

GARIKAI MAGAYA
versus
TABETH ZINDERE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 14, 17 July 2023 & 22 February 2024

Civil Trial

B. Diza & B. Pfumvuti, for the Plaintiff
T. Tandi, for the Defendant

MAXWELL J:

BACKGROUND

On 8 September 2012 Plaintiff and Defendant married each other at Masvingo Sports Club. The marriage was blessed with two children NM, born on 5 July 2014 and SM, born on 22 October 2016. On 2 November 2020, Plaintiff issued out summons claiming a decree of divorce and ancillary relief. He stated in his declaration that the marriage relationship between the parties has irretrievably broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties. He proposed that custody of the children be awarded to the Defendant with him having access every school holiday and any other time when he is in Zimbabwe subject to giving the Defendant 48 hours' notice. He stated that he works for an international humanitarian organization and is usually stationed for work all over the continent. He indicated that if the Defendant is not able to exercise the right of custody, he is capable of taking care of the minor children. He proposed to pay the school fees, buy all school uniforms and meet all ancillary school needs each term till the children turn 18 years or become self-sufficient, whichever comes after. He offered to purchase groceries for the minor children monthly, subject to a grocery list agreed to by the parties. He also offered to pay USD \$150 per child per month as maintenance, which amount is payable at the interbank rate on the day of payment. He further offered to purchase the children's clothing and to cover all outstanding living expenses for the children.

Plaintiff stated that during the subsistence of the marriage he purchased an immovable property in Mount Pleasant, paid for the acquisition and development and should therefore be awarded the property, 2073 Bannockburn, Mt Pleasant Heights, Harare. He also stated that it is jus and equitable that the Defendant be awarded all household furniture. He proposed that each party pays its own costs.

Defendant gave notice of entering appearance to defend the matter. In her plea she disputed that the marriage has irretrievably broken down. She indicated that summons for divorce were simply sent to her without parties having discussed the matter between themselves and also with their relatives. She advocated for an attempt to reconcile the perceived differences before divorce is pursued as per custom and tradition. She accepted the proposal that she gets custody of the minor children and proposed times for Plaintiff to exercise access rights. She proposed that Plaintiff pays WIFI and procures laptops and tablets as may be required due to the adoption of e-learning. She proposed that the custodian parent buys the grocery items as may be required and that Plaintiff pays USD \$450 per month per child as maintenance. She indicated that the clothes and living expenses including rentals and inclusive of a maid add up to USD \$450 per month.

She admitted that the Mount Pleasant Heights property was purchased by Plaintiff solely as a stand, but stated that she contributed directly and indirectly to its development. She indicated that Plaintiff deliberately excluded another immovable property namely 24855 Sister Pailey, Runyararo Masvingo, which property was bought before the parties were married as an incomplete house but through her direct and indirect efforts it was made habitable and therefore ought to be distributed. She proposed that the Plaintiff procures new household furniture for her and the children.

Defendant made a claim in reconvention. She claimed maintenance of USD\$ 475 per child per month. She claimed post-divorce maintenance of USD\$ 700 per month until 31 December 2024 when she finishes her university degree and potentially secures a job. She claimed that Plaintiff be ordered to pay for her routine check-ups and weekly counselling sessions necessitated by the physical abuse perpetrated by him on her which costs USD \$40 per session. She also claimed USD \$450 per month as the children's living expenses. She proposed that she be awarded household furniture and a Toyota Altis Chassis Number MR053REE 104152650 which motor vehicle she proposed should be maintained and serviced by the Plaintiff. She also requested that the motor vehicle be replaced after every five years. She proposed that the Mount Pleasant Heights property be awarded to the

children. In the alternative, she claimed a 50% share of the property. She also claimed a 30% share of the value of House Number 24855 Sister Pailey, Runyararo West, Masvingo.

She proposed that the parties appoint a mutually agreed valuator within 30 days of the order by the court, failing which one shall be appointed by the Registrar of the High Court to value the properties. She proposed that the Plaintiff be granted the option to buy out her share in the properties within four months from the date of receipt of the valuation reports failing which the properties be sold to best advantage by an estate agent mutually agreed to by the parties within 10 days, failing which one shall be appointed by the Registrar of the High Court from the list of independent estate agents. She proposed that the net proceeds be distributed in terms of each party's share of the property.

In his replication Plaintiff disputed being abusive to the Defendant and stated that it was Defendant who was abusive to him. He indicated that the parties had been discussing their difference for a long time to no avail. He stated that the nature of the relationship between them is toxic and there is no possibility of reconciliation between them. He indicated that his access to the children should not be limited to weekends only when he is in Zimbabwe. He maintained that USD \$150 per month per child was sufficient to cover all the children's needs. He disputed that Defendant contributed to the acquisition of the Mount Pleasant Heights property. He also disputed that Stand 24855 Sister Pailey, Runyararo, Masvingo is matrimonial property. He indicated that there is no legal basis to claim for the purchase of new furniture.

In the plea in reconvention Plaintiff indicated that he cannot afford to pay USD \$450 per child per month in addition to paying school fees, all ancillary school needs and medical aid. He pointed out that Defendant was not formally employed. She was running a successful tailoring business therefore there is no legal basis for spousal maintenance. He disputed that Defendant ever went for medical checkups or counselling sessions and indicated that if they are necessary it is not his responsibility to pay for them. He indicated that the Toyota Altis is not matrimonial property and challenged the requirement for him to purchase vehicles for Defendant in perpetuity. He disputed the Defendant's entitlement to any share of the immovable properties in Mount Pleasant Heights, Harare and Runyararo, Masvingo.

The parties had a round table conference on 18/08/20 but failed to reach agreement. A Joint Pre-Trial Conference was subsequently held. The following issues were referred to trial.

1. What would be the fair and equitable distribution of the matrimonial property namely:-

- 1.1 Stand 2073 Bannockburn Mount Pleasant Heights, Harare.
- 1.2 Toyota Altis Chassis number MR053REE 104152650.
2. Whether or not Stand 24855 Sister Pailey, Runyararo, North West, Masvingo is matrimonial property? If so, how should it be distributed?
3. Whether the Defendant is entitled to post-divorce maintenance, if so, what is the quantum and duration?

TRIAL

Plaintiff testified as follows. There are reconcilable differences between the parties. There is a maintenance order in place but he has been having challenges exercising his right to access the children. He bought an undeveloped stand in Mount Pleasant Heights. At the time of the trial there was a house still under construction. He paid \$43 000 for the land which payment was a bank transfer from his account. He bought the Masvingo property in 2008 as an undeveloped stand. He developed it and finished it in 2011. By the time he married the Defendant the house was finished, painted and dura-walled. There were tenants occupying it. The cession agreement is dated 2013 but the application for cession was filed in 2011.

At the time of buying the Mount Pleasant property, they were both in the Gambia and engineers were responsible for the cite management. Defendant was not in support of the idea of buying the property. He moved out of the matrimonial home in July 2021 but continued to pay monthly rentals and purchasing groceries. He did not hinder Defendant's personal development. In Gambia he asked her to further her education. She chose to do tailoring. He hired a tailor to train her and bought her a sewing machine. When they returned to Zimbabwe, he bought her another sewing machine. He paid for her driving lessons. For the degree she enrolled at Great Zimbabwe University, he paid for registration and first semester fees. He suggested that the children be transferred to Lomagundi College. He would pay for the school needs. If Defendant agrees to the transfer of the children, he is prepared to give her the Toyota Corolla Altis 2013 model in her possession.

Under cross-examination he indicated that the parties went to the Gambia in 2013 in December. Both children were born in the Gambia. His contract ended in December 2018. The whole family came back to Zimbabwe. He was unemployed until April 2019 when he left for South Sudan. It was a conflict zone with sporadic incidents of violence therefore the family stayed in Zimbabwe. He would come back every eighty weeks until August 2020. From South Sudan he went to Sudan.

He conceded that he did not provide the names of any engineers before the court or any contract between himself and any engineer whom he alleged managed the construction of the Mount Pleasant property. He also conceded that he did not tender any bank transfer forms before the court to prove that he was personally paying for the building materials and labour. He insisted that by the time of their wedding the Masvingo property was complete. He disputed that Defendant was entitled to post-divorce maintenance. That was the Plaintiff's case.

The Defendant testified in her case. In September 2011, when Plaintiff got employed in Somalia, the Masvingo house was still under construction. They made sure that the bedroom and sitting room were habitable as they wanted to put Plaintiff's personal belongings there. The builders were using incomplete rooms. The plumbing, painting, pavement, tiling of the ensuite, Durawall and ZESA connection were done when Plaintiff sent money to her. Though the property was bought in 2008, they could not save as Plaintiff was pursuing a masters degree at the University of Zimbabwe. Construction only started after he left the country in 2011 and he started sending money. He trusted her even when she was still a spinster. She contributed 30% to the construction.

Concerning the Mount Pleasant property, her agreement to remain behind when Plaintiff went to South Sudan resulted in accumulation of more money. In addition, she was looking after the children and Plaintiff's sick mother. The receipts for the materials she purchased are in Plaintiff's name because she was exploiting the good will he had created with suppliers. For instance, at Beta Bricks, using the Plaintiff's name would get them discounts due to previous purchases. Plaintiff trusted her to the extent of sending money to her for the Mount Pleasant Heights property after he had served her with summons for divorce. She is entitled to 50% of the value of the property.

The Mount Pleasant property required a special foundation. For that reason, engineers were engaged. She requires post-divorce maintenance because she had a job she wanted to do but was persuaded to focus on family projects. She is studying Business Management at Great Zimbabwe University. It will be difficult to get employment in the current economic conditions which are harsh. She is being assisted by Plaintiff's brothers and sisters.

Under cross-examination she indicated that she was claiming a 30% share of the Masvingo property because she gave expert services during construction. She indicated that she never assumed the married name and that the name Magaya on receipts was referring to a

project, not a person. She further indicated that she was trusted even before marriage and that it was not true that the Masvingo property was completed before marriage.

On the Mount Pleasant property, she indicated that though invoices were reflecting Plaintiff's name, she was the one who had made the purchases and also was the one who collected the purchased items as Plaintiff was not available. She persisted with her claim for a 50% share. She had not applied for her own maintenance because she was focusing on the children. Even though driving lessons were paid for by the Plaintiff, she has not yet obtained a driver's licence. She is in possession of the motor vehicle but is not using it as Plaintiff took away the registration book and number plates.

THE LAW

The assets subject to distribution in divorce proceedings are those that were acquired by the parties during the subsistence of the marriage which they consider to be belonging to the family. The law relating to the sharing of the assets of the spouses is set out in s 7 of the Matrimonial Causes Act [*Chapter 5:13*], (the Act). The concept "the assets of the spouses" was defined in *Gonye v Gonye* 2009 (1) ZLR 39 SC as 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. In subs 4 of the same section, the Court is enjoined to 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;...”

The Act further directs that in distributing the assets, the court shall endeavor as far as is reasonable and practicable and, having regard to the conduct of the parties, where it is just to do so, place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.

Section 26 of the Constitution provides that the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution and in the event of dissolution, provision must be made for the necessary protection of spouses. Article 16 (1) of the Universal Declaration of Human Rights (1948) provides that men and women of full age are entitled to equal rights as to marriage, during marriage and at its dissolution. This means that there must be a fair and equitable division and distribution of property at the dissolution of marriage.

ANALYSIS

1. STAND 2073 BANNOCKBURN, MOUNT PLEASANT HEIGHTS HARARE

The parties agreed that the property was purchased as a vacant stand by the Plaintiff who also financed the construction thereon. Plaintiff stated that the construction was done during the period the parties were in the Gambia. In his evidence in chief he stated that they went to the Gambia in December 2013 and his contract ended in December 2018 and that he was unemployed until April 2019. Defendant's evidence was that construction was between 2019 and November 2021. She supported her assessment by tendering receipts and quotations dated between 2019 and November 2020. Considering that Plaintiff stated that after April 2019 he was employed in South Sudan, Defendant's evidence that he was sending money to her to meet the costs of construction is probable. The question is whether or not the part Defendant played entitles her to 50% of the value of the property. I am not persuaded that the parties were on equal footing. This is more so considering that Plaintiff outlined tasks that were done post separation which were not disputed by the Defendant. He indicated that the paving, plastering, tiling, fitting of doors, windows and wardrobes were post separation. Defendant did not allude to any income generating project. Her contribution was the household chores, taking care of the children and overseeing construction.

Though in her plea she had indicated that she contributed directly and indirectly to the development of the property, it is clear that her contribution was based on Plaintiff financing the construction. She disputed the involvement of engineers during construction in one breath, but in another said they were engaged to develop the plan of the house only and yet on another stage she said they were engaged for the special foundation only. They were inconsistencies in her evidence which makes it unsafe to rely on her evidence. Defendant made reference to the case of *Muchada v Muchada* HC-H-346/86 in which the court awarded a 50% share of the matrimonial home to the wife who had taken care of the children and

improved the matrimonial home with the financial assistance of her husband who was abroad studying. In the *Muchada* case (supra) it was common cause that the wife, with the husband's approval, undertook some extensions to the property. The house which initially had two rooms, toilet and shower, at the same time of sale consisted of an additional three rooms and a bathroom. In *casu*, the parties are not agreed on what exactly the Defendant did. In addition, in the *Muchada* case (supra), the husband was evasive on the value of the property and his evidence was ruled unreliable. In *casu* it is the Defendant's evidence which has inconsistencies. In the *Muchada* case (supra), the court also considered that it was largely the contribution of the wife and her industry that transformed the property into the state it was in at the time of sale. Defendant has not justified getting a share beyond what Plaintiff offered. I find that Defendant is not entitled to a 50% share of the property.

2. TOYOTA ALTIS CHASSIS NUMBER MR053REE104152650

The parties are agreed that the motor vehicle was bought by the Plaintiff and is registered in his name. The point of departure is on the purpose for which the vehicle was bought. Plaintiff stated what he intended to use it whenever he was in the country. Defendant stated that it was bought for her and was meant for the custodial parent to facilitate the school run. She bases her submissions on the fact that Plaintiff funded the lessons for the driver's licence. Registration of the motor vehicle in Plaintiff's name leads to the conclusion that Plaintiff bought the vehicle for himself. The onus was on the Defendant to show that at the time of purchase it was intended for her. As stated in *Nyahondo v Hokonya* 1997 (2) ZLR 457, he who makes a positive assertion bears the onus of proving the facts so asserted. I am not persuaded that Defendant discharged the onus on her. Resultantly she cannot be awarded the motor vehicle.

3. STAND 24855 SISTER PAILEY RUFARO NORTH WEST MASVINGO

The parties are agreed that the property was acquired by the Plaintiff prior to their marriage. The question is whether or not Defendant contributed to its development entitling her to a share of it. Plaintiff's position is that it was completed before marriage. Defendant's position was that she contributed to its completion by finishing up some of the rooms. She however stated that her contributions were not financial or physical in nature. That statement is contrary to her assertion that she contributed in finishing up some of the rooms. How could she contribute to finishing up rooms without making financial or physical contributions? In her counter-claim she claimed a 30% share of the value of the property. In her closing submissions she claimed a 25% share. The difference was not accounted for. Defendant

sought to rely on the case of *Chitofu v Chitofu* HH 265/13 in which there was a property bought by the Plaintiff therein with his late first wife. The Defendant therein was awarded a 10% share of the same property as she had made improvements thereon. The case is distinguishable in that the Defendant therein quantified the value of the improvements she made on the property. In *casu*, Defendant has not placed before the court the value of the improvements made on the property. I find it probable that the failure to value the improvement is most likely because as stated by the Plaintiff, the house was complete when Defendant came on the scene. Considering that marriages in Zimbabwe are out of Community of property, Defendant has not provided any justification for moving the property from the category “his” to “theirs” to justify its sharing. See *Takafuma v Takafuma* 1994 (2) ZLR 103. I therefore find that Stand 24853 Sister Pailey, Rufaro, North West Masvingo is not matrimonial property and is therefore available for distribution.

4. POST-DIVORCE MAINTENANCE

Maintenance after divorce is granted in exceptional circumstance and the need must be clearly spelt out. See *Manyoni v Manyoni* HH 4/16. Defendant referred to the case of *Kangai v Kangai* HH 51/07 in which it was stated that post-divorce maintenance is no longer a right. Each case is considered on its own circumstances. In *casu*, after separation, Defendant found it necessary to claim maintenance for the children and not for herself. If the need for maintenance was there, surely Defendant would have claimed for spousal maintenance pending the divorce action at the time since she claimed maintenance for her children. The reason she gives for not doing so is simply that she was focusing on the children. Coming from a person who is legally represented, that reason gives a picture that she was not in need of maintenance herself. She is able-bodied and is capable of taking care of herself. Initially Defendant made a claim for post-divorce maintenance of USD \$700 per month until 31 December 2024. No break-down of the amount was given to show what it would cover. Orally she claimed USD \$400 per month until the end of 2024. In her closing submissions it is indicated that she reduced her claim from USD \$700 to USD \$450. The difference in figures can only be because it is not necessary for Defendant to be maintained. She found it difficult to justify any amount claimed. I am not persuaded to award her post-divorce maintenance.

DISPOSITION

1. A decree of divorce be and is hereby granted.
2. Plaintiff be and is hereby awarded

- (a) 85% share of Stand 2073 Bannockburn, Mount Pleasant Heights, Harare; and
 - (b) Toyota Corolla Altis Registration Number AFY 2342.
3. Defendant be and is hereby awarded 15% share of Stand 2073 Bannockburn Mount Pleasant Heights, Harare.
 4. The parties shall within 30 days of this order, appoint a mutually agreed valuator to value the property, Stand 2073 Bannockburn, Mount Pleasant Height, Harare.
Should the parties fail to agree on a valuator, one shall be appointed for them by the Registrar of the High Court from the list of registered valuers. The Plaintiff be and is hereby granted the option to buy out the Defendant's share within a period of four months from the date of receipt of the evaluation reports. Should the Plaintiff fail to buy out Defendant within the stated period, or such longer period as the parties may agree, the property shall be sold to best advantage by an estate agent manually agreed to by the parties, failing such agreement (within ten working days) by one appointed by the Registrar from his list of independent estate agents. The net proceeds shall be distributed in terms of the sharing ratio in para(s) 2 (a) and (3) above.
 5. In the event that the property is sold to best advantage, the Plaintiff shall sign all necessary documents to effect transfer failing which the Sheriff be and is hereby authorized to sign the documents on Plaintiff's stead.
 6. The cost of valuation shall be met by the Plaintiff.
 7. Custody of the minor children, namely, NM, born on 5 July 2014, and SM, born on 22 October 2016, be and is hereby awarded to the Defendant.
 8. The Plaintiff be and is hereby granted the right of access, two weeks of every school holiday, alternate public holidays and for a period not exceeding three days during the school term upon giving the Defendant 48 hours' notice.
 9. Maintenance of the minor children is to be governed by the order given in the Magistrates Court under M1489/21
 10. The counter-claim for spousal maintenance post-divorce be and is hereby dismissed.
 11. Each party bears its own costs.

Diza Attorneys, Plaintiff's legal practitioners
Kantor and Immerman, Defendant's legal practitioners