

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 73/2019

BETWEEN:

ADAM PETER BOUSFIELD



APPELLANT

AND

CHARMAINE BOUSFIELD

RESPONDENT

Coram: M'chenga, DJP, Makungu and Ngulube, JJA

On the 12th and 17th day of November, 2020

For the Appellant: Mr. M. Nchito SC, and Mr. C. Hamweela both of Nchito and Nchito and Mr. Y.G. Yosa of Musa Dudhia and Co.

For the Respondent: Miss A.D.A. Theotis and Miss J.R. Mutemi both of Theotis Mataka Legal Practitioners

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Petit v. Petit* (1969) 2 ALL ER 385
2. *Chibwe v. Chibwe* (2001) ZR1
3. *Musona v. Musona* – SCZ Appeal No. 15/2014
4. *Robson Banda (suing as Administrator of the estate of the late Rosemary Phiri) v. Evaristo Mulenga (suing as Administrator of the estate of the Steven Kabamba)* – SCZ Judgment No. 16 of 2003
5. *Meamui Georgina Kongwa v. Kakekelwa Samuel Kongwa* – CAZ Appeal No 3 of 2016.



6. *Indeni Petroleum Refinery Limited v. Kafco Oil Limited and others* – SCZ selected Judgment No. 29 of 2017.
7. *Penelope Chishimba Chipasha Mambwe v. Mambwe* – SCZ Appeal No. 222 of 2015 [2018] 317
8. *Scott v. Scott* (2007) ZR 17
9. *Y v. Y* (2012) EWHC 2063
10. *Violet Kambole Tembo v. David Lastone Tembo* – SCZ Judgment No. 8 of 2004
11. *Nyimba Investments Limited v. Nico Insurance* – SCZ Appeal No. 130 of 2015
12. *Mathews Chishimba Nkhata v. Esther Dolly Mwamba Nkhata* – SCZ Appeal No. 50/2015.

Legislation referred to:

1. *Rules of the Supreme Court 1999 Edition, (White Book).*
2. *Matrimonial Causes Act, No 20 of 2007.*

Other works referred to:

1. *Black's Law Dictionary, 8th ed* – St Paul MN: Thomson West, 2004

1.0 INTRODUCTION

1.1 This is an appeal against the ruling by G.C. Chawatama J made on 11th February, 2020 in chambers. Leave to appeal against the ruling was granted on 6th March, 2020. In the court below the appellant was the respondent, while the respondent was the petitioner. In this Judgment, we shall refer to them as appellant and respondent respectively.

2.0 BACKGROUND

2.1 The learned Judge dealt with an appeal against the ruling of the Registrar Mrs. T.S. Musonda made on 25th June, 2018 on a preliminary issue raised pursuant to the inherent jurisdiction of the court and **Order 14 A of the Rules of the Supreme Court 1999 Edition (RSC)** by the appellant (respondent) concerning an application by the respondent and maintenance after divorce. The appellant's grievance can be gleaned from the affidavit in support of the motion to raise a preliminary issue. The gist of it being that in her affidavit in support of the application for maintenance and property adjustment, the respondent raised questions of the appellant's ownership of shares in a company called JC Bousfield Limited and purportedly sought monetary equivalent of a portion of the same company. That the shares were given to him by his father in 1992 about eight years before they got married and thus the said business interest is not connected to the dissolved marriage.

2.2 The point of law was whether under Zambian law, the court ought to consider non-matrimonial assets in an application for property settlement and maintenance.

2.3 Upon hearing the parties on the preliminary issue, the Registrar in her ruling applied Order 14 A of the Rules of the Supreme Court which provides *inter alia* that the question of law or construction to be determined by the court should be suitable for determination without a full trial of the action and she found that the question of law in this case was not suitable for determination without a full hearing of the application for property adjustment and maintenance.

2.4 The grounds of appeal raised in the appeal to the Judge in chambers were as follows:

1. *The learned Registrar erred in law and fact when she took the position that she had jurisdiction to consider non- matrimonial property in an application for property adjustment and maintenance;*
2. *That the learned Registrar erred in law and fact when she decided that she needed to hear evidence from the parties to determine whether under Zambian law, non- matrimonial property should be considered when determining an application for maintenance and property adjustment.*

3.0 LOWER COURT'S DECISION

3.1 Upon considering the submissions made by counsel for both parties, the lower court found that the learned Registrar was on firm ground when she decided to defer the decision of the preliminary question until after receiving evidence from the parties. The learned Judge stated that this was demonstrated by the lengthy submissions on how the shares in JC Bousfield Limited were acquired, coupled with explanations of what might have been or not been the intentions of the couple.

3.2 The learned Judge was in agreement with respondent's Counsel that, the Registrar did not rule that she had jurisdiction to consider non- matrimonial property in an application for property adjustment. On this basis, the appeal was dismissed and the ruling of the Registrar upheld.

4.0 GROUNDS OF APPEAL BEFORE US

4.1 The appellant has raised the following grounds of appeal:

- 1. The learned Judge in the court below erred in law and fact when she did not address the question whether under Zambian law, the Honourable Registrar had jurisdiction to consider non-matrimonial property in an*

application for property adjustment which is the question that was presented to the court for determination.

2. The learned Judge in the court below erred in law and fact when she decided that the Honourable Registrar needs to hear evidence from the parties to determine whether under Zambian law, non-matrimonial property was available for consideration in an application for property adjustment which is a point of law.

5.0 APPELLANT'S ARGUMENTS

5.1 In the appellant's heads of argument filed into court on 11th May, 2020 which the appellant's counsel relied on at the hearing, the two grounds of appeal were argued together as follows: The purpose of property settlement is to apportion matrimonial property between the parties to a dissolved marriage. It is for this reason that property settlement is solely concerned with matrimonial property. It is untenable to divest a party of property which rightfully belongs to him and was not part of the matrimonial assets. This position was recognized in the case of **Petit v. Petit** ⁽¹⁾ which has been cited with approval by the Supreme Court in a plethora of decisions such as **Chibwe v. Chibwe** ⁽²⁾ and **Musona v. Musona.** ⁽³⁾

- 5.2 It was further submitted that under Zambian law, non-matrimonial property is not available for distribution during property adjustment and on that score, the adjudicator hearing an application for property adjustment post-divorce, has no jurisdiction to consider distributing non-matrimonial property.
- 5.3 The court below therefore fell into error when it found that the preliminary issue raised was not one of law but of fact which could only be considered after a full hearing.
- 5.4 The appellant's counsel went on to refer us to the case of **Chibwe v. Chibwe** ⁽²⁾ where the Supreme Court adopted the definition of family assets in **Watchtel v. Watchtel** as follows:

“Family assets are items acquired by one or the other or both parties married with intention that these should be continuing provision for them and the children during their joint lives and should be for the use, for the benefit of the family as a whole. Family assets include those capital assets such as matrimonial home, furniture, and income generating assets such as commercial properties.”

5.5 We were also referred to the case of **Robson Banda (suing as Administrator of the estate of the late Rosemary Phiri) v. Evaristo Mulenga (suing as Administrator of the estate of Steven Kabamba)** ⁽⁴⁾ where the Supreme Court held that the property in issue was not matrimonial property, as there was no evidence of equal contribution towards the purchase.

5.6 In the case at hand, the shares in JC Bousfield Limited were acquired by the appellant long before the parties were married. It cannot therefore be said that the shares were intended to be a continuing provision for the family. The shares are clearly not matrimonial property and should not be the subject of property settlement. Therefore, had the court below properly addressed its mind to the question before it; it would have arrived at this conclusion.

5.7 In **Musona v. Musona** ⁽³⁾ the Supreme Court was dealing with among other issues, whether property acquired by one party to a marriage on their own could form part of matrimonial property and the following position was taken:

“In line with our decision in the case of Tembo v. Tembo, the learned trial Judge held that

there was no intention by the parties that the house would form part of their matrimonial property at the time of acquisition. In the case of Scott and Scott, we held that any property purchased by one spouse with his own money presumptively belongs exclusively to the purchaser. There was evidence that the respondent used monies from the MSONI family to buy the house. The appellant did not provide cogent evidence to counter the assertion. Also, as stated in the case of Petit v. Petit, to qualify to be family assets, there must be an intention that the property would constitute a continuing provision for the parties during their lives. The appellant did not prove any such intention. The learned Judge in the court below cannot, therefore be faulted for having excluded the house in Northmead from the matrimonial assets in this case.”

5.8 Counsel for the appellant pointed out that, the fact that property acquired long before the contraction of the marriage

cannot form part of matrimonial property, was also recognized by this Court in the case of **Meamui Georgina Kongwa v. Kakekelwa Samuel Kongwa.** ⁽⁵⁾

5.9 It was further argued on behalf of the appellant that, this appeal should succeed because at paragraph 9 of the affidavit in opposition to the preliminary objection filed on 21st December, 2017, the respondent stated that she did not request the court to adjust the shareholding in JC Bousfield Limited. Therefore, it is not in dispute that the appellant's shares in JC Bousfield Limited are non-matrimonial property.

5.10 On the totality of the above submissions, the appellant prayed that the appeal be allowed and that the question of law be determined accordingly.

5.11 It was argued orally by Mr. Yosa that the question of law was indeed suitable for determination without a trial because it hinged on the interpretation of the law, practice and procedure and not findings of fact. To buttress this, he cited the case of **Indeni Petroleum Refinery Limited v. Kafco Oil Limited and others.** ⁽⁶⁾

6.0 RESPONDENT'S ARGUMENTS

- 6.1 The respondent's counsel relied on the heads of argument filed on 24th July, 2020 wherein it was submitted that it is notable from the affidavit in support of the respondent's application for property adjustment and maintenance at pages 51 – 108 of the Record of Appeal, that contrary to the contents of the appellant's heads of argument, the respondent is seeking for her maintenance and that of the children of the family, a lump sum payment of US\$3,000,000 being 50% of the appellant's assets. The assets referred to are the appellant's monthly income, his shares in JC Bousfield Limited, and his financial interests in the following companies namely, Prestige World Limited, MAD Procurement and Logistic Limited, Upper Zambezi Trust and D & A Farms Limited.
- 6.2 With regard to the claim for property adjustment, the respondent's plea is that the jointly owned properties be adjusted by giving the respondent full ownership of the house in South Africa and the appellant full ownership of the house in Chingola.

- 6.3 Although JC Bousfield Limited is the appellant's family business, the court will note from the affidavit in support of the application for maintenance and property adjustment that, the said company paid for all the household maintenance costs with respect to the Zambian and South African homes, the children's education and medical expenses, while the appellant's salary from the same, was transferred to an offshore account.
- 6.4 The acquisition of shares and whether the shares were used to maintain the respondent and the children of the family are disputed points.
- 6.5 It was submitted that the appellant's arguments have squarely hinged on the aspect of property settlement and yet the respondent's application was for both property settlement and maintenance.
- 6.6 We were referred to the case of **Penelope Chishimba Mambwe v. Mambwe** ⁽⁷⁾ where the Supreme Court stated *inter alia* as follows:

“More recently in Febian Ponda v. Charity Bwalya we observed that property adjustment is

universally understood to mean allocation of one or more properties among family assets to provide for a divorced person. There is therefore a marked difference between property adjustment and maintenance....”

- 6.7 The portion of the dicta of the Supreme Court above signifies that considerations which apply to maintenance applications are not necessarily the same as those which apply to property settlement applications. To this effect, reference was made to the provisions of **Section 56 of the Matrimonial Causes Act, No. 20 of 2007** which provides:

“56 (1) Subject to the provisions of this Section, the court may in any matter or cause in which application is made for maintenance of a party to the marriage, or of children of the family, other than proceedings for an order for maintenance pending disposal of proceedings, make such an order on such application as it thinks proper having regard to:-

(a) The income, earning capacity and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) The standard of living enjoyed by the family before the breakdown of the marriage.

(2) In making an order under subsection (1), the court shall seek to place the parties so far as is practicable and just to do so, having regard to their conduct, if the marriage had not broken down and each had properly discharged their financial obligations and responsibilities towards the other.”

6.8 Counsel for the respondent stated that, the above provision of the law makes no exception as to the source of a party's income or other financial resources. Consequently, the court

can on the strength of Section 56 of the Matrimonial Causes Act, look at the appellant's shares in JC Bousfield Limited as the same constitute financial resources which the respondent has.

6.9 Counsel conceded that, it is trite law as was held in the cases of **Petit v. Petit** ⁽¹⁾ and **Chibwe v. Chibwe**, ⁽²⁾ that the subject matter of an application for property settlement is matrimonial property. That the court during the hearing of such an application is required to ascertain from the evidence, what constitutes matrimonial property and what non-matrimonial property is. However, the question that begs an answer from this court is whether the same can be done on the hearing of a preliminary issue or during the hearing of the application for property settlement.

6.10 According to Counsel for the respondent, such a decision cannot be made at preliminary hearing stage, but only after the court hears evidence of the intention of the parties, and other issues surrounding a certain property. To buttress this submission, reliance was placed on the case of **Chibwe v. Chibwe** ⁽²⁾ in which the Supreme Court held that in making property adjustments or awarding maintenance after divorce,

the court is guided by the need to do justice taking into account the circumstances of the case.

6.11 It was further submitted that the appellant is under the mistaken impression that the court below in holding that the Registrar could only consider the question of whether the appellant's shares were non-matrimonial property after a full hearing of evidence, meant that the Registrar had jurisdiction to consider non-matrimonial property in adjustment of property. However, the lower court did not take the position that the Registrar had jurisdiction to consider non-matrimonial property in an application for property adjustment.

6.12 That the appellants are alleging that what constitutes matrimonial property for sharing post-divorce is a legal question but have cited no authority to back up their assertion. On the converse, it can be noted from the decision of the Supreme Court in the cases of **Scott v. Scott** ⁽⁸⁾ and **Violet Kambole Tembo v. David Lastone Tembo** ⁽¹⁰⁾ that what constitutes matrimonial property and what is not, is a factual question to be determined by the Registrar or Deputy Registrar upon hearing evidence from the parties.

6.13 The preliminary objection raised by the appellant is not purely a question of law, but of mixed law and fact which could not have been determined by the lower court pursuant to the provisions of Order 14 A of the RSC because the same mandates a court to determine questions of law or construction of any document. Counsel contended the question raised was not suitable for the determination of the application for maintenance and property settlement without a full trial as required by **Order 14 A Rule 1 (1) (a) of the RSC** which requires that a question be suitable for determination without a full trial of the action.

6.14 It was not in dispute that the appellant's income generated from his shareholding and position as Director in the said company was utilized for the benefit of the family. This raises a factual question as to whether the shares were intended to be a continuing provision for the family.

6.15 The Court below was therefore on firm ground in not addressing the preliminary objection because the requirements of Order 14A of the RSC were not met.

6.16 Reliance was placed on the dicta of the court in the case of **Musona v. Musona** ⁽³⁾ where the Supreme Court relied on the holding in the case of Scott v. Scott that property purchased by one spouse with his own money presumptively belongs exclusively to the purchaser. It was argued that this in effect means that the presumption can be rebutted by evidence.

6.17 The respondent's counsel, further referred us to the case of **Petit v. Petit** ⁽¹⁾ in which it was held that to qualify to be a family asset, there must be an intention that the property would constitute a continuing provision for the parties during their lives. It was contended that this denotes that where there is an intention that property though acquired solely by one party to the marriage, would constitute a continuing provision for the parties during their lives, the property in question will constitute matrimonial property.

6.18 Counsel also relied on **Section 55 (1) (b) of the Matrimonial Causes Act, No. 20 of 2007** which provides:

“55. (1) The court may, upon granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any

time thereafter, whether in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute, make any one or more of the following orders:

(b) An Order that settlement of such property as may be specified, being property to which a party to a marriage is entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them.”

6.19 Counsel reiterated that only two properties which were acquired during the subsistence of the marriage are the subject of the property settlement application and submitted that pursuant to the aforesaid provision, the Registrar shall allocate the respective properties. The court is still by virtue of the provisions of Section 55 of the Matrimonial Causes Act, empowered to order property settlement and adjustment of the appellant's shares because the respondent *in casu* enjoyed a

luxurious and comfortable lifestyle through the shareholding in JC Bousfield Limited.

6.20 Our attention was drawn to the following cases:

- **Y v. Y** ⁽⁹⁾ where Baron J held:

“.....The estate, coming from the husband’s family, was non-matrimonial property. However, the wife’s requirements and long term needs would be taken into consideration.....The parties also accepted that the sharing principle can apply to inherited assets as well as to assets acquired during the marriage...”

- **Tembo v. Tembo** ⁽¹⁰⁾ where the Supreme Court stated that; when dealing with an application for property settlement, the court should consider all the circumstances of the case including factors such as the history of the marriage and the conduct of the players to the marriage before arriving at the final settlement.

6.21 In light of the foregoing authorities, it was submitted that whether inherited property should be treated differently from

the property acquired by both parties, is a question of fact, based on the circumstances of each case.

6.22 It was further submitted that, the case of **Meamui Georgina Kongwa v. Kakekela Samuel Kongwa** ⁽⁵⁾ is distinguishable from the case at hand because in that case the property in question was initially purchased by the husband and afterwards, out rightly purchased by the wife, long after the marriage was dissolved owing to the husband's failure to make mortgage repayments. It was for the aforesaid reason that the appellant was adjudged to be legal owner of the property and not on account of the reasons advanced by the appellant herein. In this case, the said shares belong to the appellant.

6.23 In conclusion, it was submitted that the court below was on firm ground in dismissing the appeal because the questions raised were not suitable for determination without a full trial. The court did not refuse to consider the issues raised by the appellant but simply held that they were raised at the wrong time.

6.24 During the hearing of the appeal, oral arguments by the respondent's counsel were to the effect that the appeal is

misconceived and an abuse of court process as the grounds of appeal are not linked to the lower court's judgment. To fortify this argument, reference was made to the case of **Nyimba Investments Limited v. Nico Insurance**,⁽¹¹⁾ where the Supreme Court held that any issue arising in an appeal must be traced and linked to the judgment of the trial court. The prayer was that the appeal be dismissed with costs.

7.0 APPELLANT'S ARGUMENTS IN REPLY

7.1 In reply to the respondent's arguments, it was submitted in writing that the real issue presented for determination in this appeal, is whether non-matrimonial property is available for property settlement under Zambian law. In this premise, the respondent's lengthy submissions regarding maintenance are misguided.

7.2 It is settled law in this country that a gift cannot form part of property adjustment proceedings. To fortify this submission, counsel referred us to the case of **Mathews Chishimba Nkhata v. Esther Dolly Mweemba Nkhata** ⁽¹²⁾ where it was held *inter alia* that:

“The situation is even more glaring when property in the nature of gifts given to one spouse by third parties during the subsistence of the marriage is considered. Can such property be deemed to be “acquired” by the parties during the subsistence of the marriage and therefore amenable to property settlement? Can the non-recipient spouse to such donations genuinely demonstrate contribution to their acquisition? We think not.

7.3 We were urged to uphold the appeal on the basis of the foregoing clarification.

7.4 In the *viva voce* reply, Mr. Nchito stated that the ground of appeal can be traced to the judgment appealed against and he referred to the last paragraph on page 10 of the Ruling.

8.0 OUR DECISION

8.1 We have considered the record of appeal and the submissions made by counsel for both parties. We shall deal with the grounds of appeal together as they are connected.

8.2 We hasten to dismiss the respondent's submission that the grounds of appeal are not based on the judgment because they are. In the last paragraph on page 10 of the Ruling (page 20 of the record), the lower court stated that the question raised by the appellant could only be determined after a hearing of the substantive application.

8.3 The question was "whether under Zambian law, the court ought to consider non-matrimonial assets in an application for property settlement and maintenance." In this appeal, the appellant has modified the issue for determination as stated in the grounds of appeal as follows: whether under Zambian law, non-matrimonial property is available for consideration in an application for property adjustment. Maintenance proceedings have been omitted without giving a reason. In order to do justice, we shall consider the preliminary question as stated in the motion before the Registrar dated 1st December, 2017 where maintenance was included. We shall consider whether it is a question of law appropriate for determination pursuant to Order 14 A of the RSC which provides as follows:

Determination of questions of law or construction

(1) The court may upon the application of a party or its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that-

(a) Such question is suitable for determination without a full trial of the action.”

8.4 According to Black’s law dictionary, a point of law is *a discrete legal proposition at issue in a case and a point of fact is discrete factual proposition at issue in case*. In our understanding, a point of law is a question that can be answered by strictly interpreting the law while a question of fact, must be answered by reference to facts and evidence as well as inference arising from those facts.

8.5 We are of the view that a point of law was raised by the appellant. Further, the conditions under which the court may determine such a question as stated under Order 14 A RSC were satisfied:

(a)The question is suitable for determination without a full trial of the action,

(b) Such determination would finally determine an issue in the matter.

(c) The parties had an opportunity to be heard on the question.”

8.6 Our position is that, the question was suitable for determination without a trial or hearing because it called for the interpretation of the law and practice and not findings of fact. We are fortified by the case of **Indeni Petroleum Refinery Limited v. Kafco Oil Limited and others.** ⁽⁶⁾

8.7 We note that the point of law raised by the appellant is general and not specifically whether the shares held by the appellant in the said company should be apportioned between the parties.

8.8 In this country, the law is settled that, in proceedings for property adjustment or property settlement after a divorce, non-matrimonial property is not subject to distribution or sharing by the parties, see the cases of **Chibwe v. Chibwe,** ⁽²⁾ **Penelope Chishimba Chipasha Mambwe v. Mambwe** ⁽⁷⁾ and **Mathews Chishimba Nkhata v. Esther Dolly Mwamba Nkhata** ⁽¹⁰⁾ to mention but a few.

8.9 However, in an application for property adjustment, a court may consider any dispute regarding the nature of the property in issue, in order to decide whether it is a family asset or not.

8.10 The respondent in paragraph 9 of her affidavit in opposition to the motion raising the preliminary issue, clearly stated that she did not apply to have any of the shares in JC Bousfield Limited transferred to her but, the wealth and income that the appellant earns from his interest in JC Bousfield Limited is relevant to determine the quantum of maintenance due to her. This clearly shows that the question of the appellant's shares in JC Bousfield was brought in by the respondent merely in relation to her application for maintenance.

8.11 According to Section 56 of the Matrimonial Causes Act, No. 20 Of 2007, quoted earlier in this judgment, a court dealing with an application for maintenance of a party to the dissolved marriage or children of the family, other than proceedings for an order for maintenance pending disposal of proceedings, can take into account *inter alia* the income, earning capacity and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future; the court shall seek to place the parties so far as is practicable

and just to do so, having regard to their conduct, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged their financial obligations and responsibilities towards one another. This entails that, the court may take into account the income or earnings of either party to the dissolved marriage no matter the source in determining an application for maintenance.

8.12 Contrary to the appellant's suggestion, the lower court did in actual fact consider the question of law but opined that it was not suitable for determination at preliminary stage. We take the view that at preliminary stage, the court should not have been concerned with making findings of fact with regard to the affidavit evidence but should have focused on answering the question of law.

9.0 CONCLUSION

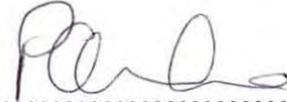
9.1 All things being said, the lower court therefore erred in law and fact when it ruled that the preliminary issue could only be determined after "a full hearing of the evidence of the parties." The appeal therefore has merit and it is allowed. We leave it to

the lower court to make findings of fact as to which properties in issue are family assets and which ones are not, after hearing the parties.

9.2 Since the appeal concerned the determination of a question of law, we order that the parties shall bear their own costs here and in the court below.


.....
C.F.R. M'CHENGA
DEPUTY JUDGE PRESIDENT


.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE


.....
P.C.M. NGULUBE
COURT OF APPEAL JUDGE