

MARTIN SIMBAI MAZORODZE  
versus  
SLYVIA MAZORODZE

HIGH COURT OF ZIMBABWE  
MAWADZE J  
HARARE, 13 May and 24 October 2011

FAMILY LAW COURT

Trial Cause

*T Nyamasoka*, for the plaintiff  
Defendant in person

MAWADZE J: The plaintiff and defendant are husband and wife. They married each other in Harare on 23 August 1997 in terms of the Marriage Act [*Cap 5:11*]. The marriage was blessed with three children, Tatenda (male born on 20 September 1997); Tapiwa (female born on 8 February 2001) and Takudzwa (female born on 10 August 2003).

On 31 March 2010 the plaintiff issued summons out of the court seeking a decree of divorce on the basis of irretrievable breakdown, an order for custody of the three minor children, an order of sharing matrimonial property and costs of suit.

On 26 April 2010 the defendant filed a counterclaim seeking a decree of divorce, an order for custody of the three minor children, maintenance for the three minor children, an order of sharing matrimonial property as per para(s) 3 and 4 of his counter claim and that each party bears its own costs.

At the pre-trial conference the parties agreed that the marriage had broken down irretrievably, that custody of the three minor children should be awarded to the defendant, the nature of access rights to be enjoyed by the plaintiff and the sharing of all movable property except a motor vehicle.

The following issues were referred for determination at the trial:

- a) What would constitute a just and equitable distribution of the property between the parties;
- b) What would constitute a just and equitable maintenance contribution to be paid by the plaintiff for the three minor children; and

- c) Whether the motor vehicle Peugeot 405 registration number AAG 0939 constitute matrimonial property and if so how it should be shared by the parties.

During the trial the following exhibits were produced:

- Exh 1 - the marriage certificate
- Exh 2 - Registration book for the motor vehicle Peugeot 405 Registration number AAG 0939 in Fredrick Mazorodze's name who is the plaintiff's father. Registration in Zimbabwe was in 2005
- Exh 3 - Deed of transfer of the immovable property in the name of the plaintiff being the matrimonial home known as stand number 8182 Cold Comfort Tynwald, Harare dated 30 November 2005.
- Exh 4 - Zimra cash receipt in Fredrick Mazorodze's name showing payment for duty clearance for the motor vehicle exh 3 for Zimbabwean \$72 957-00 dated 26 August 2005.

During the trial the plaintiff gave evidence and called his father Fredrick Mazorodze as his witness. The defendant gave evidence and called her elder brother Alois Chigonga to testify as her witness.

In terms of s 5 of the Matrimonial Causes Act [*Cap 5:13*] a court may grant a decree of divorce if it is satisfied that a marriage has irretrievably broken down. The parties in *casu* are agreeable that the marriage has irretrievably broken down and that a decree of divorce be granted. As was held in the case of *Ncube v Ncube* 1993 (1) ZLR 39 where parties are consenting to divorce it may be not necessary to hear evidence in order to ascribe fault for the breakdown of the marriage. Despite the meeting of minds between the parties on the issue of the irretrievable breakdown of their marriage I shall briefly outline the reason thereof as this will have some effect on the decisions this court will make in respect of the dispute involving the immovable property.

The plaintiff's good intentions and desire to seek better employment opportunities in the diaspora had the undesired effect of wrecking the parties' marriage. The defendant's brother Alois Chigonga had left for the UK in 2002 and he in turn invited the plaintiff to join him which the plaintiff did in 2003 leaving the defendant and the three children here in Zimbabwe. The plaintiff remained in the United Kingdom for about seven and half years and only returned to Zimbabwe on 20 August 2010. Meanwhile the defendant who had remained

in Zimbabwe was impregnated by another man and gave birth to a child on 10 March 2010. This is the basis for the marital problems between the parties. According to the plaintiff the reason he seeks a decree of divorce is that the defendant had an extra marital affair out of which a child was born while the plaintiff was in UK from 2003 to 2010. In fact the defendant had to abandon the matrimonial home briefly in 2009 although she alleges she was chased away by the plaintiff's relatives. The defendant admits to having committed adultery although she blames this on the plaintiff's long absence and lack of constant communication. Be that as it may it is clear that there are no prospects of a normal marital relationship being restored. A decree of divorce should therefore be granted.

I now turn to the issues referred to trial.

### **Whether the motor vehicle constitutes matrimonial property**

It is common cause that the motor vehicle in question a Peugeot 405 Registration number AAG 0939 ("the vehicle") was purchased by the plaintiff in the U K and shipped to Zimbabwe via South Africa. All the documentation pertaining to the motor vehicle was in the name of the plaintiff's father Fredrick Mazorodze who paid the duty at Beitbridge exh 4 and registered the motor vehicle in his name exh 2.

According to the plaintiff while he was in U K his father was helping him in the construction of the matrimonial house as he had some experience in that regard. The plaintiff said he would send money in British pounds to his father who would in turn change the money into Zimbabwean dollars and purchase all the building materials and paying the builders. The plaintiff said as a show of gratitude to his father he decided to buy him the vehicle in issue. The vehicle was therefore a gift to his father hence it was sent to him and registered in his name. The plaintiff said at no time did he intend the vehicle to be a "family car" as alleged by the defendant. The plaintiff's position therefore is that the vehicle is not matrimonial property.

Under cross examination the plaintiff said he bought the vehicle for his father as a gift and it would also enable his father to run around in assisting the construction of the matrimonial house. The plaintiff said he intended to buy a vehicle for use by his family later but this never materialised. He disputed assertions by the defendant that he had agreed to buy a vehicle for use by the defendant and children to go to work and school respectively. According to the plaintiff his main objective at this time was to finish the construction of the matrimonial house. The plaintiff said he was not aware that the defendant took the motor

vehicle forcefully from his father but understood that his father voluntarily gave the defendant the vehicle to use, albeit temporarily.

Fredrick Mazorodze told the court that while the plaintiff was in U K, the plaintiff telephoned him and advised him that the plaintiff had bought a vehicle for Fredrick Mazorodze's use and would send the vehicle to Zimbabwe. He collected the motor vehicle at Beitbridge and all relevant papers were in his name. He paid Zimbabwean \$72 000-00 as duty exh 4 and registered the motor vehicle in his name as it was his ex 2. Fredrick Mazorodze said he owned two other vehicles, a 626 Mazda and a Hardbody both with power steering which the Peugeot 405 did not have. He said most of the time he would use his other two vehicles and kept the vehicle in issue parked at his work place. He said this is the reason why he decided to allow the defendant to use the vehicle to go to her work place and ferry the children to school. He dismissed as untrue that the defendant forcefully took the vehicle from him and retorted that if he had not wanted to assist the defendant he would have simply refused to give her the vehicle. In fact he wondered what the defendant meant by forcefully taking the motor vehicle and the defendant could not explain what that entails in specific terms. Fredrick Mazorodze said he could not keep the vehicle parked at his work place most of the time when the defendant, his daughter in law wanted to use it.

In my view both the plaintiff and his father Fredrick Mazorodze gave their evidence very well in respect of the motor vehicle. They corroborated each other in all the material respects. The documentary evidence exh 2 and exh 4 is consistent with their evidence. I did not find any cause to doubt their evidence.

On the other hand all the defendant could say is that the vehicle in issue is matrimonial property which should be ordered to be sold and the parties sharing equally the proceeds thereof. The defendant said the plaintiff promised her while in U K that he would buy a vehicle for use by the defendant and children and that the motor vehicle in issue was bought for that purpose. Under cross examination the defendant surprisingly said when Fredrick Mazorodze collected the vehicle in Beitbridge and registered it in his name she never took issue with the plaintiff or Fredrick Mazorodze. If her story is to be believed why would she not raise such a pertinent issue. In fact the defendant conceded under cross examination that she only raised the issue of the vehicle at the pre-trial stage and not before which would be consistent with the allegation that it was an after-thought and the defendant was simply being vindictive.

The evidence of the defendant's brother Alois Chigonga in my view did not push the defendant's case any further as regard the vehicle in issue. Alois Chigonga in my view rightly conceded that he would not be in a position to dispute that the plaintiff bought the vehicle for the plaintiff's father and not the defendant. He said when he returned to Zimbabwe he helped the defendant to gain experience in driving after which the defendant was able to use the vehicle in issue which the defendant used for about two years but returned it to Fredrick Mazorodze when it broke down.

I am therefore satisfied that the evidence before me shows, on a balance of probability that the vehicle was bought by the plaintiff as a gift to his father Fredrick Mazorodze and that it is not part of the matrimonial estate. The vehicle in issue therefore falls out of ambit of s 7 of the Matrimonial Causes Act [*Cap 5:13*].

### **Maintenance for the three children**

As already explained the parties agreed that the custody of the three minor children be awarded to the defendant with the plaintiff exercising reasonable access which was specified by the parties. The defendant as the custodian parent claimed US\$100-00 per month per child as contributory maintenance. The plaintiff on the other hand offered to pay the full school account for the children, medical expenses and clothes. The plaintiff suggested that the defendant should cater for the day to day needs of the children.

There is no dispute that the three minor children need to be maintained by both parties and that the non-custodian parent has to pay contributory maintenance. The means of the parties should be weighed against the needs of the children. It is common cause that both the plaintiff and the defendant are currently unemployed. When the plaintiff returned from UK in August 2010 he did not manage to secure any formal job in Zimbabwe. He moved out of the matrimonial house and is staying with his parents. According to the plaintiff he survives on piece jobs and is assisted financially by his father. The plaintiff said he cannot withstand to share the same house with the defendant's illegitimate child. The plaintiff said he had been paying school fees for Tatenda who is at boarding school.

The defendant on the other hand is a trained school teacher but told the court that in 2009 she took an indefinite sick leave and was dismissed from the public service and can only be readmitted after two years which is in 2012. Her only income is the US\$180-00 per month paid by tenants who stay at the matrimonial house.

During the course of the trial the plaintiff shifted his position and acceded to the defendant's claims in respect of the maintenance of the children. This would entail that the plaintiff would pay US\$100-00 per month per child as contributory maintenance for the children and pay the full school account for the children including medical bills. The defendant would in turn cater for the other day to day needs of the children. The only request by the plaintiff, which request I find reasonable is that the payment of the US\$300-00 per month should only be effective from such time that the children are no longer staying in the matrimonial house. The reason for this is clearer when one considers how this court will deal with the matrimonial property.

### **The Immovable Property Stand No. 8182 Cold Comfort Tynwald Harare**

Section 7 (1) of the Matrimonial Causes Act [*Cap 5:13*] deals with the division, apportionment or distribution of the assets of the spouses upon dissolution of the marriage. The relevant factors the court should take into account are provided in s 7 (4)(a) to (g) of the Matrimonial Causes Act [*Cap 5:13*]. See also *Shenje v Shenje* 2001 (2) ZLR 160 (H) and *Ncube v Ncube* 1993 (1) ZLR 39 (S) which cases give useful insight on how these factors should be assessed. I shall proceed to adopt this approach in dealing with the immovable property in issue.

It is not in dispute that the immovable property in issue is matrimonial property and was acquired during the subsistence of the marriage. There were in my view minor disputes as regards whether the defendant contributed some cash towards the purchase of stand 8182 Cold Comfort Tynwald or the plaintiff paid the full amount. It is common cause that the plaintiff took a bank loan to purchase stand number 8182 Cold Comfort Tynwald and that the defendant purchased door frames and window frames for the cottage at the premises. Both parties are in agreement that when the plaintiff left for U K in 2003 only the cottage had been built. It is therefore not in issue that it is the plaintiff who contributed financially to the construction of the matrimonial house in issue using the money he got while in U K. The plaintiff would send money to his father and the defendant who would buy building materials and pay the builders. The defendant played her role assisting in the supervision of the construction of the matrimonial house and would cook for the builders. Further the defendant indirectly made contributions by remaining in Zimbabwe looking after the couple's three children.

The only narrow issue between the parties is the percentage share of this matrimonial house each party should get. The plaintiff suggests a 60% to 40% ratio in his favour whereas the defendant suggests a 50% to 50% ratio. I am inclined to accept the plaintiff's position simply on account that it is the defendant's conduct which contributed to the demise of this marriage. All things equal I would have accepted the plaintiff's position. I am of the firm view that this is a proper case where the court should pay due regard to the adulterous conduct of the defendant and grant an award in line with the plaintiff's offer. I see no cause why I should award the defendant a share which is less than what the plaintiff offered.

After making the above findings I shall proceed to deal with the major disagreement between the parties. The plaintiff's position is that the immovable property should be sold immediately and proceeds shared as per the said ratio. On the other hand the defendant's view is that the disposal of the immovable property be delayed or postponed to allow her to exercise a usufruct over the property until the youngest child attains the age of 18 years.

The defendant's position is informed by her concern for the welfare of the three children in her custody (including the illegitimate child). I am however of the view that the maintenance order granted would cater for the needs of the children in respect of their accommodation. This is a proper case where the parties should simply have a "clean break" to ensure the parties will not remain tied together for many years in view of the reason for the breakdown of the marriage.

Accordingly it is ordered as follows:

1. A decree of divorce is hereby granted.
2. Custody of the three (3) minor children Tatenda Mazorodze (born on 20 September 1997); Tapiwa Mazorodze (born on 8 February 2001) and Takudzwa Mazorodze (born on 10 August 2003) is hereby awarded to the defendant.
3. The plaintiff is awarded reasonable access to the minor children, in particular the plaintiff will take the children on Saturday and Sundays at 10 00 hours and return them at 17 00 hours.
  - 3.1 The access shall be exercised in consultation with the defendant.
  - 3.2 The plaintiff in addition to above may take the children on special family occasions as may be agreed from time to time between the parties.

4. The plaintiff shall pay US\$100-00 per month per child as contributory maintenance for the three minor children until each minor child attains the age of 18 years or self-supporting whichever occurs first.

4.1 The maintenance order in the form of the payment of the cash of US\$300-00 per month for the three minor children shall be with effect from the month the minor children would have ceased to reside at number 8182 Cold Comfort Tynwald, Harare on account of clause 6 and 6.5. of this order.

4.2 The plaintiff shall pay each of the three children's entire school account until they attain the age of 18 years or become self-supporting.

4.3 The plaintiff shall pay half of each of the three children's medical bills until each child attains the age of 18 years or self-supporting whichever occurs

5. The plaintiff is awarded the following movable property listed hereunder as his sole and exclusive property:

- Bed
- Sofa
- 1 x Television
- Radio
- 1 x DVD player
- Decoder

5.1. The defendant is awarded the following movable property listed hereunder as her sole and exclusive property:

- 2 x Room dividers
- Kitchen Unit
- Fridge
- 4 plate stove
- Cot bed
- Tender bed
- Display
- 2 plate stove
- 2 x chest drawer
- Bookshelf
- Shoe rack

- 1 x Television
- 1 DVD player

6. The matrimonial immovable property known as stand number 8182 Tynwald Township, Harare measuring 400 square metres registered in the plaintiff's name shall be sold and the net proceeds thereof shared on a ratio of 60% for the plaintiff and 40% for the defendant.

6.1 The immovable property shall be valued by a registered estate agent nominated by the parties within 30 days of this order.

6.2 In the event that the parties fail to agree on the estate agent as set out in 6.1 of the order the Registrar shall appoint an estate agent from his list of valuers to conduct an evaluation of the property upon request by either party.

6.3 The estate agent shall submit the report to the parties within fourteen days of his appointment.

6.4 The cost of the valuation shall be shared equally between the parties.

6.5 The immovable property shall be sold at the best advantage at most within 60 days of the valuation and the net proceeds shall be shared in terms of para 6 of this order (60% ratio for plaintiff and 40% for defendant).

7. There shall be no order as to costs.

*Atherstone & Cook*, plaintiff's legal practitioners