

FLORENCE SIBANDA (NEE MUGOMBA)  
versus  
THANDAZANI SIBANDA

HIGH COURT OF ZIMBABWE  
MAXWELL J  
HARARE, 26 July 2024 and 27 September 2024

## CIVIL TRIAL

*J. Ndlovu*, for the Plaintiff  
*H. Teererai*, for the Defendant

MAXWELL J:

The factual background to this matter is that the plaintiff and the defendant have been married for 26 years from 1993 to date. In 1993 they were married in a customary union which was succeeded by a civil marriage in 1998. The couple subsequently sired three children during the subsistence of their marriage. They formed 4 companies and built four homes during the marriage among other assets. In December 2019 the defendant left their matrimonial home abandoning the plaintiff and their three children. The plaintiff then launched divorce proceedings against the defendant seeking a decree of divorce and ancillary relief.

After a few attempts to reach a settlement, the parties failed to find each other and at a Pre-Trial Conference they agreed to refer the following matters for determination to trial.

1. What would constitute a fair and equitable distribution of the assets of the parties?
2. Terms of access to be exercised by the defendant in respect of the minor child Mthabisi Sibanda born 2 February 2014.
3. Who should pay the costs of suit?

Section 7.4 of the Matrimonial Causes Act [*Chapter 5:13*] on division of assets and maintenance orders outlines the circumstances that the Court must have regard to when dealing with the aforementioned issues during a divorce case and stipulates the following;

“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 court is therefore confronted with a situation where it must divide assets between two spouses seeking to dissolve their 26-year-old marriage. On one hand is a spouse who claims she has no income and has had no income since 2001. She indicated that prior to her husband moving out of their matrimonial home in December 2019 she pretty much lived on the income derived from their business companies. According to the plaintiff, it is these properties that performed so well whose proceeds the spouses used to purchase the properties that are now disputed by the parties. The parties have agreed that during the subsistence of their marriage the properties listed below were built and the household effects and furniture situate therein were acquired.

- a) No. 2220 Mainway Meadows, Waterfalls, Harare
- b) Stand 5109 Glen Norah Township
- c) House No 5516 Pumula Old, Bulawayo
- d) House No 15109 Nkulumane 12, Bulawayo

The last three of these properties are not contested as the plaintiff has indicated that she is only interested in the first property listed above, otherwise listed as “No. 2220 Mainway Meadows, Waterfalls, Harare and its household effects and furniture situate therein”. This property also happens to be currently occupied by the plaintiff and the children of the disputing couple and was also their matrimonial home before the defendant moved out in December 2019.

### **Distribution of the Assets of the Parties**

Section 7.1(a) states that:

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—

- (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other:”

And section 7.2 (a) states that

“An order made in terms of subsection may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between the spouses and may in particular, but without prejudice to the generality of this subsection—

- (a) order any person who holds any property which forms part of the property of one or other of the spouses to make such payment or transfer of such property as may be specified in the order;”

The law in so far as distribution of spousal assets is concerned is settled. The ultimate result to be achieved must be just and fair in so far as it should reflect that the parties and children are placed in a position they would have been in had the normal marriage relationship subsisted. The pivotal goal is to ensure that none of the parties is unnecessarily over burdened by hardship which comes with divorce and is also to achieve a fair distribution which would bring about as far as practically possible justice and equity. Our courts have held that both direct and indirect contributions of parties are of paramount importance when distributing the assets of the parties. See *Ncube v Ncube* HB 116/15. In *Mhora v Mhora* SC89/2020 UCHENA JA stated that

“However, it must be borne in mind that each case must be dealt with according to its own circumstances and merit”

**(a) No. 2220 Mainway Meadows, Waterfalls, Harare**

The plaintiff’s evidence was that between 2000 and 2001 the parties bought an undeveloped stand and started building thereon. The construction was financed from the companies the parties had started. The property was registered in defendant’s name. She had been employed and part of the proceeds from her employment went into the companies. In addition, she contributed indirectly by taking care of the family.

The defendant asserted that the property belongs to him by virtue of the registration of title. The power of the courts when dividing assets between the spouses are so wide that they can even order one spouse to transfer any property held by one party to another if it appears just and equitable to do so. In accordance with s.7.4 of the Matrimonial Causes Act it is clear from the submissions of the parties that the plaintiff is the one who has been mainly affected negatively by the defendant’s decision to abandon the matrimonial home and the marriage

relationship. The Court has a duty in accordance with s.7.4 of the relevant act to ensure that the plaintiff and dependent children remain in the position they would have been in had the normal marriage relation continued. The circumstances of the plaintiff are a cause for concern. She submitted that she only has shelter by virtue of a caveat that was placed on the matrimonial home by this court forbidding the defendant from selling the property. She has no income and has virtually survived on her paltry pension and monthly rent that she collects from tenants renting at the property. She is the primary carer of the couple's two children, one a minor child, the other a dependent child undergoing her tertiary education. She claims that since the defendant abandoned the matrimonial home, he has not made much contribution to the welfare of his estranged family save for the school fees of the minor child which he continues to pay.

In *Fadzai Usayi (nee Magara) v Leonard Usayi SC 22/24 on p.10*, MATHONSI JA pointed out the following

“It is significant that s.7 does not recognize the spectre of registration of property as an important consideration in the division except that s.7(3) protects certain types of property from the long reach of the court... Yet subs (1) specifically empowers the court, where appropriate, to order the transfer of property from one spouse to the other.”

Given the discretionary powers vested in the courts by the Matrimonial Causes Act [*Chapter 5:13*] to consider circumstances like the financial needs, obligations and responsibilities each spouse and child has, the standard of living of the family, the direct or indirect contributions made by each spouse, the duration of the marriage, I am of the view that the property should be shared equally between the parties with the plaintiff having an option to buy out the defendant's share. This might ensure that the plaintiff and the dependent children are not left homeless or alienated from the standard of life that they had grown accustomed to during the subsistence of the normal marriage relationship. It is clear that had the normal marriage relationship continued the plaintiff and dependent children would continue residing at No.2220 Mainway Meadows, Waterfalls, Harare as this has been their matrimonial home since the couple built the house. The court is of the view that since the plaintiff remains the sole primary carer for the minor child and dependent child, she is entitled to continue in occupation until the minor child attains the age of majority. Thereafter the house is to be valued and the plaintiff will have the option to buy the defendant's share first.

**(b) Stand 5109 Glen Norah Township, House No 5516 Pumula Old, Bulawayo and House No 15109 Nkulumane 12, Bulawayo**

In the Joint Pre-Trial Conference Minute, the question of what constitutes the assets of the parties available for distribution was not raised. In his submissions, defendant's position was that the properties under consideration here are not available for distribution as they belong to other people. Plaintiff is not laying claim to any of these properties.

**(c) Binga Stands, Stand 363 High Density and Stand 1308 Low Density**

It seems there are liabilities attaching to these properties. Plaintiff's position is that each party should be awarded one of the stands. Defendant submitted that plaintiff can be awarded the stands and be ordered to reimburse what he invested in them. From their descriptions, the stands are in different areas therefore an equitable distribution would be to award each of the parties a 50% share with the option to buy each other out. Considering that defendant proposed that the stands be awarded to the plaintiff with an order for reimbursement of what he invested, plaintiff will be given the option to buy him out.

**(d) Undeveloped stand in Ruwa, Harare**

The plaintiff referred to this property in her declaration. In response the defendant challenged the plaintiff to provide the stand number of the undeveloped stand. In her evidence and in cross examination, no further particulars were given concerning this property. Defendant testified that the property was repossessed. In the absence of information that would assist in identifying the property, I find that distributing it results in an order that cannot be enforced. Plaintiff ought to have obtained the details of the stand before the trial was concluded. I find that the stand is not available for distribution.

**(e) Boats**

Plaintiff testified that the parties acquired five (5) boats that were used for commercial fishing in Kariba. She proposed that she be awarded any two (2) of the boats. On the other hand, defendant stated that there were only three (3) boats to talk about as the other two (2) belong to Sabaoth Fisheries. To support his contention defendant referred to the registration certificates filed of record. Registration Certificates numbers 3915 to 3917 are for boats registered in the defendant's name. These are KF2915 Sibotshwa, KF2916 Assah and KF2917 Flora. The other two, though the address of the owner is the same as that of the defendant and the other three boats, the registered owner is Sabaoth Fisheries. These are KF3075 Sithandekile under Registration Certificate Number 4075 and KF3076 Cwaka under Registration Certificate Number 4076. Sabaoth Fisheries was not before the court. I therefore agree with the defendant that only three boats are to be considered for distribution. An equitable distribution is therefore

that each party gets a boat and a 50% share in the third boat with an option to buy each other out.

**(f) The Companies**

The following companies were discussed during the trial.

- (a) Thaflo Industrial Suppliers registered in January 1998
- (b) Zimroads Consultancy (Private) Limited registered in 1999.
- (c) Civil Works Laboratory (Private) Limited registered in 2001.
- (d) SibThand Enterprises (Pvt) Ltd, registered in 2001.

The companies are not in dispute as the defendant proposed that they be awarded to the Plaintiff even though they are non-trading companies.

**Access rights to the minor child**

The defendant seeks access to the minor child, *Mthabisi Sibanda* born 2 February 2014, once a year on any day at plaintiff's discretion. The position of the law is that, when dealing with children, the best interests of the child should be paramount as per s 81 (2) of the Constitution. Section 81 (3) goes on to state that children are entitled to adequate protection by the courts particularly by the High Court as their upper guardian. It is the right of every child to be well taken care of by both parents. The child's right to parental care is provided for in terms of s 19 (1) and 19(2) (a) and elaborated in s 81 of the Constitution. A court seized with a matter to do with custody, access and guardianship must consider the provisions of s 19 of the Constitution.

Access matters are to be decided by considering all the facts to a matter having regard to the best interest of the child. In *Bottger v Bottger* HC-H 405-82, at p 7, it was held as follows:

“The object of access is to nurture the affection and companionship between non-custodian parent and child, and while on the one hand it should not be of such frequency as to trespass on the control and direction of the child's daily life that is vested in the custodian parent, on the other it should not be so confined as to stultify the continuing link between child and non-custodian parent.”

In *Kumirai v Kumirai* HH 17/06 the subject of access was extensively covered, and the court stated that; -

“It is trite that access, in the absence of good reason, is not to be confined to such an extent that it stultifies the nurturing of a meaningful relationship between the child and the non-custodian parent. (See *Marais v Marais* 1960 (1) SA 844(C) and *N v N* 1999 (1) ZLR 459 (H)).

Every child needs to have a normal relationship with both parents. The benefits of nurturing such a relationship were set out in the case of *W v W* 1981 ZLR 243 wherein it was stated as follows:

“The natural affinity and emotional bond and attachment between parent and child are generally irreplaceable and an accepted fact of life. Such an association benefits and promotes a child’s emotional security and feelings of normalcy..... The custody of a child should vest in one parent whilst the non-custodial parent enjoys full access rights so as to have a bond with their child.”

The plaintiff has no issues with the defendant having access to the minor child more frequently than he has requested. An order giving allowance for that will be given.

**Contribution towards Costs**

Plaintiff prayed that the defendant be ordered to contribute towards her legal costs in the sum of US\$5 000.00. Rule 67 of Statutory Instrument 202 Of 2021 provides as follows; -

“When a spouse is without means to prosecute or defend an action for divorce or judicial separation, the court may on application order the other spouse to contribute to his or her costs, and where necessary, to his or her maintenance pendente lite, such sums as it deems reasonable and just.”

In *A.F v F.M* 2019 (6) SA 422 it is stated that the origin of a claim for a contribution towards costs in a matrimonial action originated in Roman-Dutch procedure and the substantive basis of the claim is the reciprocal duty of support between spouses which includes the cost of legal proceedings.

The learned author Hahlo in his book *The South African Law of Husband and Wife 4<sup>th</sup> Ed* at p 520 confirmed the obligation of the spouse with means to assist on costs. He remarked as follows:

“where the husband is a rich man, the wife is not obliged to realise her possessions in order to finance her action and is entitled to litigate upon a scale commensurate with the means of the husband.”

The Zimbabwean Constitution spells out the fact that spouses owe each other a duty of care in section 26 which reads:

“The State must take appropriate measures to ensure that-

- (a) .....
- (b) .....
- (c) there is equality of rights and obligations of spouses during marriage and at its dissolution
- (e) in the event of dissolution of marriage, whether through death or divorce, provision is made for necessary protection of any children and spouses”

The requirements for contribution of legal costs order were stated in the case of *Chinyamakobvu v Chinyamakobvu* 2014 (1) ZLR 509 as follows:

1. There must be a subsisting marriage. In this case the marriage between the parties is still subsisting.
2. The suit in question is a matrimonial one. The current proceedings are for a decree of divorce and ancillary relief. This requirement is therefore met.
3. The litigant requesting a contribution of costs must have reasonable prospects of success. I am satisfied that the plaintiff has made out a case for being granted a decree of divorce and have accordingly awarded her a share of the assets of the spouses. At this stage, it is no longer about prospects as a decision has already been made above.
4. The applicant is not in a financial position to bring or defend the action without the contribution of the other spouse. Plaintiff submitted that she was not in a position to pay legal costs as she is unemployed and her only income is a \$70 pension.
5. The other spouse is able to provide the applicant with his contribution. Defendant did not aver that he does not have the means and financial resources to assist plaintiff. He simply stated that since he has paid his own lawyers, plaintiff should also do the same.

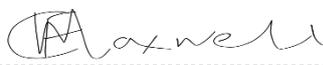
I am persuaded that the plaintiff's prayer for a contribution towards her legal costs should succeed.

**DISPOSITION**

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child Mthabisi Sibanda born on 2 February 2014 be and is hereby awarded to the plaintiff.
3. Defendant shall have access to the minor child Mthabisi Sibanda born on 2 February 2014 once a year on any day at the plaintiff's discretion and at any other time the parties may agree.
4. Issues of maintenance of the minor child Mthabisi Sibanda born on 2 February 2014 shall continue to be governed by the Magistrate Court under case number M,1034/21.
5. The plaintiff be and is hereby awarded a 50% share in House Number 2220 Mainway Meadows, Waterfalls, Harare.

6. Defendant be and is hereby awarded a 50% share in House Number 2220 Mainway Meadows, Waterfalls, Harare.
7. The plaintiff will remain in occupation of House Number 2220 Mainway Meadows, Waterfalls, Harare until the minor child Mthabisi Sibanda born on 2 February 2014 reaches the age of 18 years.
8. The house is to be valued by a valuer agreed to by the parties within 30 days of the minor child Mthabisi Sibanda born on 2 February 2014 attaining the age of 18 years.
9. If the parties fail to agree on a valuer, one shall be appointed by the Registrar of the High Court within seven days of such failure to agree from the list of registered valuers.
10. Plaintiff shall have the first option to buy out defendant from the property within six months of the date of receipt of the valuation report, or such time as agreed by the parties, failing which defendant will have the option to buy out plaintiff within a month of the plaintiff's failure.
11. If the parties fail to buy each other out from the property, it shall be sold to best advantage by an agent agreed to by the parties failing which the Registrar of the High Court shall appoint one from the list of registered estate agents. The net proceeds of the sale will be shared equally between the parties.
12. The costs of the valuations shall be borne equally by the parties.
13. The plaintiff be and is hereby awarded 50% of each of the following Binga Stands, Stand 363 High Density and Stand 1308 Low Density
14. The stands are to be valued by a valuer agreed to by the parties within 30 days of this order.
15. If the parties fail to agree on a valuer, one shall be appointed by the Registrar of the High Court within seven days of such failure to agree from the list of registered valuers.
16. Plaintiff shall have the first option to buy out defendant from the property within six months of the date of receipt of the valuation report, or such time as agreed by the parties, failing which defendant will have the option to buy out plaintiff within a month of the plaintiff's failure.
17. Any liabilities on the property are to be shared equally between the parties and the value thereof may be offset in the amount to be paid to a party on the buyout.

18. If the parties fail to buy each other out from the property, it shall be sold to best advantage by an agent agreed to by the parties failing which the Registrar of the High Court shall appoint one from the list of registered estate agents. The net proceeds of the sale will be shared equally between the parties.
19. Plaintiff be and is hereby awarded the Boat registered as Flora KF2917 and a 50% share in the boat registered as Assah KF 2916.
20. The boat registered as Assah KF 2916 is to be valued by a valuer agreed to by the parties within 30 days of this order.
21. If the parties fail to agree on a valuer, one shall be appointed by the Registrar of the High Court within seven days of such failure to agree from the list of registered valuers.
22. Plaintiff shall have the first option to buy out defendant from the property within six months of the date of receipt of the valuation report, or such time as agreed by the parties, failing which defendant will have the option to buy out plaintiff within a month of the plaintiff's failure.
23. Any liabilities on the property are to be shared equally between the parties and the value thereof may be offset in the amount to be paid to a party on the buyout.
24. If the parties fail to buy each other out from the property, it shall be sold to best advantage by an agent agreed to by the parties failing which the Registrar of the High Court shall appoint one from the list of registered estate agents. The net proceeds of the sale will be shared equally between the parties.
25. The Plaintiff be and is hereby awarded 100% shares in:
  - (a) Thaflow Industrial Suppliers registered in January 1998
  - (b) Zimroads Consultancy (Private) Limited registered in 1999.
  - (c) Civil Works Laboratory (Private) Limited registered in 2001 and
  - (d) SibThand Enterprises (Pvt) Ltd, registered in 2001.
26. The defendant be and is hereby ordered to contribute US\$5000.00 or its equivalent at the bank rate prevailing on the date of payment towards plaintiff's legal costs.

**MAXWELL J:**  .....

*Mtewa & Nyambirai*, plaintiff's legal practitioners  
*Teerera Legal Practice*, defendant's legal practitioners