

VIRGINIA KHOZA.

Versus

NKANI KHOZA.

IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 26 SEPT, 28 NOV, 12 DEC 2023 & 20 NOV, 2024.

Divorce Action.

Unassisted Plaintiff.
E. Mlalazi for the Defendant.

NDLOVU J.

INTRODUCTION

The matter before the Court is for Divorce. The parties have been married to each other for over two decades in terms of the *Marriage Act [Chapter 5:11]*. The marriage was blessed with two children namely who are now both major. The Parties have agreed that the marriage has irretrievably broken down and that divorce should be granted. The parties concluded that the household property be awarded to the Plaintiff.

ISSUES

1. The distribution of the immovable property known as **Stand No. 16122 New Parklands, Bulawayo?**
2. Whether or not the immovable property known as house number **16144 Pelandaba, Bulawayo** is matrimonial property.
3. Whether or not the immovable property known as **Stand No. 18389 Paddonhurst, Bulawayo** is matrimonial property.
4. Whether or not the **Wessels 3, PBS Thokozani, Fort Rixon**, homestead is matrimonial property.

5. The distribution of the two companies known as Totally Uniforms and Totally Butchery, and
6. The distribution of Cattle

PLAINTIFF'S CASE.

Stand No. 16122 New Parklands

This stand was acquired during the subsistence of the marriage. It was developed with proceeds from the family's business, Totally Uniforms (Pvt) Ltd, where I am a co-director. She worked very hard and was very instrumental in purchasing the building materials to make sure that the house was built. After its completion, it became the family home. She has been living at the house in question with the children for 7 years and has been responsible for its upkeep as Defendant deserted the matrimonial house in 2020 and went on to live with a girlfriend at Old Magwegwe, Bulawayo and has never returned home. She prays that she be awarded this house wholly to herself.

Stand No. 61411 Pelandaba

According to Plaintiff, this property was bought by Defendant without her knowledge and this Court must decide its fate.

Stand No 18389 Paddonhurst, Bulawayo

According to Plaintiff, this property was bought by Defendant after initially renting it.

FORT RIXON HOMESTEAD

This property was acquired during the subsistence of the marriage. It is her brainchild. The defendant was only concerned about having farms, e.g. Plot 4 Silver Stream, Nyamandlovu, and Plot 12 Pioneer Block in Filabusi. This property will become her place to retire to and therefore prays that it be awarded to her.

CATTLE

Her prayer is that a third of the total number of cattle be awarded to her. The figure is to be determined by the Court because it is not known to her.

TOTALLY UNIFORMS (Pvt) Ltd

This is a registered (Pvt) limited company registered in terms of the law. The company has 2000 (two thousand) shares. She is a co-director in the company with 50% (fifty) (1000 shares). She resigned from teaching and was appointed a co-director of the company. She worked extremely hard to resuscitate the company. She would go out of the country to buy raw materials. The Defendant was no longer interested in the company. She prays for an order allowing her to buy the Defendant out within 3 months. She has a passion for dressmaking, cutting and designing. She resigned from teaching to fulfil that passion for dressmaking, cutting and designing by being at the hub of the production of school uniforms. She teaches students from Bulawayo Polytech who are seconded to Totally Uniforms for their practicals. She invested all her energy and passion into Totally Uniforms.

TOTALLY BUTCHERY

Plaintiff submitted that it be awarded to Defendant since it falls under N. Khoza Consultants.

DEFENDANT'S CASE

Stand number 16122 New Parklands, Bulawayo, the property is matrimonial property because it was acquired during the subsistence of the two's marriage. They both pooled resources from their uniform business and sold off cattle to build the house. A fair and equitable distribution would be awarded to each party 50%.

Stand No. 61411 Pelandaba, Bulawayo is not matrimonial property. It does not belong to him. He was interested in purchasing the property and that all the necessary procedures had been completed. Before paying the purchase price, he sought legal counsel. After due diligence, it was found that the registered property's owner had passed away and that his estate had not been wound up then. As a result of that discovery, the deal fell off.

The Defendant stated that he is a tenant of **Stand Number 18389 Paddonhurst, Bulawayo**. A lease agreement between the Defendant and Nomagugu Ncube was tendered as **Exhibit C**, as such, that property cannot be shared between the two parties as it belongs to a 3rd party.

Wessels 3, PBS Thokozani, Fort Rixon, he acquired it before he met and got married to the Plaintiff. He submitted it was not matrimonial property. He presented an occupancy card from the Insiza Rural District Council as **Exhibit F** to support his claim that he acquired the rural home before marrying the Plaintiff. He stated in his testimony that he built the property entirely on his own and that Plaintiff had no input on the upgrades made to the two huts, the borehole or the solar panels that were already installed.

CATTLE.

Currently, there is a total of 12 cows.

TOTALLY UNIFORMS.

Defendant signed over 2.5% shares to Plaintiff and Defendant owns 97.5%. totally Uniforms (Pvt) Ltd. Presently has an estimated net worth of US\$ 200,000.00 and owns stock, machinery, and fixtures and fittings. He is willing to buy the Plaintiff out of the business.

BUTCHERY.

The Butchery was trading under N. Khoza Consultancy which was formed in 1995. He is no longer the one running the business but a third party. He has no interest in the Butchery business anymore. He is no longer involved in the everyday operations of the butchery. He was only interested in keeping this name alive as the current operator has not yet acquired his trade name and Defendant admitted to having been benefiting rentals from the current management.

According to the Defendant, it will be just and fair that each party retain what they had before their marriage.

THE LAW

The legislature, however, in a bid to reach equity and fairness between divorcing parties, introduced section 7 of the Matrimonial Causes Act. When it comes to the sharing of the property the Court must be guided by the general principles of equity and fairness as governed by Section 7 of the Matrimonial Causes Act [Chapter 5:13]. The Act furnishes broad guidelines for deciding what is fair in the circumstances of the case. The exercise involves balancing the divorcing couple's conflicting interests to make an equitable distribution such that one spouse is not disadvantaged. The court has wide discretion based on relevant factors aimed at achieving a reasonable, practical and just division of property. To come up with a just and fair property order, the court has to endeavour as far as it is practically possible to ensure that the spouses are put in a position which they would have been had the marriage subsisted. *Nyoka v Kamabara* HC 1486/06:

Both spouses are to be treated equally and both deserve protection. The court has to seek to strike a balance between the needs of the parties on what is a just and fair distribution. There is no reason for over-emphasizing the contributions of the parties as that would disadvantage the other party. S 7 of the Matrimonial Causes Act;

“..... the court shall endeavour as far as possible 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”.

The factors in section 7 of the Matrimonial Causes Act should be weighed up collectively and not individually. In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which

secures for each party the advantage they can fairly expect from having been married to one another and avoids the disadvantage, to the extent they are not inevitable of becoming divorced.

***Mhora V Mhora* SC 617/18,**

***Shenje v Shenje* 2001 (1) ZLR 160 (H)**

There must be a balance between the spouses, such that one spouse is not enriched to the detriment of the other spouse. In the exercise of its discretion, the court has to look at a wide spectrum of factors such as the length of the marriage, the contributions, the earning capacity of the parties, the ages of the parties, the physical and mental condition of either of the spouses, the future needs of the spouse and the current status of the parties. The list is in-exhaustive but what is central is the need to come up with a fair, reasonable and just order in the circumstances.

***Dzaramba v Dzaramba* HH38-16,**

***Usayi v Usayi* 2003 (1) ZLR 684,**

***Usayi v Usayi* 2003 (1) ZLR 684,**

APPLICATION

There is first need to establish what has been proved to be matrimonial property. The Plaintiff has the onus to prove her claims and allegations.

- **Stand Number 18389 Paddonhurst, Bulawayo**

There was no evidence from Plaintiff to prove the allegations that Defendant owns the said property. The Plaintiff confirmed that she called the owner of the stand and she confirmed that she had not sold her stand. She admits that Defendant moved there as a tenant. The defendant produced a lease agreement and testified that he knew the owner from a long time ago. The property is therefore not spousal property and not available for distribution between the parties.

- **Stand No.61411 Pelandaba, Bulawayo**

The Defendant in his papers mentioned that the person who wanted to sell him this property had no mandate to do so as the property belonged to an unwound-up deceased estate. The DRB Number was provided in the Letters of Administration. Plaintiff adduced no evidence to the contrary. This property too is not spousal and is not available for distribution between the parties.

- **Wessls 3, PBS Thokozani, Fort Rixon**

Despite the debate regarding its acquisition in terms of time and source of resources, this property is available for distribution in terms of the law between the parties. The argument by Defendant that because the parties' marriage is out community of property Plaintiff cannot claim to benefit from assets acquired by Defendant before their marriage, is legally untenable.

Stand number 16122 New Parklands, Bulawayo.

It is common cause that this property is matrimonial property and is available for the equitable distribution between the parties. Both parties will downgrade. Plaintiff claims 100% of the property whereas Defendant claims a 50% share of the same.

The Defendant is entitled to the property in Fort Rixon, as he acquired the property before tying the knot with the Plaintiff. The Defendant tendered proof to buttress his allegation. The Plaintiff never produced any evidence to quash what had been said by the Defendant.

TOTALLY UNIFORMS (PVT) LTD

This is a juristic person. It is a third party in its own right. It is not a party to these proceedings. Neither party sought to join it in these proceedings as an interested party. No evidence was adduced indicating that it is an *alta ego* of one of the parties. There is testimony of Shares exchanging hands from time to time. If anything, it is a fully-fledged company. Both parties spoke of owning shares in the company yet neither of them claimed the other's share being spousal property as contemplated in the Matrimonial Causes Act. The companies are separate legal entities with the parties as

individuals and as such should continue to exist beyond the subsistence of the marriage between the parties.

Claiming the company is therefore incompetent because a company is a separate legal entity with its existence outside the marriage of the parties. The parties must fight its shareholding structure in the Boardroom.

CATTLE

The Defendant told the Court that only 12 head of cattle were remaining. Plaintiff had no evidence to the contrary beyond her word of mouth. I will proceed based on there being 12 heads of cattle.

BUTCHERY

The Plaintiff has abandoned her claim of the Butchery. The defendant says he is not operating the same. No further mention of the butchery will be made.

DISPOSITION

Stand No. 16144 Pelandaba, Bulawayo, Stand No. 18389 Paddonhurst, Bulawayo and **Totally Uniforms** are not part of the matrimonial property. The Plaintiff adduced no evidence sufficient to move this court to award her the rural homestead, Wessls 3 PBS, Thokozani, Fort Rixon. I will therefore accordingly award it to the Defendant as his sole property. Because of this award, I hereby award the Plaintiff 60% share and Defendant be and is hereby awarded 40% share in **Stand No. 16122 New Parklands, Bulawayo**. That the Plaintiff be and is hereby awarded 1/3 of the herd of cattle as at the date of this judgment. **Stand No. 16122 New Parklands, Bulawayo** shall be valued by a reputable estate agent and the costs of such evaluation shared equally by the parties and thereafter, Plaintiff be and is hereby granted permission to buy out the Defendant's awarded share in the said property within three [3] months from the date of the judgement. Failure by Plaintiff to buy Defendant out within the 3 months will entitle Defendant to buy Plaintiff out within 3 months of the expiry of the period given to Plaintiff to buy Defendant out, Failure by Defendant to buy Plaintiff out within the stipulated time will lead to the Property being sold to the best advantage to the parties

and the proceeds therefrom shared in the 60;40 ratios after the deductions relating to the sale of the property have been made.

COSTS

Each party shall bear its costs of suit.

NDLOVU J.

Dube-Banda, Nzarayapenga & Partners, defendant's legal practitioners.