

GOLIATH MANJALA  
versus  
SIKHANGEZILE NKALA MAPOSA

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE 06 June, 2013

**FAMILY LAW COURT**

**TRIAL**

*S Simango*, for the plaintiff  
*W Bherebende*, for the defendant

CHITAKUNYE J: The plaintiff and defendant were married in terms of the African Marriages Act [*Cap 238, (now 5:07)*] on 14 June 1989.

On 19 October 2011 that marriage was declared a nullity by this court at the instance of the plaintiff in case number HH264/11. The plaintiff had married defendant when he was already married to two other women, namely Constance Chasi and Rosaria Manjala in terms of the Marriages Act, [*Cap 5:11*]. In 1990 at plaintiff's instance his marriage to Constance Chasi was annulled. He thus remained married to Rosaria and Defendant. At the time the marriage to defendant was declared a nullity the issue of the distribution of the property that had been accumulated during the subsistence of the marriage was not dealt with as it was not claimed in either party's pleadings.

On 17 November 2011, plaintiff sued defendant seeking an order for the distribution or sharing of the property acquired during the subsistence of the marriage. The defendant objected to the plaintiff's proposal on what would be an equitable distribution of the property. She made a counter claim in which she made her own proposal on how the property should be shared. Defendant also claimed maintenance in respect of the two children of their marriage who were attending learning institutions.

The parties were agreed on the properties that were acquired but disagreed on when and how some of the property was acquired. At a pre-trial conference the following was agreed:

1. That the 12 Acre Plot situate in Norton is State property hence not subject to distribution,
2. That the purported marriage has been nullified *ab initio*;
3. That Defendant has no capacity to sue for maintenance on behalf of the two major children of the marriage.

The issues referred for trial included the following:-

1. Whether or not House number 3A Helena Road, Marlborough, Harare is part of the matrimonial property;
2. Whether or not Defendant is entitled to any share on house No. 3A Helena Road, Marlborough, Harare? If so what percentage?
3. Whether or not Plaintiff is entitled to any share in the immovable property being No. 13 Neasden Avenue, Bulawayo? If so what percentage?
4. What is the equitable distribution of the movable assets?
5. Whether or not No. 1-44<sup>th</sup> Avenue, Haig Park, Mabelreign is part of the matrimonial property? If so what percentage is defendant entitled to.

The plaintiff gave evidence and tendered a number of documentary exhibits. Defendant thereafter gave evidence and tendered a lot of documentary exhibits.

Before delving into the evidence it is pertinent to clarify an issue raised by counsel for the parties. In his closing submissions plaintiff's counsel opened his address by suggesting that in as far as the marriage between the parties was declared a nullity, the provisions of s 7 of the Matrimonial Causes Act, [Cap 5:13], did not apply. He argued that it cannot be said that the parties were in a *tacit universal* partnership. As far as he was concerned the parties were not spouses as envisaged in s 7. Each party accumulated their assets independently and so that is what each should take. Counsel seemed to be equating this scenario with the instance where parties have been living in an unregistered customary law union. In this regard he cited the case of *Chapendama v Chapendama* 1998(2) ZLR 18(H) wherein court held that:-

“as the marriage had not been solemnised, the division of property in terms of s 7 of the Matrimonial Causes Act does not apply.”

Clearly counsel was wrong in that in the present case the marriage had been solemnised and the scenario is specifically provided for in the Matrimonial Causes Act.

Counsel for defendant also seemed at a loss on the issue. Counsel begun his submissions by stating that plaintiff had not disclosed a cause of action in as far as their Marriage had been nullified. Counsel cited the cases of *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219(H) and *Chapendama v Chapendama (supra)* as authority for stating that where there is no valid marriage the plaintiff must disclose the basis upon which he or she claims the distribution of matrimonial property and that basis or cause of action must be pleaded. Later on in his submissions counsel seemed to contradict himself when he alluded to the fact that s 7 of the Matrimonial Causes Act was applicable.

I am of the view that counsel for both parties were mistaken on this point. Had they cared to examine s 7 of Matrimonial Causes Act they would have noted that it provides for instances where a marriage is declared a nullity.

Section 7(1) of the Matrimonial Causes Act [*Cap 5:13*] states that: -

“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;
- (b) The payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”

The instances in which the section applies are thus made clear as- ‘**in granting a decree of divorce, judicial separation or nullity of marriage**’. In *casu* it was a case of nullity of marriage.

Precedent shows that where the marriage was nullified the courts have held that s 7 of the Act is applicable. In *Joseph Sibanda and another v Josephine Sibanda* SC117/04 court held that as one of the parties was not aware of the fact that the other party had a prior marriage, the marriage was a putative marriage to which the provisions of section 7 of the Matrimonial Causes Act chapter 5:13 are applicable.

Equally in *Makovah v Makovah* 1998 (2) ZLR 82(S) at 90A-B MUCHECHETERE J.A., referring to the provisions of section 7(1) of the Act, stated that:-

“In my view, the above provisions cover a marriage, such as the present one, which is declared null and void. If it were not the case it would work an injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was valid. It would also unjustly enrich a dishonest party such as the

applicant in this case simply because the property in question is either registered in his name or under his control. Such a position is unconscionable and the legislature by using the expression “nullity of marriage” must have envisaged that a situation such as the present one would be covered. I should state that such situations are very common in African Society because of the failure by many to realise that once they contract a “church” marriage their marriage becomes monogamous.”

In *casu* for the period 1989 to October 2011 defendant believed her marriage to plaintiff was valid. At the solemnisation of the marriage she was made to believe she was the only wife. Later she realised plaintiff had other wives. There was however no disclosure that any of the other wives was married to plaintiff in terms of the Marriages Act, [Cap 5:11], which is monogamous. For a period in excess of 20 years the parties lived as husband and wife doing all manner of things as such. Clearly in my view s 7 of the Act is applicable.

Section 7(4) of the Act states that:-

“In making an order in terms of subs (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 to either of the spouses or to any child of any benefit , including a pension or gratuity, which such 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 continued between the spouses.”

The evidence given by the parties focused mainly on direct contributions each claimed to have made to the acquisition of the properties still in dispute, namely number 3A Helena Road, Marlborough Harare, 13 Neasden Avenue Bulawayo and the movable property.

NUMBER 3A HELENA ROAD MARLBOROUGH, HARARE.

The issues relating to this property were whether or not House No. 3A Helena Road is part of the matrimonial property and Whether or not Defendant is entitled to any share on house No. 3A Helena Road, Marlborough, Harare? If so, what percentage?

The plaintiff argued that though registered in their joint names the property belongs to him and his wife Rosaria as he bought it using proceeds from the sale of their matrimonial home 24 Eves Crescent, Ashdown Park, Harare. The registration into the joint names was done without his authority or knowledge. He had merely asked to use defendant's payslip and not intended that she be a joint owner. Defendant should therefore not get any share of this property.

The defendant on the other hand contended that the property was acquired by her as the funder and it was from inception intended to be her property. She offered plaintiff a 30% share with her retaining 70% share.

From the evidence adduced certain aspects are common cause. It is common cause that the agreement of sale refers to both parties as purchasers. The application for a mortgage bond is in the two parties' names as well. On the face of it both parties were purchasers and applicants for the mortgage bond. It should therefore not surprise anyone that the title deeds are in the two purchasers' names. It is common cause that this property has been registered in the joint names of the parties since its purchase with neither party correcting any error if ever there was one.

It is further agreed the purchase price was Z\$100 000-00 paid as Z\$25 0000 deposit and Z\$75000 by way of a mortgage loan. Each party claimed to be the one who paid the purchase price for this property.

The plaintiff's evidence was to the effect that he firstly entered into a rent to buy agreement with Mrs. Towers who was owner in 1987. It was upon that agreement that defendant moved into the property on 1<sup>st</sup> June 1988. The seller had agreed that he would continue paying rent to buy till he secured a loan. When he realised that he could now secure a loan he sold his matrimonial home with his wife Rosaria, number 24 Eves Crescent Ashdown Park, Harare, in order to raise the deposit required. After the sale of 24 Eves

Crescent house he paid a deposit of Z\$25 000 to Mrs. Towers via bank transfer. Upon the payment of the deposit he was able to secure a mortgage loan of Z\$ 70 000-00. This left a balance of Z\$5000. In order to get a bigger loan to cover the Z\$5000 he asked for defendant's pay slip. In combining his payslip and defendant's payslip he was able to secure a mortgage loan of Z\$75 000. The loan application indicated both parties as applicants. He thereafter serviced the loan alone. In January 1998 when they left for Belgium he left tenants in the house and instructed an estate agent Gabriel Real Estate to deposit rentals into defendant's Beverly Building Society account as that is the account deductions for the mortgage repayments were to be made from. As far as he is concerned all the money to repay the loan from the time they were in Belgium (5years) and Ethiopia (2years), as Defendant was on tour of duty in those countries, came from rentals. The loan was paid off in 2003.

The plaintiff's version is highly improbable in this regard. According to plaintiff he was only able to buy the house after he had sold no. 24 Eves Crescent. A careful examination of the documentary evidence shows that the agreement of sale for 3A Helena Road was entered into on the 15 February 1990. That is also the date the application for the mortgage loan was made. It is also clear from the evidence adduced that no. 24 Eves Crescent had not been sold by then. The plaintiff said that that property was sold in 1991. The documents tendered by defendant confirmed that the property was indeed sold in 1991 and plaintiff was only paid the purchase price on 25 October 1991. It is therefore not true that the plaintiff used proceeds from the sale of 24 Eves Crescent to pay the deposit for 3A Helena Road. Plaintiff was emphatic that he only applied for a mortgage bond after he had paid the deposit. That means by 15 February 1990 he had paid the deposit and that was before 24 Eves Crescent was sold.

Though the plaintiff said he had in fact started paying for the property as rent to buy in 1987, his calculation of the purchase price and the manner he paid it meant he paid well above Z\$100 000-00 yet the agreement of sale clearly states the purchase price as Z\$100 000-00 comprising the deposit of Z\$25 000 and the mortgage loan of Z\$75 000. The amounts paid as rent to buy were not accounted for. When asked about that anomaly plaintiff was unable to explain.

As regards servicing of the mortgage loan before the couple left for Belgium, plaintiff said he was the only one servicing the loan as he was employed and had businesses. The businesses comprised a bus operating company Manjala Express with a fleet of six buses and mines. He alleged that defendant though employed did not contribute as her salary was

expended on her debts and other personal financial needs. According to plaintiff defendant had no money to assist him on the property.

The plaintiff's stance is however contradicted by his own avowed financial state during the period in question. In an affidavit dated 26 August 1992 in the matter '*Constance Chasi v Goliath Manjala*' M91/88, the plaintiff, in defending a claim for maintenance alleged that he was dependant on his wife, and that applicant and her legal practitioners were aware he had not been reinstated at work. He also alluded to efforts in forming a bus company with his wife and that he only had one bus given to him to use but that venture had failed. On house number 3A Helena Road, plaintiff said it belonged to his wife and children. In paragraph 5 of the affidavit he went on to emphasise that-

“Constance Chasi [never MANJALA] should wait until i have enough income to maintain my children. She is the one working who should maintain the children and not the unemployed Goliath Manjala. Does she want my only working wife to maintain both me and children whose mother is working?”

It must be noted that the person he refers to as his wife in the affidavit is the defendant Sikhangezile. Though during re-examination plaintiff attempted to deny being the deponent of that affidavit, that denial was without merit. Not only had the document been discovered as part of defendant's evidence but when asked under cross examination plaintiff had not denied being the author of that affidavit. He only expressed surprise as to how defendant had come across that affidavit. That affidavit supports the defendant's version in a material way. It was defendant's evidence that plaintiff left employment in April 1985 and since then had not been employed. The payslip he produced at the time of applying for a mortgage bond was forged. During the loan repayment period plaintiff was unable to source funds hence she met the debt on her own. Both defendant and plaintiff in his affidavit alluded to the fact that Manjala Express was their joint venture and the venture had only one bus. That venture was not viable hence it was discontinued. This confirmed that plaintiff was not being truthful to court when he said he operated a fleet of six buses under Manjala Express.

It may also be noted that apart from a mere statement that he operated six buses and had a mine, plaintiff lamentably failed to produce any document or other form of proof of income from those ventures. Clearly in my view plaintiff was hard of funds. In those circumstances he could not have been the one servicing the mortgage loan. The only source of income available was defendant's salary. Being unable to raise any income plaintiff could not have funded the improvements done at the property either.

I am of the view that from the evidence adduced the probability is that the loan repayments and improvements done before the couple went to Belgium in 1998 were financed by defendant. Not only was defendant in continuous employment but she also received a lump sum payment of Z\$63 760- 00 as ‘War victims’ compensation in October 1995. Her version which I find most probable is that she used the bulk of her lump sum payment to finance improvements at the property.

It was accepted by both parties that when they were abroad loan repayments were being done from defendant’s Beverley Building Society bank account into which rentals from the property were being deposited. The rentals were thus utilised to repay the loan till such a time defendant instructed her bank to clear the balance in a lump sum payment. The mortgage bond was repaid in full in 1999 when the couple were in Belgium. See exh 7.

Though plaintiff argued that this property was his matrimonial property with Rosaria, evidence adduced showed beyond doubt that Rosaria had never set her foot or stayed in that house. It is defendant and plaintiff who lived in that house as their matrimonial home from inception. The plaintiff was simply not being candid with court. In my view plaintiff is a stranger to the truth.

When a property is jointly registered the presumption is that it is held in equal shares unless proved otherwise. See Samuel *Kanoyangwa v Winfreda Kanoyangwa* HH 23-2011. In *Ncube v Ncube* S-6/93 at page 11 of the cyclostyled judgement, KORSAH JA had occasion to deal with a similar situation where the property was registered in joint names. He opined that: -

“It is incorrect to say that the appellant as a registered joint owner is not entitled to a half share of the value of the Napier Avenue property because she did not contribute money or money’s worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property.

The proper approach is to accord her share of that property and then, taking into account all the assets of both spouses to endeavour as far as is reasonable and practicable and is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued between them. In the performance of this duty a court is empowered, in the exercise of its discretion, to order that any asset be transferred from one spouse to the other.”

See also *Takafuma v Takafuma* 1994(2) ZLR 103 (S).

I am of the view that the defendant has made out a solid case for court to move from the 50:50 share in this property. She has shown that she is the one who effectively paid for

the property and effected improvements thereon. She played her part as the spouse who was employed. For the 5 years the couple was in Belgium she provided for the family. When they moved to Ethiopia for the two years plaintiff was with her she provided for him. In all this I did not hear plaintiff to complain about ill-treatment. The plaintiff on the other hand from the inception of their relationship lied to her about his marital status. He took her for a ride till after the stay in Belgium and Ethiopia when he now decided to reveal to her his true marital status. That deceitful conduct on the part of plaintiff must surely not be ignored. Plaintiff must have known that by virtue of his marriage to Rosaria, the marriage to defendant was null and void. He confirmed this knowledge beyond doubt in 1990 when he sought and obtained nullification of his marriage to Constance Chasi on the basis that he was already married in terms of the Marriages Act. In spite of this knowledge he led defendant on as if the marriage was valid. One can only infer that he did this to feast on the sweat of defendant. He should therefore not expect to benefit much from his deceitful conduct. A 20% reduction in his share is justified. The remaining 30% will more than compensate him for any contribution he may have made and for any other considerations he deserves in the distribution of this property.

#### 13 NEASDEN AVENUE BULAWAYO

The main issue on this property was whether or not plaintiff is entitled to any share in this property? If so, what percentage? The above property is registered in defendant's name. On the face of it, it is her property. It was clear from the evidence adduced by both parties that defendant purchased this property before the parties' 'marriage'. At the time they met she was already servicing a mortgage bond in respect of this property. The plaintiff's only basis for a claim of 30% of the property was that he believed defendant had used his Z\$15900-00 in her account to pay off her mortgage loan. Plaintiff clearly admitted but for that he had no contribution whatsoever to the purchase of that property. The plaintiff, as before could not on a balance of probabilities show that he had a source of income to enable him raise such an income. Plaintiff could not show that he made any deposits into defendant's account aside from the rentals that were being deposited by Gabriel Real Estate agent and defendant's own savings.

It was clear that plaintiff was simply clutching at anything he thought might assist him get something from his years of living with defendant as husband and wife. Unfortunately he could not prove his claim to this property. This property was bought before

their 'marriage' and stayed out of the marriage as plaintiff did not contribute anything either directly or indirectly. It remained untainted as defendant's property.

The issue pertaining to the other immovable property 1-44<sup>th</sup> Avenue Haig Park, Mabelreign, was resolved when defendant conceded that it is the matrimonial home for plaintiff and Rosaria Manjala and that she no longer wished to have a share of it. It is thus no longer an issue in this matter.

#### MOVABLE PROPERTY

There was not much to say on the movable property. As has already been alluded to, plaintiff was not a credible witness at all. In this regard he sought to allege that some of the property belonged to his wife Rosaria. He argued that he had stored that property at 3A Helena Road when he sold 24 Eves Crescent, but as has been shown 3A Helena Road was bought before 24 Eves Crescent was sold. Rosaria Manjala has never moved to 3A Helena Road and instead has always had her own accommodation. Plaintiff could not explain why Rosaria's property has remained at this property when she has her own house no. 1-44<sup>th</sup> Avenue, Haig Park, Mabelreign.

I did not hear it seriously contested that most of the movable property was acquired when the parties were in Belgium and later Ethiopia. During that period plaintiff was unemployed. He in fact confirmed he was doing domestic chores and not earning any income. It is thus uncontested that it is defendant who bought most of the movable property. The plaintiff's allocation will thus be based on his indirect contribution and his needs. I am of the view that taking into account plaintiff's conduct, whereby he took advantage of a gullible woman and lived with her at her expense when he knew he was legally married to someone else, not much should be awarded to him. I will award him as offered by defendant which offer I consider very generous.

#### **Accordingly it is hereby ordered that:-**

1. Stand number 9214 Bulawayo Township of Bulawayo Township Lands in the District of Bulawayo, also known as 13 Neasden Avenue, Bradfield, Bulawayo, be and is hereby awarded to defendant as her sole and exclusive property;
2. The defendant be and is hereby awarded 70 percent share of the Remainder of lot 67 Marlborough Township, Marlborough, Harare also known as Number 3A Helena Road, Marlborough, Harare.
3. The plaintiff is hereby awarded a 30 percent share of the Remainder of Lot 67

Marlborough Township, Marlborough, Harare, also known as 3A Helena Road, Marlborough, Harare.

4. The defendant is hereby granted the option to buy out plaintiff in respect of his 30% share in the property, Number 3A Helena Road, Marlborough, Harare, as follows-
  - i) The parties shall agree on the value of the property within 14 days of the date of this order. If they fail to agree on a value, they shall within 21 days from this date appoint a mutually agreed evaluator to evaluate the property.
  - ii) Should they fail to agree on an evaluator, the registrar of the High Court shall be and is hereby directed to appoint an independent evaluator from his panel of evaluators to evaluate the property.
  - ii) The cost of evaluation shall be borne by the parties in the ratio 30:70 (as per their respective shares).
5. The defendant shall pay off plaintiff his 30 percent share of the value of the property within six (6) months from the date of receipt of the evaluation report unless the parties agree on a longer period. Should the defendant fail to pay plaintiff's share in full within the stated period or as agreed, the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the registrar of the High Court and the net proceeds there from shall be shared in the ratio 30:70.
6. The plaintiff be and is hereby awarded the following movable property:-
  - (i) One television set
  - (ii) 2 x white bins
  - (iii) Picture frames with his pictures inside
  - (iv) 1 dinner set
  - (v) Brass round coffee table
  - (vi) Box with kitchen utensils currently in plaintiff's possession
  - (vii) 2 side bed tables
  - (viii) 1 brass gold bed
  - (ix) Press boy hanger
  - (x) 1 ironing board
  - (xi) Pilot's briefcase

- (xii) 1 office cabinet
- (xiii) Tablet packing machine
- (xiv) Car trailer
- (xv) BMW 20s
- (xvi) Electric heater
- (xvii) Philips 3 CD changer radio
- (xviii) 1 x 3 door wardrobe
- (xix) 1 white and brass dressing table
- (xx) 2 plate electric stove.
- (xxi) A herd of 13 cattle

7. The defendant is hereby awarded all the remaining movable property including-

- (i) Italian maroon leather sofas
- (ii) Italian coffee table with a bar at the centre
- (iii) Room divider
- (iv) Corner display cabinet
- (v) Two piece pink sofas with a corner table
- (vi) Bulb cover light
- (vii) Blue fan with a stand
- (viii) 4 x white bins
- (ix) Balance of the picture frames
- (x) Artificial flowers
- (xi) Curtains
- (xii) 2 x wall watches
- (xiii) 2 x double tropical fridges
- (xiv) Oak dining room suit with six chairs
- (xv) 1 x dinner set
- (xvi) Punch set
- (xvii) Food warmer trolley
- (xviii) Coffee table
- (xix) Balance of kitchen utensils
- (xx) 6 plate stove
- (xxi) Oven
- (xxii) Microwave oven

- (xxiii) 4 chair taguta table
- (xxiv) 3 x carpet Hoovers
- (xxv) Electric sewing machine
- (xxvi) Industrial steam iron
- (xxvii) Radio 3 CD changer
- (xxviii) Bed
- (xxix) Dressing table and 2 x side tables
- (xxx) 3 x office cabinets
- (xxxi) Generator Toshiba kva
- (xxxii) Peugeot 605 motor vehicle
- (xxxiii) Tools box
- (xxxiv) Cable jumpers
- (xxxv) Ladder (aluminium)
- (xxxvi) 4 x hoes
- (xxxvii) Lawn mower (heavy duty)
- (xxxviii) Garden folks
- (xxxix) Water tank (asbestos)
- (xl) 2 x wheelbarrows
- (xli) Driller
- (xlii) Belgian Puma blankets
- (xliii) 3 Belgian movable wardrobes
- (xliv) 1 x 6 chest of drawers
- (xlv) 3 Belgian Mosquito nets
- (xlvi) 2 gold chandelier
- (xlvii) 1 plate gas stove
- (xlviii) 5 African kitchen stools
- (xlix) 2 x black 3 legged Zimba pots
- (l) A herd of 14 cattle

8. Each party shall bear their own costs of suit.

*Nyikadzino, Simango & Associates*, plaintiff's legal practitioners  
*Bherebende Law Chambers*, defendant's legal practitioners.