

PRISCILLA MACHIRIDZA (Nee Maposa)  
versus  
SAUL MACHIRIDZA

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 31 May 2016, 1 &  
2, 7, and 16 June 2016 and 9 November 2016

### **Civil Trial**

*T Chapwanya*, for the plaintiff  
*T Sengwayo*, for the defendant

MUNANGATI-MANONGWA J: The plaintiff and defendant are husband and wife, their marriage having been solemnized in terms of the Marriages Act [*Chapter 5:11*] on 2 June 2010 at Harare. The marriage still subsists. Prior to 2010, the parties had been living as husband and wife since 1999 when they had entered into an unregistered customary law union. The parties were not blessed with any children.

On 12 December 2014 the plaintiff instituted divorce proceedings seeking a decree of divorce and ancillary relief on the grounds that the marriage had irretrievably broken down to such an extent that there were no prospects of restoration of a normal marriage relationship. She cited the following reasons for the breakdown of the marriage:

- a) that the defendant committed adultery and continued to commit adultery with another woman which adultery plaintiff refused to condone
- b) that defendant deserted the matrimonial home on 14 November 2014 to cohabit with a paramour at a house in Westgate

- c) that the defendant treated plaintiff with cruelty which is inconsistent with a normal marriage relationship.
- d) that plaintiff no longer has any love and affection for the defendant.

The defendant conceded that the marriage has irretrievably broken down. Before the commencement of trial, the defendant abandoned his claim for spousal maintenance. The parties had agreed on the distribution of the movable assets at the pre-trial conference stage. The following facts are common cause. The matrimonial estate consists of an immovable property stand number 234 Rydale Ridge, Harare, which is registered in the name of the plaintiff, the wife. The parties also used to own two other stands namely Stands 3843 Mabvazuva and stand 1008 Rydale Ridge which they disposed off before the divorce proceedings commenced, although the parties are disagreed as to how the proceeds thereof were utilized. It is common cause that the husband permanently left the matrimonial home in 2014. I say permanently, as there was a period that he left home temporarily which aspect I will deal with later on. With the defendant abandoning his claim for spousal maintenance the sole issue that remained for determination at trial from those agreed to at the pre-trial conference was:

“Whether or not Stand 234 Rydale Ridge is matrimonial property and if so, how it should be shared between the parties.”

The Plaintiff a Regional country director gave evidence that in 2007 she bought a vacant stand, being Stand 234 Rydale Ridge, Harare from proceeds solely acquired by herself through a loan from her former employer the Zimbabwe Community Health Intervention Research (hereinafter referred to as “ZICHIRE”) and from her bank ZB Bank. The loan from her employer was initially meant to finance in vitro fertilization procedure in South Africa to enable the parties to have children, however the funds ended up being utilized to buy the said stand. An agreement of sale Exhibit 2 was duly produced which shows that the stand was procured in 2007 by the plaintiff with the defendant standing as a witness. The defendant did not make any contribution to the purchase price.

Plaintiff indicated in her evidence that since 1999 her husband, the defendant had been out of employment. In 2002 she utilised funds that she had saved whilst studying in South Africa under a presidential scholarship to start a Company with the name Waxmall Enterprises in which both parties and plaintiff’s sister are directors. The purpose of this company was to provide the defendant her husband with a source of income.

At the time construction started on stand 234 Rydale Ridge, the defendant did not assist her as the family company Waxmall Enterprise he was managing was not doing well. Plaintiff stated that she started constructing the house using her earnings comprised of her salary and field trip allowances in addition to loans obtained from her employer and banks. The bank statements Exhibit 3 confirmed the loans obtained as shown below:

US\$4000-00 obtained on 22 November 2011

US\$7000-00 obtained on 14 May 2012 from Stanbic repaid at the rate of US\$584-00 per month

US\$7500-00 obtained on 15 March 2013 from Stanbic repaid at the rate of US\$680-00 per month

US\$7200-00 obtained on 22 May 2014 from Stanbic repaid at the rate of US\$653-00 per month.

As plaintiff was giving evidence Mr. Sengwayo for the defendant made a concession *mero motu* that the defendant was not disputing that the plaintiff got the aforesaid loans from the bank. The defendant's evidence was going to centre on the fact that defendant assisted or contributed to the repayment of the loans.

The plaintiff told the court that these specific amounts and her earnings (which from exhibit 3 rose from over US\$1700-00 per month in 2009 to over \$2900-00 in 2015) coupled with loans from her employer which appear *ex facie* the statements, financed the building of the house. Plaintiff further maintained that she saw to the repayments alone as evidenced by the monthly standing orders debiting her account in favour of Stanbic bank. She denied that she ever got a reimbursement from the defendant. She reiterated that, defendant could not have helped pay the loans in any case as he was not aware of all the loans taken, he only knew of one, only getting to know of the rest when the bundle of documents pertaining to that information was given to his lawyers.

The plaintiff stated that at the time of construction the parties were residing in rented accommodation. When the house was at window level, in 2012, defendant deserted the matrimonial home. Plaintiff continued to develop the property on her own and even changed the plan to suit her needs. She produced a bundle of documents consisting of receipts for purchase of materials and labour costs for the construction of the durawall, electrical fittings, fitted kitchen

and wardrobes, plumbing, roofing materials (tiles timber ceiling) cement, window frames and various materials that went into the construction of the house. The bundle duly produced by consent is marked exh 4 C-M. Plaintiff gave evidence that she paid for all these hence the receipts and invoices are in her name.

It was plaintiff's evidence that after the defendant had deserted her she decided to go and temporarily reside with her sister and the sister's husband in Norton in order to cut on rentals she was paying for her accommodation and concentrate on roofing her house. From December 2012 to May 2013 she was thus staying in Norton and she elicited the services of her brother in law Mr. Kenneth Muchemei who would help her when buying materials, assisted in negotiating prices and would do the running around. She denied that the husband assisted at all after the window level, having left to stay with his girlfriend. Even prior desertion, she maintained that the assistance defendant had rendered was to go and purchase bricks on behalf of plaintiff as she was the one sourcing the funds. For this contribution she offered to pay the defendant 5% of the total value of the property. The plaintiff provided the court with a valuation report which showed the open market value of the property as \$68000-00.

On movable property, the plaintiff gave evidence that they bought a Nissan Sunny in 2005 and a Toyota Camry in 2007. These vehicles were sold on the pretext that the defendant wanted to capitalize his business so no proceeds went into building the property in issue. Plaintiff further told the court that in June and December 2010 an Audi and a Toyota Hilux were imported by the parties. She actually paid for the cars with the defendant's role being just to take delivery of the vehicles from Durban. Evidence for the financing of the vehicle was provided by way of withdrawals reflected on the plaintiff's bank statements for the amounts of US\$4500-00 and US\$4100-00 on the 3<sup>rd</sup> June and 28 December 2010 respectively. The Audi she has now given to the defendant to enable him to continue with his business and the Toyota Hilux was sold and the parties shared the proceeds.

The plaintiff was cross examined at length but maintained her evidence that the defendant has never been gainfully employed since 2000 and that he never meaningfully contributed to the family even regarding rent. Defendant used to abuse rentals, plaintiff ended up doing the payments herself. As for the construction of the house, his indirect contribution was minimal and restricted to assisting in procuring materials up to window level. No monetary contribution was

made by defendant and plaintiff repaid the loans taken to finance the building without assistance or any reimbursement from defendant. She denied that the stands that the parties owned prior being Stand 3843 Mabvazuva and 1008 Rydale Ridge were sold to finance the building of the stand, rather she alleged that the money was put into defendant's business which was struggling.

The plaintiff's witness Kenneth Muchemeyi, a husband to plaintiff's sister gave evidence of how the plaintiff having been left alone by defendant in a rented accommodation had to move in with him and his family in Norton in 2012. This was to enable the plaintiff to channel resources towards construction of the property. He started assisting plaintiff by being sent to buy materials and collecting same. He gave evidence that when plaintiff moved into the property the defendant was not there. He was never paid for his services and defendant never gave him money for materials neither had he asked for his help. He told the court that at the time there was no normal relationship between the parties as they were not staying as husband and wife although defendant did sporadic visits. He was a good witness who corroborated the Plaintiff's case in all material respects *vis* the period that he got involved in the parties life.

The defendant gave evidence that he married the plaintiff in 1997 when she was a teacher and he was working for William Bain Farm Equipment and he left employment in 1999. He then got employed by Nissan Clover Leaf in 2000 and left the company in 2002 to form a company Waxmall Enterprise in which he had a major shareholding 70% he claimed, with the plaintiff and her sister being shareholders. The shareholding structure was verbally agreed to and there was no document to that effect. He alleges that he used his terminal benefits from these two companies to start Waxmall Enterprises claiming that he got \$9000 from the Old Mutual Pension Fund. No evidence of receipt of such money was ever produced. He stated that the plaintiff then went to Fort Hare for further studies and he was taking care of her and since as a teacher she was earning peanuts he had to sustain her. Regarding the status of the only immovable asset in issue, the defendant's evidence was to the effect that the parties had decided to have the Rydale stand in the name of the Plaintiff simply because they had bought a Nissan Sunny which was registered in his name, and Plaintiff felt that she also wanted an asset registered in her name since the other immovable properties being stands were registered in both the parties name. It is for this reason that he had signed the agreement of sale of the property as a witness rather than a purchaser.

It was the defendant's evidence that Waxmall Enterprise made a lot of money as it sold computers, laptops and computer consumables. A subsidiary company called Centurion Gates was then born which specialized in gates automation and business was good for this company in 2008. It was the defendant's evidence that both stands 1008 Rydale Ridge and 3843 Mabvazuva were bought by money generated from Waxmall Enterprise. He disputed that plaintiff had paid 75% of the purchase price for stand 3843. He informed the court that Stand 234 Rydale Ridge was bought from funds generated by Waxmall Enterprises. As per his evidence building started in 2008 after the parties sold Stand 3843 for ZW\$1, 2 Trillion dollars. In that regard ex 8 (b) the agreement of sale thereof was produced. He informed the court that from the proceeds he went to buy bricks, cement and sand and this completed the building of the slab. The other stand was then sold as per his evidence and the construction of walls was done up to roof level after defendant bought 7 (seven) truckloads of bricks. As in summary to bolster this evidence the defendant stated as follows:

"I built my house up to roof level from Waxmall and Centurion Gates and sold my cars, a Nissan Sunny sold in 2011 for US\$2000-00 a Toyota Camry sold in 2010 and a stand sold in 2008 and a Toyota Surf sold in 2012 for US\$7000-00."

It was defendant's further evidence that as parties were building their home he would instruct his wife to take loans from her bank. In 2010 she took a loan for \$4 000-00 which he as a dealer injected into the business "spinned" it to raise extra money to go and buy building materials".

Defendant alleged that he was buying tissue paper from South Africa and washing soap which items he supplied to Total Zimbabwe. His business Centurion Gates was making profit of about US\$3000 but required capital which defendant would get from his wife the plaintiff.

The defendant admitted that the plaintiff had in 2012 gone to stay in Norton with her sister's family and gave evidence that this was an agreement between the two of them wherein they gave up their rented accommodation to save money for building purposes. He says they had moved into a single room and their movable property had been taken to Norton and plaintiff followed her chattels. Defendant added that the parties had differences in 2011 and they had been resolved such that the separation in 2012 was not really a separation as the parties were in his words "literary living together as they would meet every day and discuss building progress at Rydale Ridge" and he would give plaintiff money. It was defendant's evidence that the

engagement of Plaintiff's brother-in-law to assist in procurement of building materials and getting quotations was a family decision. The parties would give him between US\$150 and US\$200-00 in appreciation of his services on a monthly basis. Defendant stated that the parties moved back into the Rydale Ridge property in January 2013 and the house was then a shell with no doors, no windows, had a rough floor, no ceiling, no electricity and there was no plumbing nor a septic tank.

The defendant informed the court that plaintiff took 3(three) loans the first in 2012 for \$5000-00 which amount he got, injected into the business, got profit and injected the funds into finishing the house. He did the same with the funds arising from a loan taken by the plaintiff from her bank for US\$7000-00 in 2013. As for the last loan of \$7000-00 the parties went to South Africa to buy fittings and furniture. He admitted that the loans taken by plaintiff were repaid through direct debit of her bank account but he alleged that he assisted in the repayment as he would always give half the instalment to the plaintiff. Defendant admitted that he had no receipts in his name for any of the building materials and gave the excuse that plaintiff had taken the receipts for bricks, gravel etc. to Norton and destroyed them. Neither did it mean that receipts in the plaintiff's name meant that he had not contributed but it was all because even when the parties went to purchase materials she was the one who would pay especially for finishings as she preferred a certain colour. During cross examination the defendant indicated that after leaving the matrimonial home in 2014 he had visited the home in 2016 and noted that certain improvements had been made by plaintiff and same included the new gate, lights on the front of the durawall and that the front durawall was plastered and paving had been done and there were 3 inbuilt wardrobes. He conceded that he did not contribute to these improvements. The defendant claimed that he built the house to roof level between 2007 to 2009 and thus claims to have contributed to the tune of 75% of all building materials and also that he is entitled to 75% of the value of the house however despite that, he wants the property to be shared on a 50:50 basis. The defendant stated that he indirectly contributed to the assets by way of fueling the parties' two cars, payment of rentals, buying the wife clothes, putting food on the table, gardening, taking care of the plaintiff financially and providing conjugal rights. This indirect contribution should be taken into account. Whilst he challenged the value of the house set as

\$68000-00 he did not indicate what he believes the property to be worth. The defendant did not call any witnesses.

Considering this whole evidence I find that the property in issue No. 234 Rydale Ridge is matrimonial property; it was acquired and developed during the course of the marriage and constitutes the estate of the parties. The issue of the extent of the contributions of the parties is a different one and turns on the evidence led.

The evidence placed before the court by the plaintiff clearly indicates that she was the major contributor towards the purchase of the stand in issue. She chronicled how she rose from being a teacher to a country director of a reputable non-governmental organization through empowering herself through education. Her stint with non-governmental organizations started in 2003 and that is when her earnings started to improve. Evidence of her finances as of 2008 which are up to May 2016 were placed before the court and her salary continued to raise as clearly indicated by her bank statements exh 3. The said exhibit shows the bank loans and the loans from plaintiff's employer and the bank dating back to 2010. As conceded by the defendant she is the one who had access to loans. I find the evidence of the plaintiff that she financed the acquisition of the stand and largely the developments thereof to be credible. She had the resources through earnings and loans to do so and indeed receipts were produced that reflected purchase of the bulk of the building materials and indeed the finishings. I also find her evidence that the defendant was with her up to the time the house was at window level and left her to stay with another woman to be credible. This is further buttressed by the fact that even when the defendant was away (when he purportedly moved out in 2014) the plaintiff continued to develop the property.

The defendant's claim that he financed the purchase of the stand through his company Waxmall Enterprises, and that he largely contributed to the development thereof up to the tune of 75% is not supported by evidence.

One cannot but query how the defendant wants the court to believe that he largely contributed towards the acquisition and development of the property, when he is the very person again who gave evidence that his company had to rely on the loans from the plaintiff for capitalization. Whilst saying his company did not have capital, he sought to give the impression

that it was doing very well. The defendant's evidence was not impressive as it had apparent holes which became even more glaring during cross examination. Although he claimed to have been making money through his companies Waxmall Enterprises and Centurion Gates not a single document was produced to buttress that fact. Rather the defendant indicated that from 2008 the company had no bank account, so much for an entity which is supposed to be lucrative. Although the companies he had dealt with in procuring bricks being S & M were still in existence he did not find it necessary to visit them to get copies of receipts. Neither did he find it necessary to call any witnesses as he believed that his evidence is enough. Whilst he denied that he deserted the plaintiff in 2012 resulting in plaintiff having to go to Norton to stay with her sister's family the court was not convinced by his explanation. The claim that the parties were living together and sharing an apartment when he had said that plaintiff was reluctant to stay in a single room and followed her goods to Norton did not make any sense. Defendant's evidence (which was challenged by the plaintiff) that he contributed by paying half of the loans through reimbursing the plaintiff equally did not find favour with the court. There is no aorta of evidence placed before the court as to how and from where the payments emanated. If anything the defendant depended on the plaintiff for the financing of his Company and also he had no bank account, hence this piece of evidence remains a bold assertion without any substantiation.

Section 7 of the Matrimonial Causes Act [*Chapter 5:13*] governs the apportionment and distribution of assets of the spouses at the dissolution of marriage. This section endows wide discretionary powers on the court in apportioning shares to the spouses. In so doing the court is enjoined to consider various factors enumerated in s 7 (4) (a) - (g) of the Act. These include the income earning capacity of each spouse, assets or financial resources each spouse will have in future, financial needs or obligations, the standard of living of the family, the physical and mental condition of each spouse, direct or indirect contribution made by each party to the family including caring for the family and domestic duties and the duration of the marriage. The list is not exhaustive and the court can have regard to the parties conduct as it endeavours to place the spouses in the position they would have been had a normal marriage relationship continued. All these considerations are meant to assist the court in arriving at a fair and just apportionment.

Both parties placed a lot of emphasis on their contributions. Certainly this is only one of the factors that the court is enjoined to look at in exercising its discretion. The parties have no

children and therefore the factors to be considered centre on the two. They are both in their prime time of life; no evidence was led of any spouse having a mental or physical condition that may impair them from working for sustenance. The plaintiff remains employed as a country director for her organization and defendant did not give any evidence as to the demise of his company therefore it is presumed he continues thereat. In any case the defendant withdrew his claim for maintenance. Neither of the parties gave evidence of financial obligations they have at present or in future which called upon the consideration of the court. It is common cause that the parties had marital problems in 2011 which they resolved but these reared up in 2012. Accepting the evidence of the Plaintiff, the parties had an on - off relationship from 2012 when the Plaintiff had to reside in Norton. In 2013 the problems continued with defendant staying at the matrimonial home on an irregular basis whilst involved with another woman until he moved out permanently in 2014. Given that background it is difficult to determine the standard of living of the parties as there was hardly a closely knit family, consideration being made to the evidence. The court also makes a finding that the defendant deserted the matrimonial home to go and stay with another woman; this is based on the evidence of plaintiff which the court found credible. For his part defendant says he left in 2014, whichever way, the defendant has moved on.

I am alive to the sentiments of GILLESPIE J in *Shenje v Shenje* 2001 (2) ZLR 160 at 163 H – 164 A where he indicated how the court should assess the factors listed in s 7 (4) of the Matrimonial Causes Act [*Chapter 5:13*]:

“The factors listed in this subsection deserve fresh comment. One might form the impression from decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of the seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps, it is time to recognise that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties’ needs are met rather than that their contributions are recouped.”

However *in casu*, the circumstances of the parties and the evidence at hand is such that this is one case where the issue of contribution plays a major role. This is especially so when one considers the evaluation in the foregoing paragraphs pertaining to their financial positions, needs and obligations, ages and physical condition in the absence of any children born of the marriage. It is common cause that parties had acquired assets before and same were disposed of. The plaintiff asserts that the properties were sold to fund the defendant’s business, whilst defendant disputes same; the court accepts the position as espoused by plaintiff. This is because

the defendant by his own admission required money from the plaintiff to capitalize his business which he would spin to get profits. Most pertinent, the plaintiff and her sister are directors such that even if it were to be held that the company was making money it would not be for the defendant alone. Accepting that the defendant left the plaintiff when the property in issue was at window level, and that she had to complete the house on her own without financial or any other support from the defendant, it cannot be just and equitable to award the defendant a half share. The house is registered in the name of the plaintiff and the explanation by the defendant as to why it is so was not satisfactory at all. That a car was registered in his name would not have been reason to register the stand in plaintiff's name. If anything, the agreement is in plaintiff's name because she bought the stand.

This case is distinguishable from the case of *Shupikai Vito v Engeline Zachariah Vito* HH 73/2008 where KUDYA J at p 5 in considering distribution of the immovable property of parties to a divorce which asset was registered in both their names noted that

“In both the company and the asset she registered him as an equal partner. It was always in her contemplation that they be equal partners in the company and in the matrimonial asset. Had the marriage continued, he would have remained an equal partner.”

Conversely by having the asset registered in her name the plaintiff may have intended the asset to be solely hers however because she was in a marriage, a special institution whose termination is subject to certain consideration the property is considered distributable as between the parties. This explains why s 7 (1) (a) gives the court the discretionary power to order the transfer of any asset from one spouse to the other in granting a decree of divorce, judicial separation or nullity of marriage. See *Takafuma v Takafuma* 1994 (2) ZLR 103 (S).

The plaintiff conceded that although defendant did not make financial contributions to the construction of the house he was there for her up till the house was at window level although he contributed very little. The parties entered in to an unregistered customary law union in 1999 solemnizing their marriage 11 years later in 2010. The years 2011 up till 2014 were characterized by disagreements and desertion. However after committing to the marriage for more than a decade with whatever contribution he rendered the defendant is entitled to go away with some fruit of his labours. I will take note that the defendant went away with the Audi which was in fact purchased by the funds from the plaintiff and the parties shared the proceeds of the Toyota Hilux

despite the fact that it was purchased by funds from the plaintiff. The court did not accept that he paid rent or supported the plaintiff to the extent he wants to portray. If anything the defendant relied more on the plaintiff. His employment history shows short stints of formal employment and there is nothing before the court to show for his company Waxmall Enterprises or Centurion Gates. His predicament is compounded by his absence during the crucial building stages of the house. He left when it was at window level to pursue the desires of his heart. To then seek to benefit fully from the plaintiff's labours would be improper and unjust. Spouses must note that when they get into a marriage each party has to play their role. Each contributing in their own way for the building of their estate and the nurturing of the family. For one to sit back whilst the other advances themselves with the endeavor of realizing a better lifestyle for the family in the hope that whatever is acquired will be shared equally will turn out to be an empty dream. *In casu* the plaintiff rose from being a mere teacher with a diploma to acquire a degree in Developmental studies and a Masters degree ending up with a high paying job. As a result, she became a major contributor to acquisitions of family assets. For nearly two years the defendant who has moved on with his life and is residing with another woman has not been residing at the property. I find that the plaintiff requires the property more than the defendant in that she had made it her home and modelled the same to her specific requirements. This therefore will reflect in the order.

In the circumstances, a share of 15% of the value of the property awarded to the defendant will meet the justice of the case.

Accordingly it is hereby ordered that

1. A decree of divorce be and is hereby granted.
2. Each party be and is hereby declared the sole and exclusive owner of the moveable property awarded in terms of the pre-trial conference minute dated 24 June 2015.
3. Plaintiff is awarded 85% share of the value of Stand 234 Rydale Ridge, Harare.
4. Defendant is hereby awarded 15% share of the value of Stand 234 Rydale Ridge, Harare.
5. The parties shall by consent appoint an evaluator to value the property within 14 days of the granting of this order.

6. In the event that the parties fail to agree on such appointment within the period stated in 5 above, the Registrar shall with no delay appoint an evaluator from his list of evaluators.
7. The evaluator appointed either in terms of clause 5 or 6 above shall evaluate and submit his report to the parties and the Registrar within 14 days from the date of his appointment.
8. The plaintiff shall pay 85% of the costs of the evaluation and the defendant shall pay 15% thereof.
9. The plaintiff shall pay the defendant 15% of the value of the property within 120 days of the date of valuation of the property.
10. In the event that the plaintiff fails to effect such payment within the period referred to in clause 9 the property is to be sold to best advantage and the proceeds thereof are to be shared equally between the parties in the ratio 85% to the plaintiff and 15% to the defendant.
11. Each party shall bear its own costs.

*Murambasvina, Tizirai-Chapwanya, plaintiff's legal practitioners*  
*Trust Law Chambers, defendant's legal practitioners*