CLOUPAS MAKONI
versus
PATIENCE MUGOBA MAKONI (NEE MAZANI)

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 5 July 2018 & 13 September 2018

Civil Trial

S.M Guwuriro & B Kazembe, for the plaintiff
Ms *N.R. Sai,* for the defendant

MUREMBA J: The plaintiff and the defendant were married on 24 May 2002 and on 15 April 2016 the plaintiff filed summons for divorce and other ancillary relief against the defendant.

During the course of their marriage the parties were blessed with two children who are still minors. They acquired movable and immovable property. Sometime in March 2017 after the commencement of these proceedings the plaintiff who was employed and later retrenched by the National Social Security Authority (NSSA) got his retrenchment package.

At the per-trial conference held on 26 March 2018 the parties made concessions and agreed that their marriage had irretrievably broken down to the extent that it is no longer capable of restoration to a normal marriage. They agreed that a decree of divorce be granted by consent. They also agreed that custody of the two minor children, Courtney Mya Makoni and Melissa Claire Makoni be awarded to the defendant with the plaintiff having reasonable access on alternative school holidays. They further agreed that the plaintiff pays all educational needs and expenses for the minor children and monthly maintenance of US$100-00 *per* month *per* child. They lastly agreed that each party retains the movable property in their possession. The parties were now living separately.

The parties had during their marriage acquired only one immovable property known as stand 336, New Forrester Goodhope, Marlborough, Harare, through a $100 000-00 housing loan the plaintiff obtained from his then employer, NSSA in 2012. As a result, a mortgage bond

had been registered over that property. When the plaintiff was retrenched, he had not yet finished repayment of the loan. Since the plaintiff was now out of employment, he could no longer afford to repay the loan. He consequently sold the house. By the time trial commenced on 4 July 2018, the house had since been sold and the net proceeds after the mortgage bond had been fully repaid stood at US$78 158-12. The parties had since agreed that they share 50:50 from these proceeds.

Of the issues referred to trial the only outstanding issue was:

> "Whether or not the retrenchment package constitutes matrimonial property for sharing and distribution, if yes, what percentage should the defendant be paid? What would constitute a fair and equitable distribution?"

The plaintiff was the sole witness for his case and so was the defendant. From the evidence led by both parties it is common cause that the plaintiff who was employed by NSSA as a chief economist got retrenched and signed the retrenchment agreement on 6 January 2017. The retrenchment computation was produced as an exhibit. It shows that the plaintiff got a gross amount of $131 984-95 before tax. All his other obligations with NSSA which included loans were deducted before a net payment of $18 580-67 was made into his FBC bank account. $42 135-52 went towards tax. The plaintiff said that in 2016 he was given a car loan of $48 000-00 by his then employer and bought a car from Dulys. Upon computation of his retrenchment package $47 533-00 went towards repayment of the car loan. The plaintiff said he was asked to repay 50% of the outstanding housing loan and as such $22 000-00 was deducted for that loan. NSSA also deducted the money it had advanced to him in the sum of US$1 500-00 another $235-76 was deducted. He had a total deduction of $113 404-28 and got a net payment of $18 580-67. His housing loan balance remained at $56 117-44 and this was transferred to the National Building Society. It was the plaintiff's testimony that from the time he got retrenched up to the time of the trial in July 2018 he had not found another job. Before he got paid his retrenchment package he had borrowed money which he had to pay back when he got his package. From March 2017 when he got paid, it was his only source of income until it ran out in December 2017. He said that with no other source of income he was now surviving on selling his electrical gadgets like the television, laptop, DVD player etc, the items he got upon separation with the defendant in September 2017 when the house was sold. In short it was the plaintiff's evidence that from the $18 580-28 that he received as his net payment there was nothing left as he had used all of it to meet the family's financial needs and obligations.

He said that the defendant who had always been unemployed throughout the duration of their marriage was not making any financial contribution.

When the defendant testified she did not dispute that she did not make any financial contribution towards the running of the house and the upkeep of the family. She admitted that throughout the marriage she was never employed. She said that the plaintiff had barred her from working saying that he wanted her to be a full time housewife with the responsibilities of looking after the family and running the household. She said that having been married at the age of 22 years to the plaintiff who was older (35) and had been married before, she attained a secretarial diploma with her mother paying for her tuition, but the plaintiff refused that she works saying that secretaries are of loose morals. She said that on the basis of this she is entitled to share everything with the plaintiff equally including the retrenchment package that he got from NSSA. She stuck to her claim as contended in her amended courter claim that she be awarded 50% of the $18 580-28 being the net payment plus $47 533-00 which is the amount that was deducted by NSSA for the car loan it had given to the plaintiff. This calculation would entitle her to $33 056-84. She said that should the plaintiff not have this amount he should be ordered to sell his motor vehicle, the Toyota Hilux Assegai Double cab registration number AEC 6358 and from the net proceeds thereof she be awarded 50%. Over and above that she wants 50% of $18 580-67, the net payment the plaintiff got from his retrenchment package. It was the defendant's argument that instead of buying the car with the retrenchment package, the plaintiff ought to have used the $47 533-00 towards paying off the mortgage bond thereby affording both parties a larger share upon distribution of the net proceeds of the sale of the house. She also contended that by expending the whole US$18 580-67 the plaintiff had enriched himself at her expense. The defendant who was unable to dispute that the whole amount of US$18 580-67 was exhausted by December 2017 argued that the plaintiff had not used the money reasonably. It was put to the plaintiff that he had used the money to meet unnecessary expenses such as repainting the chimney of the house and having his car serviced. The defendant further said that out of that whole amount she had personally benefitted only $1 100-00 in the form of maintenance which she got from him in terms of an existing maintenance order that is between the parties. She also said that if the plaintiff no longer has the US$18 580.67 he should be ordered to sell his car in order to buy a smaller car for himself and meet her claim. She said that this should be done because the $100 that he is paying for the maintenance of each child per month is hardly enough for the children's expenses. She said that she only agreed to it because the plaintiff is currently out of employment. She said that she

needs the money in order to buy a suitable house for the children. She said that the plaintiff should sell his car because it is luxury car and he does not need a fancy car right now since he is now unemployed and has children to think about. She said that the children will need to be looked after for a while. She said that she feared that if she does not get 50% from the retrenchment proceeds the plaintiff is likely to abandon his children and stop supporting them as he did to his children from his previous marriage. She said that during their marriage the plaintiff would refer to income from work as "our money", therefore she is also entitled to the retrenchment package.

Let me hasten to point out that the plaintiff did not file an amended plea in response to the defendant's amended counter claim in which claimed a share of the retrenchment package. The amendment was filed on 26 January 2018 and was necessitated by the fact that when the defendant filed her plea to the plaintiff's declaration and summons and filed her counter claim on 17 March 2017 she was not yet aware of the plaintiff's retrenchment package which was awarded to him in January 2017. The Joint PTC Minute shows that when the pre-trial conference was held on 4 April 2018 both the parties went on to agree on the issues for trial without the defendant's amended plea. On the basis of this irregularity or omission the defendant's counsel in her closing submissions submitted that it is trite law that what is not denied is taken to have been admitted. In other words she was saying that the defendant's claim of 50% of the retrenchment package should be granted as requested because the plaintiff did not challenge or dispute it in a plea. The question is, is the failure to file a plea in response to the amended counter claim fatal to the plaintiff's defence to the extent that the defendant's claim should be granted as requested? Ordinarily in terms of the rules of this court, if a party fails to plead or defend a claim that entitles the other party to seek a default judgment which I think is what the defendant's counsel is asking this court to do in her closing submissions. However, procedurally I do not think that this is a request I can grant for the following reasons:

(a) Failure to file a plea in a divorce matter does not result in an automatic bar of the defaulting party or the defendant. In terms of r 272 (1) (a) of the High Court Rules, 1971 the plaintiff should give notice to the defendant to plead within 12 days and inform him that in default thereof judgment will be prayed against him. *In casu* no such notice was given to the plaintiff. It is therefore improper and unprocedural for the defendant to seek to obtain a default judgment by unscrupulous means by saying that it is trite law that what is not denied is taken to have been admitted. The averment that that which is not denied is taken to be admitted applies in situations

where the defendant would have filed a plea but in that plea he or she does not dispute the averments made by the plaintiff in his or her declaration. It does not apply in situations where a plea has not been filed at all.

(b) Despite the failure by the plaintiff to file his plea to the defendant's counter claim the parties went on to hold a pre-trial conference whereat they agreed on the issues for trial. The very first issue was whether or not the plaintiff's retrenchment package constitutes matrimonial property and if so what percentage should the defendant be paid? This is the very issue that resulted in the trial between the parties, otherwise the parties had agreed on all the other issues. It is therefore clear that although no plea had been filed at the pre-trial conference the parties were well aware that this issue was heavily disputed. They failed to resolve it and made it one of the issues for trial. By the time the trial commenced, it was the only issue which had not been resolved. So the whole trial was all about this one issue. With this, the defendant cannot at this stage try to snatch a judgment on a technicality and in an unprocedural manner. If the defendant wanted a default judgment she should have sought it procedurally in terms of the rules before the pre-trial conference was held or she could have raised the issue at the pretrial conference. It was a procedural irregularity for the pretrial conference to be held with the pleadings in respect of the counter claim not having been closed. The plaintiff' defence to the defendant's claim to the retrenchment package had not been pleaded. However, that irregularity was cured by the fact that the parties managed to come up with an issue for trial which issue made it clear that the parties were not agreed that the retrenchment package constitutes property which is subject to distribution between the parties. The issue made it clear that the plaintiff's argument was that the retrenchment package does not constitute property which is subject to distribution. Even when the plaintiff gave his evidence during trial, his position was that this does not constitute property which is subject to distribution.

In view of the foregoing, the failure to file the plea by the plaintiff is not fatal to his case. The irregularity was cured at the pre-trial conference when the parties agreed on the issues for trial and the parties eventually conducted a trial wherein they led evidence relating to the issue. I will thus determine the matter on the basis of the evidence the parties led.

Whether or not the plaintiff's retrenchment package constitutes matrimonial property which is subject to distribution?

The division of property upon the dissolution of a marriage upon divorce is regulated by s 7 (1) of the Matrimonial Causes Act [*Chapter 5:13*]. It reads,

> "**7 Division of assets and maintenance orders**
> (1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—
> (*a*) the division, apportionment or distribution of the **assets of the spouses**, including an order that any asset be transferred from one spouse to the other. (my underlining for emphasis)"

The provision makes it clear that what is divided are the assets of the parties hence it uses the term "assets of the spouses' and not "matrimonial property". This means that assets owned by the spouses individually (his and hers) or jointly at the time of dissolution of the marriage are what is considered. In *Gonye v Gonye* 2009 (1) ZLR 232 (S) in interpreting this provision the Supreme Court held that assets of the spouses include property acquired before marriage, during marriage and even after separation. In other words, all assets owned at the time of divorce. See also *Nyoka* v *Kasambara* HH 88/08 and *Sibanda* v *Sibanda* SC 7-14.

What constitutes assets are immovable properties and movable properties such as furniture, vehicles, pension interest, annuities, policies, investments, bank accounts, and interests such as shares and loan accounts in companies, partnerships, trusts or any other form of business. In this regard a retrenchment package is subject to distribution as it forms part of the assets of the parties. Assets that are not subject to distribution are listed in s 7 (3) of the Matrimonial Causes Act. These are assets acquired by a spouse by way of inheritance or in terms of custom and in terms of that custom are intended to be held by the spouse personally or assets which have particular sentimental value to the spouse concerned. A retrenchment package is not listed under s 7 (3). One of the factors that is considered by the court when making an order for division of assets listed in s 7 (4) is the value to either of the spouses or to any child of any benefit, including a pension or a gratuity which such spouse or child will lose as a result of the dissolution of the marriage. This factor makes it clear that had the marriage continued between the parties the whole family would have benefitted from any benefits that would accrue to any of the spouses. The word 'benefit' is not defined but it means that anything that can be categorised as a benefit is covered. A pension is a regular payment that is made during a person's retirement from an investment fund to which that person or their employer has contributed during their working life. See Concise Oxford English Dictionary 12th edition. In the same dictionary a gratuity is defined as a sum of money paid to an employee at the end

of a period of employment. Going by these two words it follows that a retrenchment package being a payment that is made to an employee who has been retrenched from employment by his employer also qualifies as a benefit. If a marriage is in subsistence the whole family benefits from such a payment because it is income. It therefore follows that if a marriage is dissolved such a benefit is also subject to distribution in terms of s 7 (1) of the Matrimonial Causes Act.

How much should be awarded to the defendant?

As has already been stated above, $47, 533.00 was deducted by NSSA when the plaintiff's package was computed and it went towards the car loan repayment. The retrenchment computation was produced as an exhibit and it speaks to that. The defendant wants a share of this amount because to her it was not necessary for the plaintiff to get a fancy and expensive car considering that he was now out of employment and that the children need looking after. The defendant seems not to appreciate that when an employee takes a loan from the employer, upon retrenchment they are supposed to repay the loan in full. In *casu* the plaintiff got a car loan in 2016 well before he was retrenched and he bought a car. Upon being retrenched he had no option but to pay off the loan from his package. It is not like the plaintiff had a choice. He had bought a car of his own choice using NSSA's money, so he could not give NSSA the car in place of the money he had been loaned. NSSA wanted its money back. This explains why it deducted money from the gross amount that was due to the plaintiff. It is therefore not correct for the defendant to say that the plaintiff chose to buy a fancy and expensive car at the time he got retrenched instead of paying off the housing loan. Both loans i.e. the car and the housing loans were debts that he owed to his employer at the time he was retrenched. As such he was supposed to pay them back. It is not as if the plaintiff had an option of not to paying the car loan.

The defendant's alternative claim that the plaintiff's car be sold so that she can get a share from the proceeds and that the plaintiff down sizes on the car that he uses because he is now out of employment is unreasonable to say the least. The plaintiff paid off the car loan upon retrenchment because he had a duty to do so. He had no other alternative so he did not do so in order to disadvantage the defendant. The fact that he is now out of employment is no justification to order him to sell the car. This is the car that the plaintiff had been using. On the other hand, the defendant was and still uses the car which the plaintiff bought for her and had registered in her name. To acquire both cars, hers and his, he took loans. She is keeping her car and there is no reason why the plaintiff should not keep his. It is only fair that each party gets

to keep the car they were using. In any case the plaintiff bought these cars without any financial contribution from the plaintiff. The $47 533.00 was used in repaying the car loan, so it is no longer available for distribution. So I cannot award 50% thereof to the defendant

About the net retrenchment package of US$18 850.67 that was paid to the plaintiff, he said that it ran out in December 2017 having been used for a full year from January 2017. The plaintiff enumerated the expenses he paid using that money and these were basically meeting all the family's financial needs and obligations by himself. They included paying school fees for the 2 children with the older one being in high school at a private school, Kyle College in Masvingo where the fees were US$2 900.00 per term until they transferred her to a less expensive school where the fees are $325.00 per term. The plaintiff was also paying maintenance for the children and the defendant at the rate of $300 per month for the 3 of them, buying food, paying the utility bills at home, servicing the car and painting the house among other things. The defendant could not really dispute that the plaintiff was telling the truth that the money had been used in meeting all these financial obligations. The defendant's argument was that the plaintiff had not used the money wisely and had incurred unnecessary expenses such as servicing his car and painting the chimney of the house. That the plaintiff incurred unnecessary expenses is debatable. Servicing a car and repainting a house so that it can fetch a better price upon being sold cannot in my view be said to be unnecessary expenses. In fact, US$18 850.67 being used to cater for a family of 4 for a full year shows that the family was living on a very tight budget. It cannot be doubted that the money has since been exhausted. To expect that after 1 ½ years the plaintiff would still be having part of it is very unreasonable, unrealistic and irrational. This money was the plaintiff's only source of income from the time he was retrenched. Since the money is no longer there and there being no evidence that the money was misused, I cannot award 50% of this amount to the defendant. There is nothing to distribute anymore. As it is, the plaintiff is now struggling financially. He is now surviving on selling the electrical gadgets he got as his share of the movables. He is still out of employment yet he still bears the burden of paying maintenance for the defendant and the children. The parties even agreed that because of his current pathetic financial position the existing maintenance order whereby he is paying $100 per month for each of the 2 children and $100 for the defendant be maintained. It means that the defendant fully appreciates that the plaintiff has no more money. In view of the foregoing, I am not awarding anything to the defendant in respect of the retrenchment package.

Conclusion

In the result, it be and is hereby ordered that:-

1. A decree of divorce is granted.
2. The custody of the two minor children, namely Courtney Mya Makoni (born on 18 December 2002) and Melissa Claire Makoni (born on 26 January 2012) is awarded to the defendant with the plaintiff having access on all alternate school holidays.
3. The plaintiff shall continue paying maintenance in the sum of US$100 *per* month *per* child towards the maintenance of the 2 children as ordered by the maintenance court on 22 March 2016. In addition he shall continue paying for the children's educational needs and expenses.
4. The plaintiff shall continue paying maintenance in the sum of $100 *per* month towards the maintenance of the defendant as was ordered by the maintenance court.
5. Each party shall retain the movable property in their possession.
6. Each party is awarded a 50% share of the net proceeds of the sale of their immovable property: Stand Number 336, New Forrester Goodhope, Marlborough, Harare which net proceeds amount to US$78 158.12.
7. The defendant's counter claim that she be awarded a share of the plaintiff's retrenchment package is dismissed.
8. Each party shall bear its own costs.

Guwuriro & Associates, plaintiff's legal practitioners
Mundia & Mudhara, defendant's legal practitioners