

CHARLES MUTIZHE
versus
BARBRA MUTIZHE (NEE FUWE)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 15 February and 16 August 2018

Trial

R E Nyamayemombe, for the plaintiff
J Takawira, for the defendant

CHITAKUNYE J. The plaintiff and the defendant started staying together in the manner of husband and wife in 1998 under an unregistered customary law union. On the 14th June 2001, their marriage was solemnised in terms of the Marriage Act [*Chapter 5:11*].

Their marriage was blessed with two children of whom one is now an adult whilst the other is still a minor.

On the 21st January 2016 the plaintiff sued the defendant for the dissolution of the marriage on the basis that the marriage relationship has irretrievably broken down in that:

- a) The parties have not shared conjugal rights for a period exceeding 8 months
- b) The defendant has acted in a manner that is unbecoming of a married woman
- c) The parties have irreconcilable matrimonial differences.
- d) Plaintiff has lost all love and affection for the defendant such that there is no reasonable possibility that they may be reconciled through marriage counselling, guidance or reflection.
- e) The parties are incompatible and have formed completely different interests from one another.

On ancillary issues plaintiff offered that the defendant be granted custody of the minor child with plaintiff being granted reasonable rights of access. He offered to maintain the children at US100 per month per child and that he will provide the children's school requirements.

On proprietary rights plaintiff offered that defendant retain all the movable property acquired by the parties during the subsistence of the marriage.

The defendant contested the action on the aspect of the maintenance offered and the distribution of assets of the spouses. In her plea she indicated that she required maintenance in the sum of US\$200.00(later reduced to \$150.00) per month per child. In addition she also asked for post divorce spousal maintenance in the sum of US\$200 per month.

The defendant alluded to the fact that there were two immovable properties that plaintiff had not disclosed and these should be distributed.

At a pre-trial conference the parties agreed, inter alia, that:

1. That the marriage has irretrievably broken down and that a decree of divorce be granted.
2. Ernest Mutizhe born on 2nd March 1999 has since attained majority age and so no longer the subject of matters at hand
3. That the plaintiff shall be liable to pay maintenance for one minor child namely, Elsie Tariro Mutizhe born on 27th April 2004
4. That custody of the minor child be awarded to the defendant.
5. That the plaintiff shall have access to the minor child at least two weeks of each and every school holiday or on special arrangements as agreed by the parties.
6. The defendant will keep all the movable property in her possession.

The issues on which parties could not reach agreement on, hence were referred to trial, comprised:

1. Whether or not defendant is entitled to a share of the Zimbabwe Defence Forces Benefit Fund Hertfordshire Gweru Stand.
2. Whether or not the defendant is entitled to receive maintenance from the plaintiff and the quantum of maintenance for the defendant and the minor child.
3. Whether or not the defendant is entitled to an equal share in a property known as 1020 Mabvazuva, Rusape.

The plaintiff gave evidence after which defendant also testified. From the evidence adduced it was clear that the marriage relationship between the parties has indeed irretrievably broken down such that it is only appropriate that a decree of divorce be granted.

It was also common cause that the parties married when defendant was only about 18 years old and she had just completed her ordinary level education. She has had no formal training for any job. Defendant has for the large part of the marriage been engaged in informal trading. The plaintiff on the other hand has been in formal employment throughout the subsistence of the marriage.

It was also apparent that stand number 1020 Mabvazuva, Rusape was acquired by plaintiff before marriage. Defendant confirmed this in her evidence. Her only contribution was indirectly by looking after the family and chipping in here and there on family needs when plaintiff's income fell short.

As regards the Hertfordshire property in Gweru, defendant conceded that this property is not yet owned by plaintiff. In that regard her request was altered to now be for a half share of the contributions made so far towards that property.

The distribution of assets of the spouses and maintenance is governed by s 7 of the Matrimonial Causes Act, chapter 5:13. That section provides that:

“(1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—
(a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;

The property that is excluded from consideration in the distribution is stated in subsection (3) as follows:

“(3) The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage—
(a) by way of an inheritance; or
(b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
(c) in any manner and which have particular sentimental value to the spouse concerned.”

Section 7(4) enjoins court to consider all the circumstances of the case in these terms:

“(4) In making an order in terms of subsection (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 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 assets subject to division, apportionment and distribution are assets owned or belonging to either or both spouses as at the time of the dissolution of the marriage. The assets may have been acquired before, during the subsistence of the marriage or whilst on separation.

In *Ncube v Ncube* 1993 (1)ZLR 39 (SC) at 42B-D in considering the meaning of the phrase “assets of the spouses” in s 7 of the Matrimonial Causes Act, KORSAH JA aptly opined that:-

“I take the phrase ‘assets of the spouses’ to include all such property as a spouse was possessed of at the time of the distribution, and not only what was acquired by one or the other or both the parties during the subsistence of the marriage, save such assets which are proved to the satisfaction of the court to have been acquired by a spouse, whether before or during the marriage-

1. by way of inheritance; or
2. in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
3. in any manner or which have particular sentimental value to the spouse.”

Equally in *Gonye v Gonye* 2009(1) ZLR 232(SC) at 237B-D MALABA JA (as he then was) expounded on the above terms as follows:-

“The terms used are the ‘assets of the spouses’ and not ‘matrimonial property’. It is important to bear in mind the concept used, because the adoption of the concept ‘matrimonial property’ often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept ‘the assets of the spouses’ is clearly intended to have assets owned by the spouses individually(his or hers) or jointly(theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.”

At page 237D-E the learned judge opined that:

“It must always be borne in mind that s 7(4) of the Act requires the court , in making an order regarding the division, apportionment or distribution of the assets of the spouses, and therefore granting rights to one spouse over the assets of the other, to have regard to all the circumstances of the case. The object of the exercise would be to place the spouses in the position they would have been in had a normal marriage relationship continued between them.”

Applying the same rationale that assets to be considered are those owned by the parties individually or jointly at the time of dissolution of the marriage, it is appropriate to say that the Mabvazuva property though acquired before marriage has to be considered in the distribution of the assets. Though plaintiff made effort to say that it was acquired during his previous marriage, no evidence of such marriage was tendered. There was also no evidence that the property was an inheritance or fell within the exceptions in s 7 (3) of the Act. The property is surely available for distribution.

The defendant contended that she contributed in her own wifely way to the matrimonial estate. She looked after the home, took care of the children and plaintiff. She also said in her own way she would supplement income where plaintiff's salary was being deducted to pay for loans that plaintiff took.

Upon consideration of all the circumstances such as: the duration of the marriage, indirect contribution by defendant, the needs of the parties as they move out of the marriage, the fact that defendant will retain custody of the minor child and the object of placing the spouses in the position they would have been in had a normal marriage relationship continued between them, I am of the view that the defendant deserves a reasonable share. It would be a travesty of justice if defendant were to walk out of the 20 year marriage with only a token share in the assets of the spouses in the form of the few movable items offered to her.

For the duration of the marriage she contributed in her own way to the success of the marriage for that period. Not only was she a provider of a homely environment but she also took care of the couple's children and provided comfort to plaintiff. In my view, an award of 35% share in the Mabvazuva property to the defendant would be just and equitable. This is the only immovable property available for division and apportionment between this couple that has been together for over 20 years.

As regards the Gweru property, both parties agreed that it was not yet owned by the plaintiff. The plaintiff's interest in that property, as espoused in exhibit 5, is limited to the contributions made to date. The plaintiff sought to limit the contribution to US\$1500 whilst defendant contended that the sum must include the US\$900 which plaintiff paid to the previous allottee.

I am however of the view that the inclusion of US\$ 900 is not justified as this appears to have been outside the official agreement and purely meant to position plaintiff in a better position to take over from the previous owner. I believe only his contributions towards the

acquisition of the property should be considered. This is the sum reflected in exhibit 5 as the sum that had been contributed and which can be refunded less 10%.

This is a property plaintiff stands to benefit from as long as he fulfils the terms and conditions set by the ZDF Benefit Fund by making the appropriate contributions whilst defendant will not benefit after divorce.

The defendant may thus be granted a sum of US\$ 750.00 being half the contributions made as at the time of dissolution of the marriage.

The next issue pertains to maintenance.

Section 7(1) (b) of the Act enjoins court to make an order for 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.

In deciding whether to order payment of maintenance, and the quantum thereof, court is guided by the standard of living the family enjoyed and the ability of the other spouse to continue with the provision. This entails an assessment of the income and expenditure of the parties.

In this regard litigants are enjoined to be candid with court in respect of their income and expenditure. As previously stated the object is to ensure that the spouses and children maintain the lifestyle they were used to and would have continued to enjoy had a normal marriage relationship continued between them.

In *Matongo v Matongo* HH 14/12 at p 7 of the cyclostyled judgment court was noted that:

“It is imperative to point out that in claims for maintenance it is always important for the claimant to lay bare her or his expected expenditure and the basis thereof. If one’s claim is based on the standard of living they used to enjoy as a couple that must be made clear by showing that what she/he intends to use the money for and quantity thereof is what they used to enjoy as a couple; it had thus become a necessity which she/he should not be deprived now as the other party can still afford it. Where the claim is based on new expenditure one has to show that such expenditure in its nature and quantum is necessary and the other party can afford to pay for it.”

In *casu*, the evidence showed that plaintiff’s income comprises a gross basic salary of about \$745.00 per month and allowances of about \$760.00 per month. His net salary is affected by the normal deductions and other loan deductions such that his net income fluctuates between \$ 600.00 and \$1000.00 per month. It was his evidence that he has to take loans to cater for school fees for all his children and for himself as he is currently doing post graduate studies with a local university. He thus contended that with such an income he

cannot afford to pay \$150.00 for one minor child and \$200.00 for the defendant as maintenance. Besides tendering his payslips, plaintiff did not provide a schedule of his expenses. When asked about the schedule, he was unable to be clear on his monthly expenses. His stance was simply that as he would be paying school fees for the minor child and that child will be at boarding school, the sum of \$150.00 for the child was too high. He instead offered a sum of \$35.00 towards the child's accommodation during the period the child will be with defendant.

The defendant, on the other hand, maintained that she needed \$150.00 for the child and \$200.00 for herself.

It is Common cause that the minor child is now enrolled in boarding school and so in effect the child will only be with the defendant for two weeks of the school holidays and it is during these two weeks that most of its food requirements will be met by defendant. However, as regards casual clothing, medical and other needs, not accommodated in the school account, defendant has to provide as the custodian parent. She thus still needs reasonable sum to augment her own income. In her evidence she asked for a standard sum of US\$150 per month per child. Unfortunately she lamentably failed to justify such a figure especially as the child will be at boarding school most of the time. Defendant could not provide a schedule of expenses requiring such a sum during both school term and school holidays. Her failure to distinguish expenses during school term and holidays only served to confirm that she had really not applied her mind to the actual needs of the child.

Further, under cross examination the defendant was given another opportunity to itemise the child's requirements for which she needed US\$ 150.00 for, but alas, she again failed to do so. It would appear she just wanted a sum of US\$150.00 for the child without any justification. The defendant lamentably failed to justify the figure she was asking for in light of the fact that the child is now at boarding school which is fully paid for by plaintiff.

Though the defendant failed to justify he US\$150.00 it is pertinent to note that as the custodian parent she will certainly need accommodation and feminine provisions for the child. it is my view that the \$ 35.00 offered by plaintiff ostensibly for rent of a single room for the period the child will be with defendant , is inadequate. In this offer plaintiff did not consider other basis needs to enable the child to enjoy the same standard of living as when the parties were still married.

I am of the view that taking into account the plaintiff's income as alluded to above he certainly can afford more than what he has offered. From his evidence this is the only minor

child, albeit he has to cater for other children who are attending tertiary education. An addition of about \$15.00 should enable defendant to cater for the needs of the minor child, and this I believe plaintiff can afford.

The other aspect pertains to post divorce spousal maintenance.

As with the evidence on maintenance for the minor child, the defendant failed to articulate her maintenance requirements. All she was able to say was that she needed a sum of US\$200.00 per month for her own maintenance. She could not on her own indicate what that US\$200.00 will be used for. When I asked her what she needed the US\$200 for, her response was to the effect that when they were still together plaintiff would assist her in her business when she fell on hard times. After further prodding she ended up saying that it will be for rentals and to boost her business when she fell on hard times. It was clear that defendant had no clue as to what was expected in a maintenance claim. All she was eager for was \$200.00 for herself, yet the onus was on her to prove that she needed such a sum in order to maintain the same standard of living she was used to during the subsistence of the marriage and that the plaintiff can afford it.

Pertaining to her own contribution to her needs, the defendant stated that she earned about US\$80 to US\$100 per month from her cross border trade, yet she expended US\$200 on each trip. She just could not explain the rationale of spending US\$200.00 on a trip to only recoup US\$80 to US\$100 per that trip.

What was clear from her evidence was that she either had not been advised on what was expected of her in such a claim or she was simply not convinced on her own needs post divorce.

It is, however, common cause that defendant and the children have been living in an accommodation provided by plaintiff's employer. It is thus clear that such accommodation will not be availed post divorce. Thus all the attendant benefits with such accommodation will not be there and plaintiff has to cater for this. This is his family and he has to ensure it is provided with the basic needs such as shelter, food, clothing and payment of utility bills.

However, the sums needed for these basic needs were never thought of. It was as if maintenance should be granted just at the mere asking and in the quantum demanded.

The issue of post divorce spousal maintenance has been debated in this court before and this court has stressed that such maintenance is no longer just for the asking. A spouse must justify the need, the quantum and the duration of such payments.

It is trite that a spouse that needs maintenance post divorce must show that they are unable to sustain themselves post divorce hence they require the other spouse's support. The position was aptly noted in *Chiomba v Chiomba* 1992 (2) ZLR 197 at 197F-198B wherein court was stated that:-

- “- Marriage can no longer be seen as providing a woman a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.
- Young women who worked before marriage and are able to work and support themselves after divorce will not be awarded maintenance if they have no young children. If a young woman has given up work she will be awarded short term maintenance to tide her over until she finds a new job.
- Middle aged women who have devoted themselves for years to the management of the household and care of the children should be given “rehabilitative” maintenance for a period long enough to enable them to be trained or retrained for a job or profession.
- Elderly women who have been married for a long time and are too old to now go out and earn a living and are unlikely to remarry will require permanent maintenance.”

In *casu*, the defendant being 38 years old is in the middle age bracket. She has however not been in any formal employment. Throughout her married life she has been an informal trader. From the evidence by both parties it appeared that her informal trade was not that viable as she constantly required plaintiff to provide funds to boost her business. She in fact said that since separation, and with the plaintiff's reduction in maintenance payments to her, her business has collapsed. The plaintiff confirmed as much when he said that though the defendant engaged in flea markets, he did not know her income as she would ask for money to augment her business. The defendant's business acumen is thus doubtful. It may be a sheer pastime occupation. This is not surprising as she has had no training in entrepreneurship. From a young age of 18 years she has just been trading without any formal training hence the collapse of the business should not be a surprise. Thus unless she is given rehabilitative maintenance long enough to enable her to train and acquire some business management skills, the dissolution of this marriage maybe catastrophic to her.

It is my view that defendant requires maintenance for such a period as would enable her to train and start her own sustainable income generating project. A period of about 3 years will thus be recommended.

Having determined that defendant needs rehabilitative maintenance, the next issue is on the quantum of such maintenance. It may be noted that besides requiring accommodation of her own nothing much was said about other needs which she is unable to provide for herself. the defendant did not provide a list of her expenses so that court is able to assess her own contribution to that list and the shortfall for which plaintiff must be ordered to meet in

order that she continues enjoying the same standard of living the couple enjoyed whilst together.

In the circumstances court was left with plaintiff's offer of \$100.00 per month. This offer was made without considerations of the nature of the needs defendant will be saddled with once she vacates the employer provided accommodation. It is thus necessary to factor in the fact that defendant will have to seek rented accommodation to cater for herself and the minor child. It appeared common causes as between the parties that that currently one room costs US\$70.00 per month and two rooms would be about \$140.00 per month. In the circumstances a sum of \$150.00 per month as spousal post divorce maintenance will suffice. This sum will be paid over a 3 year period which I deem adequate for defendant to be able to stand on her own feet.

Accordingly it is hereby ordered that:

1. Decree of divorce be and is hereby granted.
2. Custody of the minor child Elsie Tariro Mutizhe is hereby awarded to the defendant.
3. The plaintiff is hereby granted reasonable rights of access to the minor child of two weeks of each and every school holiday or on special arrangements as agreed by the parties.
4. The plaintiff shall pay US\$ 50.00 per month as maintenance for the minor child until the child attains the age of 18 years or becomes self supporting whichever is first.
5. The plaintiff shall meet the minor child's school fees and other school requirements.
6. The plaintiff shall pay post divorce spousal maintenance in the sum of US\$150.00 per month for 3 years from the date of this order.
7. The defendant be and is hereby awarded all the movable property in her possession.
8. The plaintiff shall pay to defendant a sum of US\$ 750.00 in lieu of her share in the contributions made towards the purchase of the Zimbabwe Defence Forces Benefit Fund Hertfordshire Stand, Gweru within 6 months of this order.
9. The defendant be and is hereby awarded a 35% share in Stand 1020 Mabvazuva, Rusape whilst the plaintiff retains a 65% share in the said property.
10. The property shall be evaluated by a mutually agreed evaluator. Should the parties fail to agree on an evaluator within 30 days of this order, one shall be appointed for them by the Registrar of the High Court from his panel of evaluators.

11. The plaintiff is hereby granted the option to buy out defendants share in stand 1020 Mabvazuva within 6 months of this order or within such longer period as the parties may agree.
12. Should plaintiff fail to pay out defendant's share within the period stated or agreed by the parties, the property shall be sold to best advantage by an estate agent mutually agreed by the parties or, failing agreement, one appointed by the Registrar of the High Court. The net proceeds there from shall be shared in the ration 65:35.
13. Each party shall bear their own costs of suit.

Mvingi & Mugadza, plaintiff's legal practitioners.
Coghlán, Welsh & Guest, defendant's legal practitioners