

THEMBA SIPINDIYE  
**versus**  
TENDAI MUJAJI WILSON

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 27 SEPTEMBER 2016 AND 4 AND 13 OCTOBER 2016

### **Civil Trial**

*J Tsvangirai* for the plaintiff  
Defendant in person

**MATHONSI J:** The plaintiff and the defendant are former husband and wife who were married to each other in terms of the Customary Marriages Act [Chapter 5:07]. Their marriage was dissolved by order of the magistrates court sitting at Bulawayo on 13 December 1999. The court also divided their matrimonial assets and made an order for maintenance in favour of the defendant who was granted custody of the two minor children. The maintenance order related to both personal maintenance for the defendant and for the minor children.

The relevant part of the court order reads:

“(3) Immovable property: Defendant (defendant herein as well) to have usufruct right over house number 4 Nicholson Road Romney Park until the youngest child of the marriage attains the age of 18 years and thereafter the house to be evaluated and each party to get a half share of the net proceeds of the sale of the house. If one of the parties is interested in the house (they) should buy out the half share of the other party failure of which the house is to be sold by private treaty and the net proceeds shared equally.”

The youngest of the children was Tafadzwa who celebrated her eighteenth birth day on 13 October 2004. According to the order of the magistrates court her maintenance expired by effluxion of time on that date and so did the defendant’s usufructuary right over the house in Romney Park. The court order in question was not contested in that regard and clause 3 thereof which I have cited above governs the relationship between the parties post divorce.

The plaintiff instituted summons action against the defendant seeking an order entreating the defendant to allow for the valuation of the house and thereafter its sale so that the parties may share the proceeds equally. In the event that the defendant does not co-operate the plaintiff would like the Sheriff to be empowered to appoint a valuer to do the honours before selling the house by private treaty. He would also like the defendant to pay the costs of suit on a legal practitioner and client scale.

He averred in his declaration that although the youngest of the children has attained majority status, the defendant has refused, neglected or failed to suffer an evaluation of the former matrimonial home for it to be sold. For that reason he craves the intervention of the court aforesaid.

The defendant entered appearance to defend. She also filed a plea and counter claim. The essence of her opposition is that the divorce order did not make provision as to who between them would nominate or appoint an estate agent to conduct an evaluation. While the plaintiff could not appoint an estate agent of his choice to perform that exercise without securing her prior agreement, she had no obligation to allow an estate agent unilaterally appointed by the plaintiff onto the property. As far as she is concerned the plaintiff should have approached the magistrates court “for appropriate relief.”

In her counter claim the defendant averred that the plaintiff defaulted in paying personal maintenance for herself in the sum of ZWD 1000-00 per month and ZWD500-00 per child for the two children. She did not particularise the arrear maintenance and did not quantify such arrears in any functional currency but maintained that the plaintiff “has been unjustly enriched at her expense” thereby entitling her to claim unspecified damages against him. She then made the strange averment that the plaintiff’s half share of the house should therefore be awarded to herself in consideration of the unspecified “damages” arising out of maintenance arrears.

In response the plaintiff averred that the maintenance for the children lapsed in 2004 when Tafadzwa attained the age of 18 years. In fact the maintenance in favour of Ronald Sipindiye who was born on 29 July 1982 was ordered to run specifically until 29 July 2000 while that of Tafadzwa up to 13 October 2004. The plaintiff pleaded that the personal maintenance for the defendant, which also sounded in Zimbabwe dollars was not reviewed when that currency became moribund.

The plaintiff went further averring that the attempt to do so by the defendant in 2012 resulted in the maintenance order being discharged leaving no maintenance order in existence. He insisted that he paid maintenance at the time the order subsisted until he lost his job hence the discharge of the order.

The issues for trial were fixed by the parties at the pre-trial conference held before a judge before the defendant lost the services of her legal practitioners. They are:

1. Whether this court has jurisdiction to entertain this matter.
2. Whether the maintenance order dated 13 December 1999 is valid (presumably meaning extant).
3. Whether the plaintiff is in contempt of the maintenance order dated 13 December 1999.
4. If so, whether this court should refuse to hear him until he has purged his contempt.
5. Whether the defendant is entitled to claim the plaintiff's share of the former matrimonial house in lieu of the plaintiff's obligations in terms of the maintenance order of 13 December 1999.

In my view the parties convoluted the issues. In fact it became apparent at the trial that there was in essence only one issue for determination namely the last one. This was either because the defendant only anchored her case on her claim for maintenance suggesting that she should be allowed to deduct what is due to her by way of maintenance from the plaintiff's share or the rest of the so-called issues could not possibly be issues for trial at all.

The parties are in agreement that the value of the house in question currently stands at around \$40 000-00. Clearly therefore the magistrates court whose monetary jurisdiction is now limited to \$10 000-00 would not have jurisdiction over the dispute. In any event, this court has original jurisdiction over all civil and criminal matters throughout Zimbabwe in terms of s171 (1) of the Constitution. Nothing has been said to suggest why it would not have jurisdiction over this matter, itself a civil matter arising in Zimbabwe. Therefore the first issue resolves itself.

On the question of the maintenance order of 13 December 1999, it is common cause that the order in favour of the children lapsed on 29 July 2000 for Ronald and on 13 October 2004 for Tafadzwa when they respectively attained majority status. They are now adults. Although the

order for the defendant's personal maintenance was to subsist until her death or remarriage and none of those eventualities have occurred, the defendant conceded that the maintenance order in question was not only discharged in 2012, it was never converted to the functional currency of the day.

The defendant, who appeared in person, kept on asking rhetorically whether an order of a magistrates court discharging the earlier maintenance order or refusing to award her maintenance in 2012 could be allowed to supercede an earlier order. In saying so she again conceded that the order of 2012 was not challenged either by way of appeal or review. The defendant complained bitterly that at the maintenance hearing in 2012 the plaintiff had given evidence, which apparently found favour with the court, that he had lost his employment at Sugar Refineries in 2003 and therefore did not have means to sustain the order for personal maintenance. Believing that to be true the court found in favour of the plaintiff.

She stated that the plaintiff misled the court in that regard because he was in fact running a company and submitting returns to Zimra. In addition he was then employed by two companies namely Poly Packaging and Panalink located in Kelvin North. Unfortunately for the defendant this is information she may have come across after the court hearing in 2012 and did not use.

In addition the order dismissing her claim for maintenance has not been challenged and therefore remains extant. It obviously supercedes the maintenance order of 13 December 1999 which, being a maintenance order, could not remain in force until Kingdom come. It could be varied or discharged and was indeed discharged due to change of circumstances of the plaintiff. Therefore issue two is resolved on the basis that the maintenance order of 1999 is no longer extant. That also resolves issues 3 and 4 because the plaintiff cannot be in contempt of an order which is no longer in existence and cannot be prevented from accessing this court.

It therefore remains for me to determine the last issue of whether the defendant is entitled to claim the plaintiff's half share of the former matrimonial house. The plaintiff stated that the divorce order was very specific that the parties would be entitled to their respective shares when Tafadzwa attained 18 years. She did so in October 2004 thereby triggering the provisions of clause 3 of the divorce order requiring the evaluation and sale of the house. He did not enforce that provision because the youngest child had not become self-supporting. He allowed the

defendant to remain in occupation without paying him any rent but expected her to meet other bills like rates, water and electricity.

The plaintiff testified that he lost his employment in 2003 and did not have money to help out. Prior to that maintenance was garnished from his salary. He however always brought food for the child. He now requires his share of the house to enable him to set himself up afresh and there is no legal basis for the defendant to try and vary the terms of the court order now to suit her situation.

Most of the defendant's testimony was devoted to the issue of maintenance which she says the plaintiff did not pay. She does not know how much she is owed. She has not bothered to quantify the arrears be they in respect of Tafadzwa or herself. At some point she was able to hazard a figure of \$28000-00 as maintenance arrears, but it appeared to be a figure that she plucked from a hat because she never had a maintenance order in her favour sounding in United States Dollars.

While she may have been entitled to maintenance in the sum of Z\$1000-00 from 1999, I take judicial notice of the fact that she was receiving it through a garnishe order until 2003. I also take judicial notice of the fact that thereafter there was runaway inflation which resulted in the slashing of zeros on currency. I can state with certainty that as long as that figure was not revised, it was wiped away by inflation leaving nothing to be paid.

It is also significant that when the defendant eventually went to court for a variation in 2012 wherein she was seeking an order for \$400-00 maintenance, the plaintiff was no longer employed or the defendant could not prove ability to pay. As a result her claim was dismissed. There being no existing maintenance order upon which the defendant could found a claim for arrear maintenance or "damages" as she prefers to call it, I have no hesitation in concluding that she has failed, on a preponderance of probabilities, to prove her counter claim. In any event even if she had proved a claim for maintenance, such cannot prevent the sale of the house which is due for sale in terms of a court order. If she is owed she can execute against property but cannot prevent the sale in terms of a court order.

On the other hand, it cannot be doubted that the former matrimonial home is owned jointly by the parties in equal shares by virtue of an existing divorce order. The suspension of

their entitlement to their respective shares has been lifted by effluxion of time. The plaintiff is therefore entitled to the relief that he seeks.

In the result, it is ordered that:

1. The defendant's counter claim is hereby dismissed.
2. The defendant is directed to co-operate in the evaluation of stand No. 4 Nicholson Road Romney Park by a valuer agreed upon between the parties after which the said property shall be sold by such valuer and the proceeds shared equally between the parties.
3. In the event of the parties' failure to agree on an estate agent and/or valuer to value and sell the property within 30 days of the date of this order then the sheriff of the High Court is hereby directed and empowered to appoint an estate agent and/or valuer of his choice who shall value the house.
4. Thereafter the Sheriff of the High Court shall sell the said property by private treaty and divide the net proceeds equally between the parties.
5. The defendant shall bear the costs of suit on an ordinary scale.

*Dube-Tachiona & Tsvangirai*, plaintiff's legal practitioners