

PUWAYI CHIUTSI  
versus  
CLARA TAFADZWA CHIUTSI

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 28 NOVEMBER, 2008 AND 13 NOVEMBER 2009

**FAMILY LAW COURT**

**Civil Trial**

Plaintiff in person  
Defendant in person

MUSAKWA J: Plaintiff issued summons in which he sought a decree of divorce, custody of minor children, division of matrimonial property and an order that each party bears their own costs.

On the other hand the defendant counter-claimed for a decree of divorce. She also claimed that she be allowed to reside at the matrimonial home, number 41 Ridgeway North, Highlands, Harare until the youngest child attains the age of eighteen years or becomes self supporting, whichever occurs earlier and thereafter the house should be sold and the proceeds shared equally. In addition she claimed that until the house is sold the parties should contribute equally towards the maintenance of the house and payment of rates.

The parties got married in 1998 and they have five children born of the marriage. At pre-trial conference stage they agreed that the marriage had irretrievably broken down and that custody of the children be awarded to the defendant. The parties also reached a settlement on the sharing some of the movable assets that were acquired during the course of the marriage. Referred to trial were issues on the division of immovable property, maintenance in respect of the minor children and who should be awarded the Chrysler motor vehicle.

In his testimony plaintiff confirmed that he will be responsible for the children's schooling needs and clothing. He stated that he was solely responsible for the purchase of the matrimonial home, which is number 41 Ridgeway, Highlands, Harare. Previously he had purchased a property in Marlborough through a sale conducted by the Sheriff. The property

had been registered in defendant's name. Although he had paid the transfer costs and the mortgage, he acknowledged that defendant's employer had provided the letter of guarantee. The property was in a dilapidated state and he had it renovated. Defendant's contribution was said to be in the form of planting flowers although the plaintiff hired landscapers to plant the lawn.

Plaintiff explained that the property was registered in defendant's name to protect the interests of her employers who had provided the guarantee. He had not been able to provide the twenty-five percent deposit required by the building society. There had been problems in securing the guarantee and defendant had given up pursuing it with her employer.

In 2000 the plaintiff sold the Marlborough property for \$1 650 000.00. The balance due to CABS was \$536 913.00. He also paid the agent's commission. He then secured a mortgage bond with Beverly Building Society for the purchase of the Highlands house. He paid the deposit and met all the mortgage repayments. He was also responsible for the maintenance of the property. According to plaintiff defendant only provided the curtaining.

Plaintiff also testified that when he was employed by the Public Service he was allocated a three bed roomed flat, described as number 91 Block 7, Francis Flats, Belvedere. At some stage he contributed towards a housing scheme run by the then Ministry of Local Government and National Housing (now Ministry of Housing and Social Amenities). The contract with that ministry entailed the provision of a stand, a flat or a house. He was allowed to occupy the flat until the contractual obligations of the ministry were fulfilled. He in turn offered the defendant occupation of the flat and she declined.

As regards the Highlands property he indicated that he offered the defendant ten percent share but she declined. It was his evidence that the defendant acquired a residential stand through her employers. However, he could not give particulars of the stand.

On maintenance for the children he testified that he meets all their needs with the defendant making minor contributions. He pays all school expenses, buys their groceries and clothing. He undertook to continue doing so. Three of the children are at boarding school and the fourth one was expected to join them in 2009. Since the children would only be at home for about three months every year he offered to provide US\$150 in maintenance for the youngest child. In the alternative he offered to pay a nominal sum of \$100 000 000.00. It was his contention that the defendant can take care of herself.

As regards the motor vehicle at the centre of the dispute, the plaintiff testified that in her plea the defendant was claiming an Opel Astra and a Mitsubishi Pajero. The claim in respect of the Chrysler only arose at the pre-trial conference and there was no amendment to the plea. According to him the defendant had initially claimed that he purchase for her a good second hand Toyota Corolla vehicle. Plaintiff stated that he regularly buys vehicles for resale. When he purchased the Chrysler it was meant for resale. He disputed that he purchased it for the defendant and was adamant that it was not shown to the children because they were at school. He described it as an expensive vehicle to use on a day to day basis and that the defendant cannot afford it. Once in a while he gave the vehicle to the defendant for the convenience of the children. He mainly uses it for collecting the children from boarding school. He offered the defendant several cars and she declined them. He cited as an example his offer to purchase for her a Peugeot 306 vehicle that was being sold by her employers.

Under cross-examination by the defendant the plaintiff stated that she had refused to pursue the issue of a guarantee from her employer until he took it up with a Mr Huta. In respect of motor vehicles he also conceded that he owns a Mazda T 3500 and a Bedford truck which he uses for his commercial activities. The plaintiff then closed his case.

The defendant also testified in her case. She stated that when she was working for the Export Processing Zone they were offered a guarantee for purchasing a house in Marlborough. The plaintiff was responsible for the transfer fees and the mortgage repayments. The plaintiff later sold the house. At the time of the hearing this matter the plaintiff had moved out of the matrimonial house. As regards the matrimonial house she has resided there for the past eight years. She does not want it sold. She is claiming a fifty percent share of the house. The house is said to be in a state of disrepair. This is because the plaintiff has not had it painted since they occupied it. In addition she claimed that the plaintiff willfully damaged the doors, windows and wall.

Regarding the flat it was her testimony that it is currently occupied by plaintiff's sister. It appears there is a legal dispute regarding the flat. According to the defendant every time an attempt has been made to remove the plaintiff's sister the plaintiff has had recourse to the courts. That is why she is not interested in the flat.

In respect of the vehicles it was defendant's testimony that apart from the Chrysler the plaintiff also has Mercedes "C" and "E" class, a Jaguar and a Mazda T3500. It was further her evidence that up to about a week prior to this hearing she had been using public transport. She

had used the Chrysler for about a week. She was of the view that plaintiff can afford the expenses related to her use of the vehicle.

The defendant did not want the plaintiff to have much access to the children. This was because the plaintiff had prevented her from visiting the children at their boarding school in Chipinge. She claimed that the plaintiff visits the children in the company of his girlfriend and this upsets the children. She prefers that the plaintiff be granted access to the children during alternate weekends commencing from Friday evening. During school holidays she prefers that the plaintiff be with the children for a week.

On maintenance the defendant testified that the plaintiff pays school fees and buys uniforms. However, in respect of groceries it was her evidence that he provides as and when he feels. She prefers that the plaintiff pays her cash. She initially put the figure at US\$2 500.00 but she later revised this to US\$600.00. On clothing she indicated that she requires \$500 per child or the plaintiff can purchase clothing for the children three times a year. The amount claimed by the defendant was not backed by any expenditure incurred in the past. The figures are unrealistic and do not take into account what plaintiff provides as conceded by herself as will be highlighted in the course of the judgment.

On medical aid and prescriptions the defendant testified that she requires US\$200. This is because medical health providers demand cash upfront. This is despite the fact that she and the plaintiff are under her employer's medical aid cover. The claim by defendant appears to be premised on the erroneous assumption that the children will visit a doctor every month. No evidence was adduced that the children need constant medical attention.

Under cross-examination the defendant conceded that the plaintiff always pays the children's school fees. Although she sought to claim that as at the time of this hearing the groceries purchased by the plaintiff were running out, in essence she did not dispute that the plaintiff provides groceries in bulk. It was also not in dispute that the plaintiff provides for the children's school uniforms and that the defendant only purchased uniforms for the children in 2001.

On the other hand the defendant maintained that until the children went to boarding school plaintiff gave her a vehicle for use with the children. The vehicles she used were either a Mercedes Benz or the Chrysler. Although she had stated that she used to take the children to school she did not dispute it when it was pointed out to her that in previous litigation on the provision of a vehicle she had not disputed that it was the plaintiff who took the children to

school. Her explanation was that she did not think that it was an issue. It also came out from the cross-examination that in the previous litigation the defendant had sought to be provided with a Pajero vehicle.

There was also the issue of the children at boarding school resenting the presence of the plaintiff's girlfriend during school visits. Although the defendant had stated that one of the teachers had drawn the issue to her attention she could not dispute that the plaintiff had communicated with the headmistress on the matter. She also conceded that the headmistress had not raised any issue. The defendant also conceded that the plaintiff was responsible for paying water, electricity and telephone bills. Although the plaintiff put it to the defendant that she owns a residential stand, this was denied.

In considering this matter, I must point out that the plaintiff was forthright in his testimony. It was not disputed that he always provides groceries, school fees, uniforms and casual clothing for the minor children. The children are at boarding school and will only be with the defendant for about two weeks during the school holidays. Therefore maintenance in the sum of US\$150 per month appears reasonable in the circumstances.

The defendant did not provide evidence regarding the medical aid contributions for the minor children. In her counter-claim she sought an order that plaintiff pays monthly premiums equivalent to the CIMAS Private Hospital Scheme. She however confirmed that medical aid cover is already being met by her employer. She did not explain why the type of medical cover being provided has to change. It would be fair though, to order that plaintiff contributes towards costs of prescriptions, consultation fees and shortfalls as and when they arise.

Generally the courts strive to ensure that the parties and children maintain a similar life style to the one they enjoyed prior to divorce. In her counter-claim, defendant claimed that she be provided with a good second-hand Toyota Corolla. She did not amend her papers to claim the Chrysler. I was not persuaded that she is entitled to the Chrysler. The children are at boarding school and will only be with the defendant for half of each school holiday. The plaintiff expressed his willingness to provide the defendant with a Toyota Corolla or another equivalent.

In respect of the immovable properties I will start with the flat. The plaintiff's evidence was that he contributed to a housing scheme called "Pay for Your Own Housing Scheme". In terms of the contract he was to be provided with a stand, a house or a flat. The Ministry of Housing and Social Amenities acknowledged its obligation and allowed him to

retain occupation of the flat which he leased when he was employed in the Public Service. It is this flat he said he offered defendant for her occupation and she declined. No documentation was tendered to confirm the status of the property. On the evidence available the flat does not belong to the parties and cannot constitute matrimonial property. At most plaintiff is holding the flat as a lien.

In his pleadings the plaintiff made no reference to the matrimonial home. In other words, he made no claim as regards how it should be awarded. On the other hand the defendant counter-claimed for an order that she be allowed to reside in the matrimonial home until the youngest child attains the age of eighteen years or becomes self-supporting. Thereafter the property should be sold and the net proceeds shared equally.

The starting point to note is that the Highlands property belongs to the plaintiff since it is registered in his name. However, in accordance with s 7 of the Matrimonial Causes Act [*Cap 5:13*] it is necessary to consider the parties' respective direct and indirect contributions. Section 7 (1) of the Act provides 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 assets be transferred from one spouse to the other;
- (b) .....

On the other hand s 7 (4) provides that-

“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 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 other domestic duties;
- (f) the duration of the marriage;

and in so doing the court shall endeavor 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 case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) is a well established authority on the application of s 7 of the Matrimonial Causes Act in matrimonial disputes. McNALLY J.A had this to say at page 106-

“The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term “his”, “hers” and “theirs”. Then it will concentrate on the third lot marked “theirs”. It will apportion this lot using the criteria set out in s 7 (3) of the Act. Then it will allocate to the husband the items marked “his”, plus the appropriate share of the items marked “theirs”. And the same to the wife. That is the first stage. Next it will look at the overall result, again applying the criteria set out in s 7 (3) and consider whether the objective has been achieved, namely, “as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses.....in the position they would have been in had a normal marriage relationship continued.....”.

Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually “his” or “hers”.

The plaintiff did not give details of the source of funds for the acquisition of the Highlands property save to state that he was solely responsible for servicing the mortgage bond. What is not in dispute is that when the parties acquired the Marlborough property the plaintiff secured a guarantee from defendant’s employers. This would constitute an indirect contribution towards the purchase of the property by the defendant. It is immaterial that the plaintiff could have secured the funds for the deposit elsewhere. The undeniable fact is that they used defendant’s benefit from her employer to qualify for the mortgage bond. Defendant’s share in the circumstances amounts to fifty percent.

When the Marlborough property was sold the mortgage balance stood at \$536 913.00. The house was sold for \$1 650 000.00. The plaintiff did not explain what happened to the balance of the proceeds of the sale of the house after clearing the mortgage. I can only note that the balance would have been substantial. With the plaintiff not explaining the source of funds for the deposit in respect of the Highlands property, the probability is high that it came from the remainder of the proceeds from the sale of the Marlborough property. The defendant’s share in the Highlands property by virtue of the earlier indirect contribution to the Marlborough house would still remain at fifty percent.

Although no specific details were given it was not disputed that plaintiff is in a better financial position than defendant. Taking into account the standard of living enjoyed by the parties it cannot be overlooked that the children are entitled to a decent home which is not

significantly different from the Highlands house. I have already pointed out that the plaintiff did not testify on how he wants the matrimonial home shared. Neither did he make any claim in the pleadings. He has already moved out.

Taking into account the needs of the children and in the exercise of my discretion I am satisfied that the defendant is entitled to stay in the matrimonial home until the youngest child attains the age of eighteen years or becomes self-supporting, whichever occurs sooner. By virtue of such an award her share of the immovable property will be diminished and in my discretion I will reduce it by twenty percent. This is because defendant is going to enjoy the use of the property for the next thirteen years. I will also take into account that plaintiff has a right to some unascertained immovable property against the Ministry of Housing and Social Amenities. Since the children are going to live in the house during part of their school holidays it is only fair that the parties share the rates and maintenance costs for the house equally as claimed by the defendant in her counter-claim.

In the result it is ordered as follows-

1. That a decree of divorce be and is hereby granted.
2. That custody of the minor children namely, Fanuel Puwayi Chiutsi (born 12<sup>th</sup> December 1995), Takudzwa Candace Chiutsi (born 8<sup>th</sup> August 1997), Tabonga Lindsay Chiutsi (born 10<sup>th</sup> July 2000), Tristan Hunter Ngaakudzwe Chiutsi (born 29<sup>th</sup> January 2002) and Hayley Chiutsi (born 19<sup>th</sup> January 2006) be awarded to the defendant with plaintiff having access upon reasonable notice to defendant.
3. That plaintiff provides maintenance in the sum of \$150 per month in addition to the provision of groceries, school fees and clothing for the minor children.
4. That the minor children shall continue to be under defendant's medical aid cover with plaintiff paying for any consultation fees, shortfalls and prescriptions.
5. Each party shall keep as their sole property the movable effects in their respective possession.
6. That plaintiff shall purchase a serviceable Toyota Corolla motor vehicle with a report from Automobile Association of Zimbabwe and have it registered in defendant's name within sixty days of this order.
7. The defendant is granted the right of use of house number 41 Ridgeway North, Highlands until the youngest child attains the age of eighteen years or becomes self-supporting, whichever occurs earlier.

8. That upon the youngest child attaining the age of eighteen years or becoming self-supporting plaintiff shall pay defendant thirty percent of the value of the house described in para 7 above.
9. In the event of the plaintiff failing to pay defendant her share as ordered in para 7 above, the house shall be sold to best advantage within two months with plaintiff and defendant sharing the proceeds in the ratio of seventy percent and thirty percent respectively.
10. That each party shall bear its own costs.