REPORTABLE ZLR (57)

Judgment No. S.C. 103/2000
Civil Appeal No. 299/99

JULES PATRICK LAFONTANT v ELINOR KAYE KENNEDY

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, SEPTEMBER 5 & OCTOBER 12, 2000

P Nherere, for the appellant

A P de Bourbon SC, for the respondent

McNALLY JA: At the hearing of this appeal on 5 September 2000 the Court asked the parties to submit further written argument. As a result of confusion in the registry, it was only on 4 October, when I enquired about Mr *Nherere's* supplementary heads, that I discovered they had been lodged promptly on 12 September.

The respondent (Mrs Kennedy) has been resident for some years in Zimbabwe. She worked, until her retirement, for an international organisation which posted her here. So she did not acquire domicile. She lived here with her husband, the appellant (Mr Lafontant). They were married in Italy in 1983. She is a New Zealand citizen. He is domiciled in Haiti.

The parties were divorced, at her instance, in Haiti on 21 November 1997. She reverted to her maiden name. Subsequently they became embroiled in a

dispute before the High Court of Zimbabwe over certain immovable and movable property situated in Harare. They are still involved in litigation in the United States of America over two apartments in New York and the money in various bank accounts.

We are concerned only with the Zimbabwean litigation. Mrs Kennedy sued Mr Lafontant for a declaration that she was the sole owner of the immovable property at 13 Hillary Road, Ashbrittle, Harare, and of a certain 1992 Nissan Sedan vehicle. There were other disputes, but they are no longer important. Mr Lafontant asserted that the immovable property, acquired long after the marriage but before the divorce, was registered in both their names and thus he was entitled to half of it, or 50% of the net proceeds. The car, he said, was his.

Mrs Kennedy's claim to the whole of the immovable property, despite the fact that the property was registered as theirs jointly, was based in the declaration on an averment that it would be "just and equitable" that she be declared sole owner. The evidence and the argument make it clear that this claim was based on s 7 of the Matrimonial Causes Act [*Chapter 5:13*] ("the Act"). From the beginning, I must add, Mr Lafontant disputed the application of s 7 to the issue of the house.

The learned judge, on the other hand, seems not to have relied on the section. He said:

> "It was not in dispute that the said property (he was speaking of both the movables and the immovable property) was acquired *stante matrimonio* – i.e. during the subsistence of the marriage. However, the parties have not asserted any claim as to ownership based on any matrimonial regime. The whole basis of this case has been to invite this court to determine which of the

> properties belongs to one or other of the parties in his or her name. Furthermore, where it is jointly owned, as in the case of the house, the court is being asked to make an apportionment based on their respective contributions towards the acquisition of the property."

His Lordship then went on to find that they had contributed to the immovable property 80:20 in her favour. He found that the vehicle was hers, but that Mr Lafontant might buy it from her for $100 000.00.

Since both in this Court and the court below Mr *de Bourbon* has based his case on s 7 of the Act, it is appropriate to deal first with the question – is this a case in which s 7 of the Act can be applied?

Section 7(1)(a) reads:

> "7 (1) Subject to this section, in granting a divorce … 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 another;".

The words "subject to this section" do not concern us in this case. So the simple question is: "Given that the Civil Court of Port-au-Prince, Haiti, is not an 'appropriate' court by definition (s 2 of the Act), is the section applicable in a case where two former spouses, divorced in Haiti, subsequently dispute the ownership of property in Zimbabwe?".

To my mind, the answer is quite obviously "no". I agree entirely with Mr *Nherere's* submissions. The relief is ancillary to the decree of divorce and may be granted by an appropriate Zimbabwean court either when it grants the decree or at

any time after it has granted that decree. By the same reasoning one may say that "thereafter" in the context means "after it has granted the decree".

I am pleased to note that in two judgments in the High Court this reasoning has been adopted. BLACKIE J in *Faria v Clarridge* 1988 (2) ZLR 202 concluded by parity of reasoning that a woman already divorced under the old Act (which had no such provisions as to property division) could not seek a division of property under the new Act after it was introduced. (See especially at 206 C-D). And in *Walls v Walls* 1996 (2) ZLR 117 a three judge bench (CHIDYAUSIKU, BARTLETT and GILLESPIE JJ) affirmed the correctness of the decision in *Faria supra*. I refer in particular to the judgment of BARTLETT J at 143 D-E and to that of GILLESPIE J at 160 D-H. Both refer to an unreported decision of BARTLETT J in *Lewis v Beeson*. GILLESPIE J says of it:

> "This latter decision is not an authority dealing with retrospectivity; rather it shows that where a marriage is dissolved by a foreign court, this court has no powers under Act 33 of 1985 (now *Chapter 5:13*] to make a property distribution order."

I am satisfied therefore that the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] do not apply in cases where the parties have previously been divorced outside Zimbabwe, that is to say, by a court other than "an appropriate court".

The learned judge, however, did not rely on the section. He was of the view that the court was being asked "to make an apportionment based on their respective contributions towards the acquisition of the property". I turn therefore to

consider whether there is any basis in law for such an approach, apart from the provisions of s 7 of the Act.

What law is applicable? In Roman-Dutch law the proprietary consequences of a marriage are governed by the law of the husband's domicile at the time of the marriage. See *Frankel's Estate & Anor v The Master & Anor* 1950 (1) SA 220 (A) at 233, 237, 238 and 251; *Sperling v Sperling* 1975 (3) SA 707 (A); *Esterhuizen v Esterhuizen* 1999 (1) SA 492 (C) at 494 C-D. No evidence has been led as to the law of Haiti, if that was indeed the country of domicile of Mr Lafontant at the time of the marriage. Nor may we, since 23 October 1992, presume that that law is the same as that of Zimbabwe, by virtue of the provisions of s 25 of the Civil Evidence Act [*Chapter 8:01*].

In the present case both parties accepted that the law of Zimbabwe applied; there was no suggestion that the law of Haiti applied; in the case of the immovable property Zimbabwean law is the *lex loci rei sitae*; and in any event the matter is not, as I have ruled, a matrimonial dispute at all. The parties are not married to each other. It is a dispute between co-owners. I propose to apply Zimbabwean law.

What then is the Zimbabwean law relating to joint ownership of immovable property? It seems that joint ownership is the same as co-ownership, which in turn coincides with what the Deeds Registry Act [*Chapter 20:05*] calls "land held by two or more persons in undivided shares" – see ss 24, 25, and 26 of that Act.

Where two persons own immovable property in undivided shares (as is the case here) there must, I think, be a rebuttable presumption that they own it in equal shares. That presumption will be strengthened when (as here) the parties are married to each other at the time ownership was acquired. Thus Jones *Conveyancing in South Africa* 4 ed p 118 states:

> "Where transferees acquire in equal shares it need not be stated in the deed that they acquire 'in equal shares', as this fact is presumed in the absence of any statement to the contrary".

The title deeds of the immovable property were not produced in evidence. We do not know whether the deed shows that the property was transferred specifically in equal shares or not. But either way, the fact remains that they are *prima facie* owners in equal shares. This is the basis of such decisions in this Court as *Takafuma v Takafuma* 1994 (2) ZLR 103. As KORSAH JA said in *Ncube v Ncube* S-6-93 (unreported):

> "As a registered joint owner she is in law entitled to a half share of the value of the property".

That, therefore, is the starting point.

The Court cannot move from that position on mere grounds of equity. It cannot give away A's property to B on the mere grounds that it would fair and reasonable, or just and equitable, to do so. There must be a more solid foundation in law than that.

In *Nyamweda v Georgias* 1988 (2) ZLR 422 (S) the reason was that Miss Nyamweda was found by the court to have been an agent for her undisclosed

principal, Mr Georgias. She was in effect his nominee at will. In *Young v van Rensburg* 1991 (2) ZLR 149 (S) KORSAH JA held that van Rensburg created Young "a nominee for the respondent (van Rensburg) (and) that on demand the appellant would transfer the farm to the respondent" (155 C-D).

There are other situations in which the Court can intervene such as fraud or mistake or, as I suggested as the hearing, an allegation that Mr Lafontant's share was a donation between spouses, voidable at the instance of the donor. See Lee and Honoré *Family, Things and Succession* 2 ed at para 61. None of these grounds was specifically alleged in the pleadings.

In evidence Mrs Kennedy was asked (at p 8):

> "Was it ever your intention that he should have a beneficial half share in the property?".

She answered:

> "No, that was not the intention."

The evidence that was accepted by the court, although Mr Lafontant disputed it, was that all the money for purchasing the land and building the house came from her. He had neither money nor income – odd jobs excepted. There seems every justification for that finding on credibility. We accept therefore that she paid for the land and the building. He played a part in supervising the building work – he had, after all, little else to do.

In evidence she was also asked, at the same page:

"(This plot) was registered in your joint names. How did that come about?'.

She answered:

> "Since I have worked for the United Nations I have travelled quite extensively, and for convenience sake I have had our property registered in both names. This was so that if I were to be away, and something needed to be done, then my former husband could have attended to it."

I have given a great deal of anxious consideration to the question whether Mrs Kennedy's declaration discloses a cause of action. She has not alleged specifically that he was a nominee. She has not in terms claimed that it was a donation revoked whether for ingratitude or otherwise. She has alleged simply:

> "(The) plaintiff paid for the purchase of the property and avers that it is just and equitable that (the) defendant transfer to (the) plaintiff as her sole and exclusive property his share of the property."

I think by claiming and proving that she alone paid for the property, it must necessarily follow, if it was registered jointly in their names, that she effectively gave him the half share as her nominee, for convenience. By instituting action, she is terminating that nomination. The cases of *Nyamweda supra* and *Young supra* are appropriate precedents.

Had the matter been properly pleaded, I believe the learned judge would not have been induced to deal with the matter on the basis of apportionment. In fact his choice was between awarding the property entirely to Mrs Kennedy, or leaving things as they were. However, in the absence of any cross-appeal, we can do no more than dismiss the appeal in respect of the immovable property with costs.

The application to amend the prayer, in the supplementary heads of argument, accordingly falls away.

As far as the movable property is concerned (and I note that the amendment to include further property was not pursued), it seems to me that once Mr Lafontant's evidence was disbelieved, his case collapsed. As I indicated earlier, this Court agrees with the findings of the trial judge on the question of credibility.

Accordingly the appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Muzenda & Maganga, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners