

DISTRIBUTABLE (16)
Judgment No S.C. 11\03
Civil Appeal No 149\01

Adam Gobvu Usayi V Patricia Usayi

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE MAY 8 & JUNE 24, 2003

A. *Gijima*, for the appellant

M.V. *Chizodze*, for the respondent

ZIYAMBI JA: This appeal is against an order of the High Court granting to the respondent one half share of the sale price of the matrimonial home. The appellant and the respondent were married in 1961 after having lived together as husband and wife from 1952. In 1995, they stopped living together due to certain differences which had arisen between them.

The parties lived in the low density suburb of Marlborough. Divorce proceedings were commenced in 1996 when the respondent issued summons. Shortly thereafter, the appellant sold and transferred the matrimonial home to a third party notwithstanding a prior order by the High Court interdicting him from disposing of the matrimonial property pending the determination of the divorce proceedings. The transferees of the property sought to evict the respondent who obtained another order from the High Court preventing her eviction pending the determination of the divorce proceedings.

The main contention advanced by the appellant before us was that the Court *a quo* misdirected itself by awarding the respondent a fifty per cent share in the matrimonial home when she made no contribution to the acquisition thereof. It was submitted that the effect of such an award was "to place the respondent in the position of a joint owner of the property in question, and not

merely a person benefiting by virtue of her matrimonial relationship with the owner of the property". It was submitted further that the appellant had acted reasonably in offering the respondent a fifteen percent share in the property or, in the alternative, a full house which he had purchased in Highfield. The appellant was quick to add however, that by the time the matter was heard by the High Court, the Highfield property had been disposed of.

Section 7 (1) of the Matrimonial Causes Act [Chapter 5:13] (the Act) allows the Court in granting a decree of divorce, judicial separation or nullity of marriage to make an order dividing, apportioning or distributing the assets of the spouses. Section 7(4) of the Act provides as follows: -

"7.(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following –

- (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
- (d) the age and physical and mental condition of each spouse and child;
- (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which each spouse or child will lose as a result of the dissolution of the marriage;
- (g) the duration of the marriage;

and in so doing 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 continue between the spouses."

It will be seen that the court must endeavour, in making such an order, to place the parties in so far as is possible in the position they would have been had the marriage continued to subsist.

The respondent is over 60 years of age. The marriage was of considerable duration. There is no allegation or suggestion that she did not perform to the best of her ability, her duties as wife to the appellant and mother to the parties four children, two of whom are now deceased. She continues to be responsible for their handicapped son of whom the appellant makes no mention. The matrimonial home was situated in Marlborough, a low density suburb and the respondent has not the means to obtain similar accommodation for herself and her son.

The appellant, on the other hand, has a well developed communal home at Chishawasha and has the option of utilising the land for agricultural purposes in order to generate income therefrom. In addition, he has business interests from which he earns income the full particulars of which he chose to withhold from the Court. It seems clear from the evidence that the appellant did not disclose his financial affairs to the respondent. She had no idea how much income he earned nor was she aware that during the subsistence of the marriage, he had purchased a house in Highfield. She learnt of this house through her legal practitioners after summons for divorce had been issued. Since leaving the matrimonial home the appellant has been resident in Sunningdale. He advised the Court that this is rented accommodation but this evidence is coloured by his failure to be honest with the Court about his income.

What the evidence as a whole shows is that the appellant is in a far better position than he would have been had the marriage subsisted. He has the

proceeds of the matrimonial home as well as that of the Highfield house. He has his well developed home in Chishawasha. He has his business the success of which he has played down to the Court.

The respondent, on the other hand, is in a worse position. Having been financially dependent on the appellant, she has no income and no prospects of being able to earn any for the maintenance of herself and their handicapped son. She has no home and no prospects of being able to acquire one. The offer of 15% of the sale price of the house would go nowhere near enabling her to obtain a house to live in. The learned judge considered this and awarded her a 50% share of the sale price. In my view, the award made by the Court *a quo* cannot, in the circumstances of this case, be faulted.

The conduct of the appellant in selling the matrimonial home despite an order of the High Court restraining him from doing so was correctly found by the Court *a quo* to be deserving of censure. We are advised by counsel for the respondent that an application is pending before the High Court for the setting aside of that sale. For this reason the respondent withdrew the cross appeal which sought that the property in question be resold and that the respondent be awarded 50% of the new sale price.

Mr *Gigima*, who appeared for the appellant, was persistent in his submission that the respondent, having made no financial contribution to the acquisition of the house, was not entitled to an award of 50% of the sale price. Having regard to the provisions of s7(4) of the Act, this submission is unsound. The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night nurse for her husband and children? How can one place a

monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and therein an atmosphere from which both husband and children can function to the best of their ability? In the light of these many and various duties how can one say as is often remarked: "throughout the marriage she was a housewife. She never worked?" In my judgment, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of the "direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties". A fair approach is that set out by Professor Ncube in his book *Family Law in Zimbabwe*. At p 178 he said: -

"Our courts, when formulating a legal approach to the re-allocation of property on divorce, should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife. As Gray aptly puts it:

'A just and realistic evaluation of her efforts depends instead upon the avoidance of the absolute terms of cash value in preference for the relative approach of differential equality between financial and non-financial contributions to the acquisition of matrimonial assets.'

Thus the evaluation process should not seek to determine how much a housekeeper is worth in comparison with, for example, a university lecturer, nor should the process seek to determine the value of a wife's cooking, washing and rearing of children as compared to, say, a government minister's work. The proper approach would be to presume that in the majority of marriages the spouses assume equivalent, though different, duties which are equally beneficial to the welfare of the family."

The learned judge adopted this approach. At p 110 of the record she said:-

"This, in my view, is a proper case in which to adopt the approach set out by Professor Ncube in his book whereby it should be presumed that the plaintiff assumed equivalent, though different duties, which were equally beneficial to the welfare of the family. It is she who for many years was

left at the communal home as sole custodian of the children, in charge of the family. In that role she enabled her husband, the defendant, to engage in the academic pursuits abroad which placed him a in position to improve the family's standard of living. It is her contribution on the domestic front which freed her husband to work outside the home. But for her efforts the home and family may not have remained intact. Such a contribution cannot be undervalued. She is over 60 years of age and has no income of her own. By virtue of her age and lack of training she has no prospects of obtaining employment."

In my view no basis has been shown for altering the judgment of the High Court. The appeal is therefore dismissed with costs.

CHIDYAUSIKU CJ: I agree

CHEDA JA: I agree

IEGM Musimbe and Partners, appellant's legal practitioners

M V Chizodza-Chineunye, respondent's legal practitioners