considerable wealth.

He painted her as a greedy prostitute out to make financial capital out of him without any factual basis. On the contrary the facts point in the opposite direction. It is him who is seeking to benefit from her property not the other way round.

The defendant was an inconsistent and shifty witness. Initially he claimed that his contribution to the acquisition of the disputed property amounted to 80%. He later made an about turn and said it was 50-55%. The figures relied upon by the defendant appear to have been sucked from the air. They are not backed up by any facts.

In a desperate bid to inflate his claim the defendant sought to include contributions allegedly made before the couple solemnized their marriage on the 13th March 2004. There is a serious factual dispute as to when the parties fell in love.

The defendant claims that they fell in love sometime in 2001 but kept the affair a closely guarded secret because it was an adulterous affair as his late wife was still alive.

On the other hand the plaintiff flatly denied that she ever engaged in an adulterous affair with him as they only fell in love in November 2003 after the death of his erstwhile wife.

I have however already made a factual finding that the couple must have fallen in love before the death of the defendant's first wife. That being the case I take the robust view that whatever contributions the defendant made prior to the solemnization of the marriage on the 13th March 2004 do not count as contributions to the matrimonial estate. This is for the simple but good reason that prior to that date there was no matrimonial estate in existence.

The defendant could not possibly have contributed to a non-existent matrimonial estate. Whatever contribution the defendant might have made before marriage should be treated as donations or free gifts. It is trite that donations or free gifts are ordinarily irrevocable in our law and are not recoverable.

Looked at from another angle such contributions were made in furtherance of an immoral and adulterous affair contrary to public policy. It appears that the leading case on this subject is *Pietzsch v Thompson 1972 (4) SA 122(R)*.

In that case the plaintiff sought to recover a ring, gold watch and money he had given to the defendant in contemplation of marriage after the defendant had divorced her husband. It was held that as the gifts had been given in the course of an immoral and adulterous association itself *contra bonas mores* and against public policy the plaintiff could not recover.

The court reasoned that to allow the plaintiff to recover would be to encourage the recovery of donations made in furtherance of a contract public policy condemns.

In the case of *Dube v Khumalo 1986 (2) ZLR 103 (SC)* the Supreme court was at pains to make it clear that public policy is geared towards the preservation of valid marriages. Having said that it went on to observe that the common law principle of *in pari delicto* applies. Simply stated the principle stipulates that where parties to an agreement are in equal guilty the party who has performed cannot recover, the loss lies where it falls.

The defendant sought refuge under the case of *Sibanda v Sibanda HH-90-02*. In that case the plaintiff was able to recover despite the existence of an adulterous relationship. Reliance on that case was misplaced because the trial court made a specific factual finding that the plaintiff was unaware that the defendant was married.

In this case it is the defendant himself who alleges that he entered into the association with the full knowledge that it was adulterous and contrary to public policy hence the endeavour to keep it secret.

Having said that there is need to look at the contributions which the parties made towards the acquisition of the alleged matrimonial home.

The plaintiff gave concrete imperical evidence backed up by both documentary and *viva voce* evidence from independent witnesses. Her evidence which was beyond challenge was to the effect that she single handedly purchased the property in question as a vacant stand in 2001. She then obtained a mortgage bond from National Building Society. She utilized the funds for the construction of the property. She arguemented the money with proceeds from the sale of her house in Eastlea and the sale of her Toyota Camry motor vehicle.

She is a company executive with a good job. She is solely responsible for the mortgage bond repayments.

The defendant on the other hand was unable to give any evidence of any meaningful contributions either direct or indirect. All what he could prove was that he installed a second hand geyser removed from his previous lodgings. At most he contributed \$120 000.00 for labour.

All the builders and contractors who worked at the project denied the defendant's assertions and to a large extent backed up the plaintiff.

They denied being paid and supervised by the accused save for the isolated incidents I have adverted to above.

The defendant admitted not having directly supervised the builders and artisans. He nevertheless insisted that he made invaluable indirect contributions. He said that the builders and artisans were from the same church. Because of the need to conceal the adulterous relationship he would secretly visit the project and give advice to the plaintiff who would then give instructions to the contractors.

This was denied by the plaintiff and I believe her. The plaintiff struck me as a desperate woman who has been kicked out of her own home in pursuit of an association which has gone terribly wrong. In her desperation she has agreed to refund the defendant whatever contributions he will have proved to have made towards the acquisition of the disputed property.

Section 7 of the Matrimonial Causes Act [*Chapter 5:13*] enjoins the court to distribute matrimonial property upon divorce fairly and equitably. The relevant portion reads:

..."the court shall endeavour as far as is reasonable and practicable and having regard to their conduct, is just to do so to place the spouses and children in the position they would have been in, had a normal marriage relationship continued between the spouses. "

As I have already pointed out, the defendant already has two houses a farm and two business enterprises all to himself and his children from his former marriage. He admitted that the plaintiff contributed towards the acquisition of the farm.

The plaintiff only has the disputed house to her self and her children from previous associations.

The marriage lasted for a very short period before it ran into serious problems and the parties went their separate ways. At the time of separation the parties had not had time to consolidate their properties into a common matrimonial estate. Both parties are persons of substance none will be driven into destitution without the other.

The defendant attempted to fasten onto alleged marital misconduct on plaintiff's part so as to tilt the balance against her. He was however apart from raising unsubstantiated suspicion unable to profer any concrete evidence that the plaintiff was unfaithful to him. He mentioned the plaintiff's alleged paramours but did not serve them with summons so that they could be heard if they chose to.

The defendant has been occupying the plaintiff's house since she fled the premises. He has continued to benefit from her property whilst he strictly keeps his own property to himself and his children. The marriage endured for a very short duration for the couple to have made any meaningful contribution to a joint matrimonial estate.

Whatever contribution he made towards the maintenance and acquisition of the disputed property is more than adequately compensated for by his use of the property and the plaintiff's contributions towards the acquisition of the farm.

It is therefore my considered view that having due regard to the social standing of the parties and the brevity of the marriage this is a proper case where each party should be ordered to keep whatever he or she brought into the marriage.

It is accordingly ordered:

1. That a decree of divorce be and is hereby granted
2. That the property known as stand 87 of stand 54 Winchendon Township be and is hereby awarded to the plaintiff as her sole and personal property.
3. That the defendant is to bear the costs of suit.

Wintertons, for the plaintiff legal practitioners.

F G Gijima and Associates, the defendant's legal practitioners.