

ZIVAYI MAGONDO  
versus  
TRACY MAGONDO (nee CHKWANHA)

HIGH COURT OF ZIMBABWE  
ZISENGWE J  
MASVINGO 9 and 30 March, 2022

*T. Mpofu* for the plaintiff  
*S. Silva* for the defendant

### **Civil Trial – Divorce**

**ZISENGWE J:** The parties to these divorce proceedings are agreed on virtually all issues relating thereto save for the distribution of two sets of movable items namely two snooker tables (also referred to as pool tables). Whereas the defendant insists that these two items are ineligible for distribution, the defendant contends to contramiser.

The plaintiff's position with regards to the motor vehicle, which is an Audi motor vehicle registration number AEA 3952 is that he purchased it using the proceeds of a *minatory dolicitim* he received from a certain benefactor. On that basis he claims that the said motor vehicle is of sentimental value as contemplated in section 7(3) (c) of the Matrimonial Causes Act, [*Chapter 5:13*].

He also resists the inclusion of the Audi motor vehicle on the basis of its utility value. In this regard he testified that he uses it to attend drive to persons who call him requiring urgent medical attention. The plaintiff is a retired nurse. He testified that before his retirement he was employed as a nurse in the Zimbabwe National Army. His position in this regard therefore is that rendering the motor vehicle liable for distribution in terms of section 7 of the Matrimonial Causes

Act will effectively rob him of his sole means of livelihood as he will be unable to attend to medical locums and emergencies. He further testified that should he be relieved of that motor vehicle then he will not be able to support his minor children.

The defendant in her evidence presented a contrary version in respect of the acquisition of the motor vehicle and maintained that it is available to be distributed as part of matrimonial property.

In this regard she testified that the plaintiff actually obtained bank loans (*one from a financial institution called "Getbucks" and one from Bank ABC*) to finance the purchase of the motor vehicle. She also claims that during the time that the plaintiff was servicing the loans the burden of providing for the needs of the family fell on her shoulders. She indicated that her cross boarder vending forays sustained the family and kept it afloat. Needless to say that she completely denied the plaintiff's version that the Audi motor vehicle is not liable for distribution.

As far as the two pool tables are concerned, the plaintiff denied ownership of thereof. He testified that he is only routinely engaged in the servicing of them at the behest of his grandfather who owns a liquor outlet going by the name Bob's tavern. To buttress his position he produced a letter authored by one Clever Mukize who identified himself therein as the Branch Manager at Bobs Tavern. In a word the letter states that the pool tables in question belong to a business entity called the Fort Group and that the plaintiff services them when such service is needed or when they break down.

Further the plaintiff called Mr Mukize as a witness to and the latter confirmed the contents of his letter and insisted that the pool tables do infact belong to the Fort Group and not the plaintiff. He would deny under cross examination that he was doctoring his evidence to serve plaintiff's interests who is incidentally related to the owner of Bob's tavern.

In her evidence the defendant insisted that the acquisition of the pool tables for business purposes was actually her brainchild after she had received such business idea from her nephew. She testified that plaintiff readily and enthusiastically agreed to the idea when she introduced it and that given that he (i.e. plaintiff) is related to the owner of Bob's tavern they had a ready venue where to place the said pool tables. They then proceeded to purchase two tables for US\$1 550 and US\$1 600 in 2011 and 2012 respectively.

She indicated that she was unable to produce the receipts for the purchase of these pool tables because in the acrimony preceding the institution of these divorce proceedings, plaintiff locked the bedroom where such comments are stored and denied her access thereto.

As far as the Audi motor vehicle is concerned, there appears to be cogent reason not to include it as part of the property subject distribution in terms of section 7 of the Matrimonial Causes Act. Both parties are in agreement that the motor vehicle was purchased and imported by plaintiff and subsequently registered in his name.

I find on balance that defendant's version of the acquisition of the motor vehicle is more plausible than plaintiff unsubstantiated and far-fetched assertion that he purchased it from the proceeds of a donation from an unnamed person. I do not believe that the plaintiff in this regard has been candid with the court. He went out of his way to procure evidence suggestive of the fact that the pool tables do not belong to him yet did precious little to substantiate the narrative of a monetary donation. Even if he had, I still do not believe that it would qualify to be excluded for division in terms of section 7(3) of the Matrimonial Causes Act.

The said provision reads;

“7. ***Division of assets and maintenance orders***

(1) .....

(2) .....

(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 action, are intended to be held by the spouse personally; or*

*(c) in any manner and which have particular sentimental value to the spouse concerned”.*

I do not see any sentimental value attaching to a motor vehicle acquired through proceeds of a monetary donation. A fortiori, I am satisfied that that the motor vehicle was acquired in the manner described by the defendant as opposed to that described by the plaintiff.

Equally untenable is the suggestion by the plaintiff that the Audi motor vehicle should be excluded from the distribution equation by virtue of its utility function. Such an approach stands to unduly prejudice the defendant who I believe from the evidence made indirect contributions towards its acquisition.

Ultimately, I do not see any good reason why defendant should not be award a 50% share of the value of the Audi motor vehicle. In this regard the unchallenged evidence of the plaintiff is that the said motor vehicle is currently valued at US\$2 500 and the defendant in my view is entitled to a half share of that value.

The pool tables are a different kettle of fish. A third party having laid claim to the property in question, and the said property being in the possession of the said third party, it would be too presumptive and there being no documentary proof of the purchase of the same by either or both of the parties, it would be too presumptive to accept defendant's position that they (i.e. parties) own the same by her *mere ipse dixit*. Danger always lurks in such situations of distributing property which belongs to a third party.

The cumulative impact of the documentary evidence (the letter of confirmation authored by Mr Clever Mkize), the oral evidence by both Mr Mkize and the plaintiff, the fact that the pool tables are in the physical possession of a third party and the absence of documentary evidence showing the purchase of the pool tables by either or both of the parties is such as to make me circumspect in considering them as part of property liable for distribution. It is trite that the possession of a movable item creates a presumption of ownership.

In the final analysis therefore the following is a comprehensive order of the court capturing all the issues between the parties.

1. Divorce

A decree of divorce be and is hereby granted.

2. Custody of minor children

That the custody of the minor child Vanessa Nelly Magondo born on 20 March 2005 is hereby awarded to the defendant.

3. Access

That plaintiff be awarded reasonable access to the minor child Vanessa Nelly Magondo to be exercised during each alternate school holiday, public holidays or any other occasion – agreed by the parties.

4. Maintenance

4.1.....

4.2. There shall be no order for post-divorce spousal maintenance.

5. Distribution of movable assets

5.1. The following movable assets are hereby awarded to the plaintiff.

5.1.1. 3 solar systems

5.1.2. 1 cow

5.1.3. 1 bed

5.1.4. 1 room divider

5.1.5. 1 deep freezer

5.1.6. 1 wardrobe

5.1.7. 1 Sony radio

5.1.8. 40 inch Plasma Television set

5.1.9. 2 sofas

5.1.10. 50% share of the value of the Audi motor vehicle registration number AEA  
3952

5.2. The following movable assets are hereby awarded to the defendant.

5.2.1. 1 “Jojo” tank

5.2.2. 1 solar system

5.2.3. 1 bed

5.2.4. 1 room divider

5.2.5. 2 sofas

5.2.6. 4 piece kitchen unit

5.2.7. 1 upright refrigerator

5.2.8. 4 plate stove

5.2.9. 50% share of the value of the Audi motor vehicle registration number AEA 3952.

5.3 The plaintiff given the option to buy off defendant's 50% share of the value of the motor vehicle in the sum of US\$1 250.

5.3.1. The option in 5.3. above to be exercised within 90 days of this order filing which the motor vehicle to be sold by private treaty to the best advantage of the parties and the and the proceeds shared equally between the parties

6. Immovable property

House No. 6226, Victoria Ranch registered in the plaintiff's name be sold by private treaty and the proceeds be shared equally (50/50) between the parties.

7. Each party to meet its own costs of suit.

*Pundu & Company*; plaintiffs' legal practitioners  
*Legal Aid Directorate*; defendant's legal practitioners