

PATRICIA MANDEYA
versus
ANTHONY MANDEYA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 9 and 10 September and 16 October 2008

Family Law Court-Divorce Action

Mrs. B.T. Mtetwa, for the plaintiff
J.R. Tsivama, for the defendant

KUDYA J: On 27 September 2006 the plaintiff wife sued her husband for divorce and other ancillary relief out of this court. He contested the suit and counter claimed for divorce but with different ancillary relief.

At the commencement of trial on 9 September 2008, *Mrs. Mtetwa*, for the plaintiff, applied to amend the plaintiff's claim for personal and child maintenance. The plaintiff prayed that the defendant pay her rentals until such time as she received her share of the matrimonial assets and thereafter personal maintenance and maintenance for the minor child at the inter bank rate equivalent of US\$250.00 per month for each, respectively. In addition she claimed for the payment of both her medical aid subscriptions and that of the child until she received her share of the matrimonial estate and the child became of age.

Mr. Tsivama, for the defendant did not oppose the amendment with respect to the child. He opposed it in respect of the defendant on the ground that it was not one of the issues that were referred to trial even though it had been pleaded. I granted the amendment as I was satisfied that the issue was pleaded and that there would be no prejudice to the defendant. This necessitated an amendment to the second issue that was referred to trial to include the determination of whether the plaintiff was entitled to maintenance and if so, the amount thereof.

The issues for determination in this matter are as follows:

1. who should have custody of the minor child
2. whether the plaintiff is entitled to maintenance and if so, in what amount; and the amount of maintenance that is due to the minor child
3. whether the business known as Reliance Auto Electric (Pvt) Ltd t/a Total Car Wash forms part of the matrimonial assets
4. If so, what would constitute a fair and equitable sharing of the same?

The plaintiff gave evidence as did the defendant. Between them, they produced ten documentary exhibits.

It was common cause that the parties started to live together in 1992, contracted a customary union in 1994 and married by civil rites, as confirmed by the marriage certificate exhibit 1, on 14 February 1997. Thereafter Tadiwanashe was born on 28 April 1997. The plaintiff is a qualified teacher who holds a Masters' degree in French and a diploma in marketing. The marriage relationship was turbulent and tumultuous. Matters came to a head and on 5 August 2006 when she permanently left the matrimonial home with her son. The parties agreed at the pre trial conference that the marriage had broken down beyond repair. I was satisfied from both their testimonies on this aspect that their marriage has indeed irretrievably broken down.

At the pre-trial conference the parties agreed on the distribution of the movables and the matrimonial house. The matrimonial house was to be sold to best advantage with the parties sharing the proceeds equally. It emerged from the plaintiff's evidence that no progress had been made towards its disposal as the defendant had obstructed valuers and viewers from assessing the property. She also stated that she would not be able to buy him out and would rather he bought her out in a set period failing which the matrimonial house would have to be sold. It seems fair and equitable that I make an order for the distribution and disposal of the house along the lines that were suggested by the plaintiff.

During trial, the defendant was happy with the prevailing custody and access arrangement in place since the plaintiff left the matrimonial home and wanted it to continue. He, thus, conceded that the custody of the minor child be awarded to the plaintiff and sought reasonable rights of access. I will therefore award her custody of and grant him access rights to the minor child.

The defendant also agreed to maintain the minor child. He offered to pay US\$200.00 per month as maintenance for the minor child and to meet all its educational and medical expenses. He categorically stated that he would not hazard to guess the cost in local currency due to the vagaries of hyperinflation. While she sought 100 liters of fuel per month to take the child to school, he offered 50 liters per month. Her evidence that she spent 100 liters per month on the child was not refuted. It is only fair that he be made to meet this expense in full as it forms part of the educational expenses of the child which he agreed to meet in full. I will

accordingly order that he pays the local currency equivalent of US\$200.00 and all the educational and medical expenses of the minor child.

The plaintiff sought maintenance for herself pending the receipt of her share on the disposal of the matrimonial assets. The basis of her claim was that during the time that they lived as a family unit, he used to meet all their expenses from the business account. He has solely benefited from this source since the time she left the matrimonial home in August 2006. She has had to rely on the goodwill of her brother, her employer, friends and the small savings that she had to meet all her living and medical expenses. She found employment in February 2007 which ended in March 2008 after her employer relocated to South Africa. Her former employer has continued to meet her medical expenses in sympathy of her illness. Her medication is expensive and is purchased in foreign currency. She is a member of a medical aid society which meets some of her medical expenses.

She sought personal maintenance in the sum of US\$2 5000.00. This was made up of US\$200.00 for rent, US\$300.00 for medication and between US\$500.00 and US\$1 000.00 for groceries. The aggregate of the sub-heads is between US\$1 000.00 and US\$1 500.00.

The defendant stated that his wife was well educated, smart, versatile and enterprising such that she would be able to maintain herself as she had done since she left the matrimonial home. He agreed to pay her rentals of US\$200.00 per month as he had been doing since July 2008 until she received her share of the matrimonial assets and thereafter to meet one-half of her rentals. He also agreed to meet her medical expenses. The only item that he was unable to meet was her grocery expenses. He stated that when they used to stay as a family they spent the equivalent of US\$150.00 per month on groceries and contended that her claim was excessive. He further stated that he was not able to meet her personal maintenance outside the sums he volunteered to pay because he was overstretched by payment of rentals of US\$150.00 for the company. He accepted that he was in receipt of the local currency equivalent of US\$100.00 per month from a sub-tenant.

Post divorce maintenance for any spouse is based on need. The defendant does not dispute that the plaintiff has a real need for maintenance as she is not employed. She has tied her claim to the receipt of her share of the matrimonial assets to demonstrate her desire to look after herself. The onus was on the defendant to show that he was paying rental in the sum of US\$150.00. He failed to produce the lease agreement which he averred he renewed in 2005 even after adjourning to enable him to bring it from his office where he had left it. He misled

the court that he started to pay rent when the plaintiff was still living with him but hid it from her because he did not want her to know that he was doing so in foreign currency. He was not able to show that the company was paying rent. He admitted that the request to pay in foreign currency was a new phenomenon which occurred after the plaintiff had left the matrimonial home. In my view, he had no reason to hide the payment of rent in local currency from her from 2005 until she left in August 2006 as the parties worked relatively well together then. In addition, the plaintiff demonstrated that the defendant disposed of company assets and invested the proceeds to his own account. He accepted that he has pursued other economic interests. It seems to me that he is able to maintain the plaintiff until she receives the proceeds of the sale of her half share of the matrimonial assets.

I am satisfied that the plaintiff has made out a case for personal maintenance. After all, she has always sought maintenance from him as shown in the exchange of correspondence between their legal practitioners, which letters make exhibits 2 to 6. While the defendant abdicated his responsibility in this regard, he was at times afflicted by a pang of conscience as he paid the child's maintenance and contributed to the defendant's rentals as shown in exhibit 5 and 6 when he paid \$500 000.00 on 7 March 2007. The plaintiff stated that he would request her to supply him with their grocery needs though he never supplied any food provisions to her. I find her claim for groceries excessive. I would grant her maintenance in an amount equivalent to that of their son. In addition I will order him to pay her rentals and medical expenses in accordance with his offer.

The next issue for determination concerns the status of the company in the matrimonial estate. The plaintiff gave detailed evidence of her contribution in the company even before she married the defendant by customary rights, after that union and during the subsistence of the civil marriage. For 12 years she worked for and in the company for no pay. It was common cause that the company was formed before she met the defendant. The date of its incorporation is provided in exhibit 7, the Reliance Electric (Private) Limited trading as Total Car Wash Company Profile and Cash Flow Projection, as 19 January 1991. It apparently had a share capital of 100 shares and was involved in vehicle maintenance and repairs, car wash services, tyre changing, wheel balancing and exhausts maintenance. The five sets of annual financial statements, which were produced as exhibit 9 covered the years ending 31 March 1992, 1993, 1994, 1995 and a three month management financial report as at 13 May 1998, confirmed her version that she was involved in the affairs of the company even when they were still living in

concubinage. The first four statements of exhibit 9 were signed by her in her maiden name as a director of the company. They did not deal with the finances of the car wash business but of the vehicle maintenance and repair workshop business. His attempts to deny the existence of the financial reports in question were demonstrably false. At first he alleged that he had seen them for the first time in court. He was shown the letter from his then erstwhile legal practitioners of 8 April 2008 which acknowledged receipt of the statements in question. He then decided to blame his legal practitioners for not showing him the documents. It was only when it was shown that they wrote that they would respond after receiving his instructions that he admitted that he had analyzed the statements and satisfied him that they were a true reflection of the state of the company at the time. He thus confirmed the truthfulness of the plaintiff's version concerning the period she was involved in the operations of the company.

He also accepted that she was a co-signatory of the company account with Zimbank as shown by the cheque leaf photocopies at the back of exhibit 8, the 11 bank statements for the company's account for the period 31 December 2001 to 21 July 2005. She produced exhibit 10, her endowment policy with Old Mutual which she alleged she ceded to Zimbank to finance the business. The cession was registered on 6 March 1998 and cancelled on 18 August 2000. Exhibit 10 was complementary to exhibit 7 in that it demonstrated that the company obtained a loan from Zimbank to develop the car wash business at 71 Belvedere Road in Harare. She thus demonstrated that she directly contributed in raising working capital for the company.

The defendant's protestations that she did not use the loan for the benefit of the company sounded hollow to me. After all, he accepted that the plaintiff was involved together with him in the formation of the car wash business. He regarded her as a mere partner but not as an equal partner in that branch of the business. He did not dispute her detailed version on how she utilized her earnings as a French translator to capitalize the business and the proceeds from her newsletter to buy a non-runner motor vehicle. This vehicle was repaired and refurbished and sold. The income went towards the purchase of more vehicles. He could not dispute her version that through their joint efforts they found rented premises at Avondale Service Station and purchased second hand car wash equipment. The car wash business in its heydays operated from three sites, that is, in Newlands, Avondale and Belvedere. She was at all times responsible for administration and marketing while he handled the finance and technical side of the business.

The parties were in agreement that during the course of their marriage the vehicle maintenance and repair business was closed and they concentrated solely on the car wash business. The articles of association of the company were not changed to reflect this new position. They continued to reflect the objectives of the initial business. The parties decided to amend the articles of association in order to avoid the hassles of registering a new company. Their attempt hit a snag when the company's bankers lost the articles. The parties did not pursue the matter with the Registrar of Companies and decided to carry on their car wash business in the norm of old. The parties agreed that they were equal shareholders in the company, which in their understanding was their family business. Despite the defendant's spirited protests that such an agreement was ever reached, I am satisfied from the contents of exhibit 7 that the parties did reach such an agreement. In my view, exhibit 7 served as a memorial record of that agreement. It recorded that each party held 50 fully paid up shares in the company, whose sole business was in car washing. The plaintiff was pitched as the finance director while the defendant was named as the managing director.

The defendant attempted to hide the true position of the company by roping in Francis Thomas Mandeya who he alleged without any documentary proof was a director and shareholder with him in the company since its incorporation to no avail. He however stated that Francis was last involved in the affairs of the company in 1994. He was never involved in its car wash business; did not take part in its management, board meetings nor share in its dividends. I was satisfied that the company belonged to the plaintiff and the defendant.

The defendant concluded an agreement with the owners of 71 Belvedere Road to develop the virgin land and construct suitable buildings for the use of the car wash business. The fixed structures would accrue to the owner while the company would not pay any rentals for a given period in recognition of the improvements it made onto the stand. The agreement was signed by the defendant. It was not clear whether he signed it in his own name or on behalf of the company for he failed to produce the lease agreement in question. His failure in this regard led me to conclude that he was hiding information which would confirm the plaintiff's story that he was given a rent free period of 12 years to use the stand and not a period of 5 years as he alleged. Whether he signed the lease as a representative of the company or in his personal capacity; it had one effect of being a lease agreement which was entered into for the benefit of the marriage. The lease agreement would fit the mould of matrimonial property. The parties agreed that the developments at 71 Belvedere Road were a product of

their joint effort and that some of the materials that were used to construct the carports were taken from the garage at the matrimonial home.

The defendant claimed for a one-half share of the value of the car wash equipment, the value of the lease agreement including any sub-leases and the goodwill in the car wash business. She asked the Court to appoint an evaluator to evaluate these values and thereafter direct the defendant to pay half their value. The defendant opposed the award of an equal share in the value to the plaintiff and suggested that she be awarded 40% against his 60% of that value. The difficult I have with the suggestion is that the equipment, goodwill and lease agreement belong to the company and not to the parties. I believe that it is fair and just that the equity in the company be awarded to each of the parties in equal measure. This is in recognition of the equal contributions that they made to the affairs of the company. Such a distribution accords with the distribution of the matrimonial house which the parties agreed to, which house was purchased from the proceeds generated by the company. I will further direct that the Master appoints a Chartered Accountant to evaluate the equity in the company and direct the defendant to pay the plaintiff one-half of that value.

The plaintiff's position was vindicated by the evidence. Costs must follow the cause. I will award her the costs of suit.

Accordingly, it is ordered that:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child Tadiwanashe Mandeya born 28 April 1997 is awarded to the plaintiff with the defendant having reasonable rights of access which are to be exercised in consultation with the plaintiff.
3. The defendant shall pay maintenance for the minor child in the Zimbabwe dollar equivalent of US\$200.00 per month and pay all the school fees including levies, top ups and all other educational and medical requirements until the child is 18 years old or self supporting whichever occurs first.
4. The defendant shall pay the plaintiff:
 - i) maintenance in the Zimbabwe dollar equivalent of US\$200.00 per month and her monthly medical expenses until such time as she receives the value of her one-half share in the equity of the company;

- ii) her monthly rentals until such time as she receives her share of the proceeds of the sale of the matrimonial home and thereafter he shall pay one-half of the monthly rentals due until the minor child is 18 years old.
5. Each party is awarded a one-half share in the immovable property Stand No. 2124 Westgate Harare.
- 5.1 The parties shall by consent appoint an evaluator within 14 days of this order
 - 5.2 In the event that the parties fail to agree on such appointment within the period stated in clause 5.1 above, then within 7 days of such failure the Master shall, from his panel of evaluators appoint an evaluator
 - 5.3 The evaluator appointed either in terms of clause 5.1 or 5.2 above shall evaluate and submit his report to the parties and the Master within 14 days from the date of his appointment
 - 5.4 The costs of such evaluation are to be shared equally between the parties
 - 5.5 The defendant shall make payment to the plaintiff within 90 days of the evaluation of such amount as represents 50 % of the value of the property
 - 5.6 In the event that the defendant fails to effect such payment within the period referred to in clause 5.5 above, the property is to be sold to best advantage and the proceeds shared equally between the parties
6. Each party is awarded an equal share in the equity of Reliance Auto Electric (Pvt) Ltd t/a Total Car Wash.
- 6.1 The equity of the company is to be evaluated by a chartered accountant appointed by the Master within 14 days of this order.
 - 6.2 The cost of evaluation is to be paid in full by the defendant.

- 6.3 The evaluator shall submit his report to the parties and to the Master within 30 days of his appointment.
- 6.4 The defendant shall purchase the plaintiff's shareholding in the company, which shall be equal to the value of one-half share of the equity of the company arrived at under clause 6.1, within 60 days of the date of the submission of the report in terms of clause 6.3 above.
- 7 The defendant shall pay the plaintiff's costs of suit.

Mtewa & Nyambirai, the plaintiff's legal practitioners

Sawyer & Mkushi, defendant's legal practitioners