

GERTRUDE TENDESAYI TAWENGWA (NEE MBOFANA)
versus
CHARLES ZVIDZAYI TAWENGWA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 11 July 2017

Opposed Matter

Ms *S Mangwengwende*, for the applicant
Mr *Chinyama*, for the respondent

MUNANGATI-MANONGWA J: The applicant herein has applied for maintenance *pendente lite* and contribution towards her costs for divorce in terms of Rule 274 of the High Court Rules, 1971. The parties herein are husband and wife. The parties' marriage of 36 years has hit turbulent times. This is happening when all the four children born of the marriage are adults. The parties still live under the same roof albeit living separate lives. The applicant has instituted divorce proceedings in this court and that action has led to yet another misunderstanding further distancing the parties. Due to the divorce proceedings, so the applicant alleges, the respondent has decided not to adequately maintain the applicant leading the applicant to approach this court seeking relief.

The facts of the matter are as follows. The applicant a 58 year old unemployed housewife claims maintenance *pendente lite* from respondent in the sum of US\$1500.00 per month and contribution towards her costs for divorce proceedings currently pending before this court. She indicates that when she issued divorce summons in 2016 the defendant her husband completely refused to support her financially. She has had to rely on her adult children for financial support due to the abrogation of duty by the respondent. The respondent has opposed the application on the basis that the application for maintenance has been overtaken by events as he is now paying

US\$300.00 towards applicant's maintenance. As for the contribution of costs for the divorce proceedings the respondent in his opposing affidavit submits that, applicant can make savings from the US\$300.00 maintenance currently being received. Further, respondent pleads inability to pay such an amount claiming his business enterprises went down in 2005 and he relies on his allowances as a Senator in the sum of US\$1207.00 per month and, he attached a copy of his pay slip as proof.

In essence the respondent is in agreement that the applicant requires maintenance but says he is already providing. It is his argument that the US\$300.00 is sufficient more so when he pays for electricity, rates, water and buys groceries.

Thus, what has to be determined is the quantum of the maintenance and whether what is already being paid is sufficient. The court notes that the respondent only started paying the US\$300.00 after the applicant had lodged this application and only a day before he filed his opposition papers. The timing is such that the court cannot be hoodwinked to believe that the respondent was meeting his duty to maintain his spouse.

In cases as this it lies within the court's discretion to determine the need for such maintenance and the quantum thereof. To be able to exercise that discretion properly, it is necessary for the parties to the application to be open and candid with the court as regards their expenses, income and other resource avenues open to them. In essence utmost good faith is required. This principle was clearly enunciated in the case of *Lindsay v Lindsay*.¹ In my view it is when the court is in the clear as regards each party's circumstances that it can then proceed to determine the quantum of maintenance which is fair and just in the circumstances. Where a party fails to place before the court all material facts pertaining to its position that party has itself to blame, as the court will make a determination on what has been placed before it and make the necessary inferences where necessary.

In determining the quantum of maintenance the sentiments of KORSAH JA in the case of *Lindsay v Lindsay* cited above are instructive. The learned Judge of Appeal stated as follows:

“The principle is well settled that, in the determination of the amount fixed as alimony payable *pendente lite*, regard must be had to what would be adequate as maintenance for a wife of a man in the husband's position, considering his ability to pay and all other circumstances. What, then, is the financial position of the appellant?”

¹ 1993 (1) ZLR 195 (S)

In that regard it is the ability of the respondent to pay the amount claimed as weighed against the applicant's needs which is crucial. The wife's needs also have to be looked at against the parties' lifestyle.

The respondent paints a picture that he has no means and applicant needs no more than the US\$300.00 he is already paying. The pay slip attached by respondent as an annexure shows a net salary of US\$2 113.00 although respondent refers to his income as US\$1207.00. This shows an underestimation of over US\$900.00 which I find to be deliberate. The respondent has three immovable properties registered in his personal names being Lot 1 of Lot 213 of Greendale measuring 4065 square metres, Lot 1 of Lot 8 of Philadelphia Township of subdivision B of Gnomewood of Philadelphia measuring 8094 square metres held under Deed of Transfer 7108/90 and Stand 8137 Kuwadzana Township held under Deed No 8283/87. The respondent further has shareholding in other five immovable properties owned by several companies where he has an interest which are:

- i) Stand 8645 Highfield Township held by Chata Enterprises (Pvt) Ltd DT 4731/98
- ii) Stand 4186 Glenview Township held by Chata Enterprises (Pvt) Ltd DT 1982/99
- iii) Stand 4806 Highfield Township held by George Tawengwa Hotels (Pvt) Ltd DT 3135/85
- iv) Stand 4756 Glen View held by Chata Enterprises DT 1065/96
- v) Lot 22 of Longlands, Marondera held under DT 3135/85 held by Tamu Enterprises.

He also has 50% shareholding in the following companies: Chaleston Investments (Pvt) Ltd, Tabro Holdings (Pvt) Ltd and Tamu Manufacturers (Pvt) Ltd and 50% interest in assets at Sandra Farm in Marondera.

Faced with this evidence the respondent stated in his opposing affidavit that:

“my whole business went down around 2005 and has not been operational ever since and that the farm referred to is a family farm which members of the family inherited from our deceased father George Tawengwa and the cattle therein do not belong to me.

The companies referred to are all defunct and have never operated since 2005 and respondent is not the only director in those companies. He has no controlling stake in them.”

Respondent does not challenge the shareholding, he may not have a controlling stake in some of the companies but he has an interest which cannot be ignored. The court cannot accept a bald denial or statement that the companies are defunct in the absence of any financial statements

of any sort or reports from the companies' accountants. In any case, some of the companies own immovable property as demonstrated above.

The applicant himself owns several immovable properties in his own right, that constitutes remarkable wealth considering that two of the properties are in affluent suburbs of Greendale and Philadelphia, the latter measuring 8094 square metres.

Applicant's evidence that she has been unemployed since 2005 and was being maintained by the respondent up until April 2016 when she instituted divorce, points towards the ability of respondent to see to all of applicant's needs having done so for 11 years without complaint. As applicant retorts, she knows the extent of respondent's wealth and it is proper that until the divorce matter is finalized she has to be maintained at the level she was being maintained prior to the institution of divorce. The respondent has the means given the extent of his assets. He has not been candid with the court as regards his financial status and the US\$300.00 he is paying is far less than what the applicant is entitled to given her needs.

However, the court cannot lose sight of the fact that the respondent purchases groceries and pays utility bills which is not disputed by the applicant. In considering what is just and fair in the circumstances those items have to be removed from the applicant's list of expenses. Applicant has claimed US\$200-00 per month as the costs for her education. It has not been denied by the respondent that she is studying nor the amount challenged in the opposing affidavit. I will allow that item for it is important for applicant to pursue her education in order to be able to also look after herself even prepare to engage in self-help projects. To expect that at the age of 58, applicant would seek and find formal employment is wishful thinking given the state of the economy.

I find the cost of entertainment which is indicated as \$160.00 to be on the high side in the absence of more information, hence I reduce it to US\$100-00.

Accordingly I award the applicant the amount of US\$1 000.00 per month as maintenance pending finalisation of litigation.

Regarding the issue of contribution towards costs, the law on this matter has been stated by Hahlo The South African Law of Husband and Wife 4 ed at p 520 as follows:

"The rule whereby a wife may obtain from her husband a contribution towards her costs also applies where the spouses are married out of community of property. In this case the

husband's obligation is based purely and simply on his duty of support, and the onus is on the wife to show that she does not have the necessary means, while her husband is able to make the contribution. Where the husband is a rich man, the wife is not obliged to realize her possessions in order to finance her action and is entitled to litigate upon a scale commensurate with the means of the husband.”

To succeed in such a claim applicant must establish the following:²

- i. That there is a subsisting marriage.
- ii. The suit in question is a matrimonial one.
- iii. The applicant has reasonable prospects
- iv. The applicant is not in a financial position to bring or to defend the action as the case maybe and
- v. That the other spouse is able to provide applicant with this contribution.

It is common cause that the parties’ marriage still subsists and there is a divorce action pending in case number HC 3452/16. In the divorce proceedings the applicant seeks the distribution of matrimonial assets of considerable value. The marriage has been in existence for more than 36 years and given the provisions of section 7 of the Matrimonial Causes Act [Chapter 5:13], and indeed s 26 of the Constitution of Zimbabwe that provides for equality in marriage and at its dissolution, the applicant will certainly be awarded a fair share of assets. Therefore she has reasonable prospects of success in the divorce matter. It is also her right to be able to assert her rights in defence of what she claims she is entitled to. It is common cause that applicant is not employed and has been surviving of respondent since 2005 hence she has no means.

As for the ability of the other spouse to provide such finance for litigation, the findings on his ability to pay maintenance equally apply herein with the same force. Respondent has considerable assets by way of immovable assets, and he earns US\$2 000 as allowances from the position of Senator. As respondent has not been candid with the court regarding his other companies apart from a bald assertion that they are defunct with no financial evidence to back the averment, the court will take it that the companies are operational. Regard being made to the applicant’s vast interests that have to be protected or defended during the divorce proceedings

² See Dube v Dube HB 78/06 at p5 cyclostyled judgment.

wherein she is claiming three (3) immovable properties and 50% shareholding in about four (4) companies and 2 (two) motor vehicles, legal costs levied by her legal practitioner are certainly going to be considerable. She has also indicated that negotiations have been protracted by the respondent's attitude which is uncooperative. The respondent has not even denied allegations of walking out of meetings or failing to turn up at the meetings. This in essence increases costs. I therefore find that all the requirements as aforementioned entitling the applicant to the relief she seeks have been satisfied.

A claim of US\$8 000.00 is in my view reasonable given the nature of the claims in the divorce proceedings and that her legal representative is fairly senior. That being so, her claim is justified, and having managed to satisfy the requirements for contribution towards costs she is entitled to the relief sought. Given that the applicant has made a case that she is unable to fund her divorce proceedings and her only income at the moment is US\$300-00 which respondent is paying as maintenance, I find it proper to grant costs in her favour on a client-attorney scale as prayed for in the order. This is premised on the fact that she has to pay her legal practitioners on that scale yet she has no means.

Accordingly the following order is made.

1. The respondent shall pay maintenance *pendente lite* to the applicant in the sum of US\$1 000 per month starting from the date of this order to the date of finalization of the divorce matter HC 3452/16.
2. The respondent to contribute the sum of US\$8 000.00 towards the applicants' legal costs in the divorce matter pending in this court.
3. The respondent to pay costs of suit on an attorney-client scale.

Phillips Law, applicant's legal practitioners
Chinyama & Partners, respondent's legal practitioners

