

TAFADZWA MAHACHI
versus
SANDRA MAHACHI (NEE MAKAHAMADZE)

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 19 September 2016 and 11 February 2017 and 23 February 2017

Trial

T. Zhuwarara, for the plaintiff
Ms M. Chigwaza, for the defendant

MUNANGATI-MANONGWA J: The parties in this matter, are a fairly young couple who have decided to end their marriage which was solemnized in terms of the Marriage Act [*Chapter 5:11*] in August 2006. It is agreed between the parties that the marriage has irretrievably broken down and it is time for each to go their separate ways. There are two minor children born of the marriage. Both parties agree that the defendant, the mother should have custody. Parties have reached agreement on movables. The rest of the matters pertaining to sharing of immovable property, maintenance for the children and for the defendant and access rights remain contentious. The parties have left it to the court to resolve these issues.

The plaintiff a bank Executive who is Head of Finance instituted these divorce proceedings seeking dissolution of the marriage, and ancillary relief. The following is common cause: That during the subsistence of the marriage the parties acquired by purchase two immovable properties all registered in the plaintiff's name being:

- (a) No 21 Rosedene Gardens Ashdown Park, Harare also known as undivided 2.76% share being share number 21 in Lot 4 of Lot 1 of Lot 12 of Tynwald (which they bought as a shell house and completed up)
- (b) Number 18 Westminster Avenue Sentosa Harare also known as stand 3022 Mabelreign Township 15 of Lot 3 of Sentosa Mabelreign.

The plaintiff further inherited 50% share of Number 14 Glynde Avenue Mabelreign also known as stand 1491 Mabelreign Township from his father. It is a fact that in 2014 the plaintiff then bought his brother's share in the property and now owns the whole property. He

collects rentals of US\$500 per month from this property. The plaintiff left the matrimonial home in August 2014 and the defendant remains in the house in Sentosa. There is a maintenance court order wherein the plaintiff is paying maintenance for the two minor children at US\$700-00 per month. He pays school fees for the school going minor child. The order also granted US\$100, 00 as spousal maintenance to defendant. The plaintiff is up to date with maintenance payment.

It is also not in contention that the parties minor children are of poor health. Both suffer from allergies and have special needs in terms of diet and toiletries and require a controlled environment. Further it is not in contention that the defendant has challenges with her health, having had miscarriages (although the plaintiff disputes the number of instances), and problems with fibroids and had problematic pregnancies. Defendant is due for an operation. The defendant is not in formal employment although she has a dormant gown making business.

Plaintiff's case

The plaintiff seeks to retain the Sentosa property on the basis that there was no contribution by the defendant. He states that the property is encumbered and with the defendant not willing to share the obligation she cannot have a share thereto. Evidence led by plaintiff and his witness coupled with produced statements confirmed that the property still has an outstanding amount of US\$200 000, 00. The plaintiff stated that he pays \$2500, 00 per month towards the mortgage bond. As the house is large, it may not be ideal to continue in occupation and may seek to negotiate with his employer to sell it with the bank taking its proceeds. He did not expect the bank to auction the property as what happens with foreclosures. He offered to allow the defendant to stay in the house for 4 (four) months before she can move to Rosedene Gardens, the parties' other property.

The plaintiff wants to retain title to the Rosedene Gardens property although he is willing to give defendant a life usufruct until she remarries or dies whereafter title goes to the two children. In the absence of the two children the property goes into his estate. As for the Mabelreign property, the plaintiff gave evidence that since he grew up in that house, and inherited 50% of the shares ultimately acquiring full title through purchase of his brother's shares, it has sentimental value to him. The property, it has been argued on his behalf, is excluded from distribution by virtue of s 7 (b) and (c) of the Matrimonial Causes Act. In that regard the defendant cannot get 50% share and in any case she did not contribute thereto.

Regarding maintenance of the minor children, the plaintiff maintained that the US\$350.00 per child per month as per the order of the maintenance court should prevail. As per the joint pre-trial-conference minute the plaintiff shall attend to payment of school fees for the minor children, pay for the medical aid and shortfalls thereto. It was argued on his behalf that the maintenance order by the maintenance court is final as it was never termed interim nor appealed against nor did the plaintiff seek its review. In spite of the maintenance order granting spousal maintenance, the plaintiff is adamant that the defendant does not deserve maintenance as he over the years contributed \$10 000,00 to the defendant's business and she is capable of looking after herself.

In his declaration the plaintiff sought access to the two minor children every alternate weekend, half of each school holiday and when there are special functions on his family side with prior notification to defendant. The defendant objects to such an arrangement especially regarding the youngest child Soleil Jane Tanzwikwa on the pretext that her health is such that the plaintiff cannot cope. She contends that tests on the child's allergic reactions are not complete yet and they are still figuring out everything. The offer to have the plaintiff spend two weeks with the older child during holidays was accepted. The plaintiff insists on not separating the children.

Under cross examination evidence came out that the plaintiff earns other benefits which were not on the payslip like school fees allowances which when calculated are about \$6 800,00. Further in 2015 he got a gross incentive of US\$100 000-00, resulting in a net of US\$50 000-00. In 2014 a gross amount of US\$80 000-00 and a net of US\$40 000-00. In 2013 a gross of between US\$60 000-00 to US\$80 000-00. According to his evidence the incentive bonus for 2016 would appear on the March 2016 payslip.

Defendant's case

The defendant filed an amended plea which was admitted by consent. Therein she claimed maintenance in the sum of US\$1000-00 per month per child. She further claimed US\$150-00 per month for the maid, US\$150-00 per month for the gardener and that the plaintiff pays school fees and medical aid subscriptions for the children.

She also sought US\$250-00 per month for her medication and payment of her medical aid. The defendant wants 50% of all the three properties that the parties own. Hastening to add that in her plea she made it clear that she is aware that 50% of number 14 Glynde Avenue Mabelreign was inherited and it is only the 50% of the share that the parties then bought that she seeks to access.

On the issue of access, the defendant in her plea and evidence maintained that the older child Evita Anashe born on 5 June 2006 could spend more time with the father whilst the youngest child Soleil Jane should not sleep over until she is a little older. The only issue therefore became one of access to Soleil Jane the 3 (three) year old.

On the maintenance of the children the plaintiff insisted in her evidence that she required the \$1 000-00 per month per child to cater for servicing of the motor vehicle, fuel, purchase of groceries, attending to the children's special needs from the special diet to the special soaps and lotions that they use due to the allergies they have. Electricity, dstv, wifi, the gardener and the maid also require to be paid for.

She admitted that the older child is a weekly boarder but she has to take the child to the bus, pick her up, and attend to weekend events. The youngest child is taken to school every day and picked up.

The defendant maintained that she requires the \$250-00 per month for her sustenance. She requires medication. From the time she got pregnant with the first child whom she lost she has had a series of health problems up to date. She has a problem of fibroids, and always had problematic pregnancies each time being hypertensive. She also has chronic sinusitis. Of the six (6) pregnancies she carried, only 2 babies survived and the other were miscarriages with one death. She has had operations, evacuations and is due for another major operation. Due to this poor state of health she requires to remain on medical aid and she states that she would constantly require medication.

Further it is defendant's argument that she is not yet in a state to sustain herself as the business of gown making had gone down due to her ill-health and attendance to the welfare of the children. She requires 2 years of support to get the business running. Often she was advised to rest by the doctors and lately when she tried sewing, she suffered from fabric dust and had to have an operation in March 2015. At that juncture she could not see or drive. To buttress her medical history she indicated that the plaintiff's medical aid had paid for all the operations and miscarriages.

In claiming 50% of the Sentosa house, the plaintiff states that she is unable to share the burden of the mortgage as she is unemployed. She however contributed by looking after the home and children. Soon after delivery of the last child the plaintiff left for Swaziland and she had to adjust to a new house and look after 2 (two) children without any assistance. At one time the plaintiff was away from August 2013 to March 2014 on work commitments. It is her contribution in kind that she seeks considered.

The defendant's claim of 50% of the Rosedene Gardens property is based on direct and indirect contribution. She gave evidence that the property was purchased through mortgage finance from her husband's employers. It was a shell house with no doors, ceiling no plumbing and electricity. She helped to make the place habitable, supervised workers, would go and buy tiles, paint and other requirements up and above looking after their sickly daughter. The maid was employed part-time. She also bought the parties' first sofas, first stove, toaster, kettle, bedding and other gadgets. She contested the plaintiff's assertion that she did not contribute anything in the marriage.

Whilst admitting that the plaintiff inherited 50% of No. 14 Glynde Ave Mabelreign, the defendant indicated that when the parties were staying at the house she sewed curtains, took care of the plaintiff's mother, took her to the doctors, cooked and bathed her. The plaintiff's mother suffered from dementia and congestive heart failure and had a heart pacer. She did these duties in conjunction with the plaintiff's sister. There are tenants at the property and she would attend to meetings with tenants, signing of lease agreements and collect rentals. Although the plaintiff later purchased the other 50% from his brother, the money belonged to the family. She seems not averse to the plaintiff getting the property due to its sentimental value but wants her contribution recognised.

The defendant accepted the offer for the Rosedene Gardens property but flatly refused to have conditions imposed as proposed by the defendant, she wants freehold rights. It was her concern that the plumbing is not fully functional, there is no security due to previous burglary reports in the complex. There are no burglar bars and there are issues with water. She indicated that if she were to move, she would require a minimum of 4 (four) months to remain in Sentosa.

The Law

Section 7 of the Matrimonial Causes Act [*Chapter 5:13*] sets out considerations meant to assist the court in arriving at a fair and just apportionment and distribution of assets of the spouses at the dissolution of marriage. This section endows the court with wide discretionary powers 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 and child will likely have in the foreseeable future, financial needs, 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.

The provisions of s 7 are in my view in sync with what s 26 of the Constitution of Zimbabwe Amendment (No 20) Act 2013 envisages. Sections 26 (c) and (d) place an obligation upon the State to ensure that there is equality of rights and obligations in marriage and that upon death or divorce provision is made for the necessary protection of any children and spouses. This is especially so when one considers that s 7 provides that the financial needs, obligations and responsibilities of each spouse and child in the foreseeable future be considered including the manner in which a child was or is likely to be educated. This is meant to safeguard the children's interests and indeed those of a spouse. It is thus imperative to infuse these standards when interpreting the considerations set by s 7 of the Act. As TSANGA J rightly put it in *Katsamba v Katsamba*¹

“The approach to division of property on divorce in the Matrimonial Causes Act is essentially evaluative. The considerations to be taken into account are both adult and child centred.”

It is common cause that s 7 of the Act provides for consideration of both direct and indirect contribution by the spouses. This was aptly expressed by GUVAVA J (as she then was) in *Mutongwizo v Mutongwizo*² when she stated that:

“there can be no doubt that all contributions are important in a marriage whether they be material or otherwise. Some contributions are not even tangible as they relate to the moral support given to a husband as he goes about his work and ensuring that he comes home to a comfortable and happy home. Although such contributions cannot be quantified in any monetary terms there are no doubt important in the building of a happy home”.

Analysis

The parties have been in marriage for 10 years from the date they wedded which is a considerable period. The plaintiff has in his evidence clearly displayed an attitude that the defendant has not contributed anything meaningful to the marriage to the extent that apart from the movables that the parties agreed to share he was not willing to give her a share of any of the three immovable properties that are in his name. Despite having the benefit of counsel who is expected to advise a client on the provisions of the law, the plaintiff

¹ HH77/14 at p5

²² HC2342/06

maintained a stance which given the provisions of s 7 of the Act are untenable more so when one considers the envisaged equality in marriage propagated by the Constitution.

It is not in dispute that the plaintiff inherited 50% share in Mabelreign property from his father and he then bought out his brother by acquiring the brother's 50% share when the brother ran into monetary problems and faced legal action. The plaintiff indicates that this property has sentimental value to him and should be excluded from the sharing regime. Reliance is placed on s 7 (3) of the Act which states that:

“(3) The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage—
(a) by way of an inheritance; or
(b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
(c) in any manner and which have particular sentimental value to the spouse concerned.”

The plaintiff's acquisition is indeed covered and protected by the law. The plaintiff grew up in this house which belonged to his parents, that in itself is dear and sentimental to him as he alleges. He inherited half of the property although he bought the other half through a loan of US\$22000-00 provided by his employer. It is common cause that he is still servicing the loan. It is important that he retains this property for the stated reasons. It is not disputed that the defendant resided in that house, took care of plaintiff's mother, participated in managing the tenants' agreement and collection of rentals and did the curtains. The defendant's contribution can be recognised elsewhere in the asset distribution but not by getting a share of this property which the legislature expressly excludes from being distributed whether acquired before or during marriage.

As for the Rosedene Gardens property the plaintiff has insisted that he wants the defendant to only enjoy a usufruct and in the event of her remarrying or dying the property should revert to the children. In essence the plaintiff does not want the defendant to have any real rights to the property. Of note is the fact that apart from contributing to the final construction of this property by supervising builders and going to purchase materials albeit using money from plaintiff and making the shell house into a home. The defendant also bought furniture items to furnish that home. This contribution was apart from the role of raising the parties' family. It is common cause that the parties had their first child in the Tynwald home and the child had health challenges which challenges she together with the youngest child still face. The defendant is an equal partner in marriage as provided by the

Constitution, as such has personal rights to share the assets accumulated by joint efforts in the marriage as opposed to rights derived from being the custodian of the children.

It is time that the different but equal roles played by parties in a marriage be given the necessary recognition especially in light of the provisions of the operative constitution. That the plaintiff bought the property through assistance from his employer is no bar to sharing of assets as when parties acquire assets they are for the purpose and enjoyment of family. If it were not so, then s 7 would not be clothing the courts with the powers of taking from one spouse and handing to the other depending on the results of the evaluative process so provided therein. Due to the divorce the defendant is moving out of the Sentosa house, she is losing on future pension from the husband and being unemployed and of ill health, it is in the interests of justice that she gets the Rosedene Gardens property in her own right.

It is the most equitable thing to do due regard being made to the circumstances of the defendant and indeed provisions of s 7 (1) (a) which allows transfer of an asset from one spouse to the other. In awarding the property to the defendant the court takes note of the evidence by defendant that the plumbing is not functioning properly which though disputed by plaintiff the court finds no ground to doubt the defendant. Further the issue of security was also raised arising from allegations of burglary. The order to be given will thus take note of the need to attend to these issues since the defendant as the custodian parent will be residing in that house with the children and it is imperative that the conditions there be conducive and safe for the children as well.

The Sentosa property is the most valuable asset the parties have and has been the matrimonial home. From the evidence of the parties it is a four bedroom upmarket property, large, spacious with a swimming pool. The defendant had wanted 50% of the value thereof as her share. It is common cause that the property is encumbered and the balance outstanding is US\$200 000-00. The defendant not being formally employed has indicated that she is unable to contribute to the mortgage bond. The plaintiff is servicing the bond at the rate of \$2500-00 a month. The plaintiff indicated that he may not require the house as it is too big for him and he may have to approach the bank, his employers to relinquish same and if there is any outstanding amount he will have to pay up. Understandably the plaintiff cannot occupy the house given its extent. Given the extent of the debt it is my view that there is nothing to share as between the parties. It is unfortunate that none of the parties brought a valuation report for the court to have an insight on the current value of the property. As matters stand, the disposal of the house might mean the plaintiff remains with an obligation

The parties having agreed on custody the contentious issue that remained for resolution is access. The plaintiff's access to the older child was resolved through concessions during trial wherein the parties agreed that she could spend two weeks with the father. It is the younger child Soleil Jane Tanzwikwa (born 14 July 2013) who has been the centre of dispute *viz* access rights. It is common cause that this child like her sibling suffers from serious allergies. She has to eat food prepared by certain special oils, her diet involves soya based products, uses special soaps and creams. Shrubs and trees have had to be cut at the parties' home, and she has to survive in a controlled environment. The defendant's evidence which was not disputed is that the parties are still to figure out everything that she reacts to. The plaintiff argued that he is aware of the child's condition and the child is able to communicate hence he can manage the child. He also stated that if he has a longer access period to the older child only, this will breed jealousy between siblings.

Central to any issue pertaining to a child is their best interests. At the time of hearing the child was three (3) years old. As we speak she is still not yet four (4) years old. Her health and the conditions she has to survive under as enunciated by the parties is such that in my view it is not in the best interests of the child that she be in plaintiff's custody for a straight two weeks. The plaintiff did not present to court any arrangements that he will make for the monitoring of such a young child given her condition save to state that he will have a maid. He is formally employed and given the delicate medical history of the child especially where the parties are still figuring out what else she reacts to, it is not in her best interests that she spends such a long time away from the mother who from evidence has been caring for her full time as she is a live- at- home mother. Being alive to the fact that it is important to maintain a child-parent relationship, this can still be maintained by ordering reasonable access times given the circumstances of the child until she is much older. The defendant's stance in her plea that plaintiff has access to the child in issue in her presence is unreasonable. There is no evidence that the plaintiff is a danger to his child. To nurture the relationship between father and child, it is reasonable and in the best interests of this minor child that the father has access to this minor child on Saturdays and Sundays every alternate weekend during set times. When she is much older and more stable any court can then consider increasing the access times.

Reacting to the defendant's claim for maintenance for the children, Mr *Zhuwarara* for the plaintiff submitted that the court should simply confirm the order for maintenance given by the Maintenance Court as the defendant had neither appealed against it nor sought a

review. It is notable that after the granting of the Maintenance order the plaintiff amended his declaration and offered US\$350-00 per child in line with the Maintenance court order. He argued that the defendant put the same claim she presented to the maintenance court and a substantive order had been made, further she had presented less detail in the current matter. The defendant was accused of not contributing towards the maintenance of the children.

This court is certainly not bound by the maintenance court order in the absence of an agreement by the parties to retain the terms of that order. As defendant rightly explained in evidence, the maintenance order remained an interim order since the issue remained pending in the High Court. Further, defendant explained that in her claim in the Maintenance Court she had included school fees and claimed a higher figure which claim is different from what is before this court. The order itself, exh 6 refers to one school going child and it is clear that the younger child was left out. Evidence shows that the younger child attends some institution and is picked up and dropped at school. The older child is picked up from and dropped at the school bus venue and when there are school fixtures there are attendances. That she is in weekly boarding school does not disentitle her to maintenance. What this does is to reduce her entitlement.

In her claim for maintenance for the children, the defendant seeks payment for the gardener and maid, fuel, car maintenance, motor vehicle insurance, wifi, DSTV contributions, water and rates. It is common cause that the children are on a special diet, they between themselves use different soaps and lotions and on the current maintenance they have had to go without certain things. She had to forego cleaning of carpets and other things which assertion was not challenged. Mr *Zhuwarara* in his submissions indicated that the defendant's enumeration of expenses was not supported by any documentary evidence and the figures were thumb sucked. Apparently, the figures enumerated by the defendant pertaining to fuel wifi, motor vehicle insurance, DSTV, water and rates, gardener, maid and fuel were not challenged. The plaintiff did not deny that there is need for a gardener and a maid, the earnings of which did not require documentary evidence. Her claim for a maid was labelled abdication of her motherly role by Mr *Zhuwarara* for the plaintiff. That cannot be because even in marriage the parties have always had a maid and in any case that maid has to be supervised. It is the global amount of \$1000-00 per child which was challenged all be it not in greater detail apart from saying the other child was at boarding school. The defendant indicated how she has to wake up at night to attend to their sick children apart from taking

them to school and pick up points. That in itself constitutes great contribution to the welfare of the children.

It is common cause that the vehicle has to be serviced and fuel is required to move the children. The other outlined requirements are reasonable except that the claim of \$1000-00 per child would be excessive as it would not take note of the fact that the other child would be in boarding school. The plaintiff's other monthly claims being rates, gardener and maid, DSTV, Wi-Fi, electricity remain justified to maintain a comfortable home for the children who in essence are entitled to be brought up within the means of their parents.

In considering maintenance there has to be a balance between the needs of the children and the ability of the parent to afford that. Section 7 of the Matrimonial Causes Act, however, also gives the court the liberty of considering the position that each child would have been had the marriage relationship continued. It is clear from the evidence that the plaintiff is the financial backbone of the family. Exhibit 5(a) shows that plaintiff earns a good salary of US\$10000.00 gross (although other allowances like school fees are not reflected therein) apart from the incentives he has been getting for the past 3 years ranging from a gross of \$60 000-00 to \$100 000-00 per year as per his evidence. This is a considerable amount of money which is not ordinarily gotten. His financial muscle is evident in the fact that he is servicing a bond for the Sentosa property at \$2 500-00 per month and has taken up accommodation for a monthly rental of US\$850-00. He is also repaying a loan at the rate of US\$833-00 per month for the half share he purchased from his brother in the Mabelreign property. He is getting rentals from a cottage at the Mabelreign property in the sum of \$500-00 per month. Whilst he owns 100% of the Mabelreign property, he confirms he has put his sister in occupation. Thus when plaintiff moved out of the matrimonial home it was out of choice that he chose to rent accommodation elsewhere incurring \$850-00 in rentals which amount could have been saved. Nonetheless plaintiff will be moving into the matrimonial home when the defendant moves out which therefore means that the self-created obligation of rent will fall away. Further, whilst plaintiff sought to give the impression in his evidence that he personally pays all the fees for the child, it emerged later when the court sought clarity that his employer pays two thirds of the fees. He is up to date with his maintenance and has not pleaded that he is struggling.

The court is satisfied that the plaintiff is a man of means and capable of financially maintaining his children at a reasonable rate having balanced the considerations that go into a maintenance claim. In that regard the maintenance for Evita Anashe Mahachi the older child

is set at US\$400-00 per month and that of the younger child at US\$550-00. In addition the plaintiff shall pay for the gardener and maid at the rate of US\$100-00 per month per employee. He shall also pay for the rates in full, electricity to the tune of \$100-00, wifi amounting to \$50-00, pay for DSTV subscriptions. The plaintiff shall supply defendant with fuel to the value of \$100-00 per month, comprehensively insure the defendant's motor vehicle, pay for the registration licences thereof and attend to the servicing of the motor vehicle when it breaks down or attains the requisite mileage for service. The parties have already agreed on the plaintiff retaining the children on his medical aid and shouldering the educational requirements.

The defendant sought maintenance in the sum of US\$250-00 per month for the next three years. She is currently receiving \$100 per month as per the maintenance court order. From the evidence it is clear that the defendant has had health problems which continue to haunt her. She has had problematic pregnancies and had about five miscarriages one of which was caused by a freak accident when the parties had an altercation. The defendant shamelessly tried to deny this acknowledging one miscarriage yet the defendant detailed when and how she had the miscarriages and how on one occasion it is the plaintiff who took her to hospital. I find no reason for her to lie since these losses were traumatic to her. She had an operation in 2015 which aspect was not disputed and she has another pending operation which she is due to undergo. The defendant indicates that she has a passion for sewing and with the help of her mother and the plaintiff she had started a business and the income she got, she used it to supplement the family needs. However, the business had gone down due to her ill health and she is starting to build the business. She suffered a setback in 2015 when she was affected by fabric dust resulting in an operation aforementioned and could not see or drive for six months. It is not denied that the husband had in yesteryears put in about \$10 000-00 into her business and there are wedding gowns in stock which need upgrading. She indicated that given time she should be up and running. Her current income is between US\$45-00 and \$150-00 per month. She also wants to be maintained on the plaintiff's medical aid which was given as Liberty blue plus executive package which level she is currently at. The plaintiff, during cross examination, offered to cater for defendant's medical aid with a different service provider. He indicated that his employer was covering that up to the tune of US\$200 per month. The defendant was amenable to being put on an alternative medical aid scheme which is executive level as she still has pending procedures and requires medication.

It is my belief that the defendant has proved that indeed she is entitled to maintenance. For her, it is not mere say so, but clearly there is apparent need which is reasonably justified, see *Rabvukwa v Rabvukwa*.³ She is not an experienced seamstress, but driven by passion she is willing and prepared to eke a living given time. She indicated that in a period of two years she should be self-sustaining. It is indisputable that she is of ill health and she is also to be in charge of not very healthy children which will impede upon her ability to sustain herself in time. There is a pending operation which she has to undergo and it is unknown what time will be required for her to fully recover. Young though she might be, her health and that of her children affect her potential to look after herself. Submissions by her legal representative that the court grants her \$350-00 per month or a lump sum of US\$15000-00 is not supported by any pleading or evidence. The defendant claimed US\$250-00 per month and that is what the court has to consider.

Apart from arguing that the defendant is not entitled to maintenance for the reasons aforementioned, there was no challenge to the figure of \$250-00 and the defendant was never quizzed on the amount itself. I find that the amount is reasonable given the defendant's circumstances. The period of two years which the defendant requested for her to be able to sustain herself is in my view reasonable and justifiable as she has to attend to her health issues first and then get to sort out her business enterprise. I find the fact that defendant suggested a limited period for the maintenance shows a consciousness to the fact that maintenance is not a bread ticket for life.

In her amended plea and in her evidence the defendant sought that the plaintiff be made to pay for her legal costs on a client attorney scale. Mr *Zhuwarara* in his submissions indicated that the defendant could not seek costs in the manner she did given that such request was rejected and the plaintiff seeks costs from her. No evidence for rejection of such request was placed before the court and neither did plaintiff in his evidence persist in his claim for costs. The issue of costs remain in the court's discretion. It is common cause that the defendant is without means as she is currently receiving US\$100-00 per month from the plaintiff. Her quest to defend this matter cannot be said to have been without merit as the plaintiff was not offering her any share in the immovable properties acquired during the subsistence of the marriage. She was also partially successful. It is just given the defendant's

³ 2004(1) ZRL 530 (H)

circumstances that the plaintiff be ordered to pay part of her costs. Accordingly, the court will order the plaintiff to shoulder 50% of the defendant's legal costs on an attorney client scale.

In the result, the following order be and is hereby granted:

1. A decree of divorce be and is hereby granted.
2. The custody of the minor children Evita Anashe Mahachi (born 5th June 2006) and Soleil Jane Tanzwika Mahachi (born on the 14th July 2013) be and is hereby awarded to the defendant.
 - 2.1 The plaintiff shall have access to the minor child Evita Anashe Mahachi every alternate weekend and for half of the school holidays and whenever there is a special function on the plaintiff family side upon prior notification and arrangement with the defendant.
 - 2.2 Plaintiff shall enjoy access to the minor child Soleil Jane Tanzwika Mahachi every alternate weekend at the same time with Evita Anashe Mahachi. Soleil Jane Tanzwika Mahachi shall be picked not earlier than 9:00am on Saturdays and be returned to defendant by 4.00pm on Sundays.
3. Plaintiff shall pay maintenance for the minor child Soleil Jane Tanzwika Mahachi in the sum of US\$550-00 per month with effect from the 28th February 2017 until the minor child finishes tertiary education or becomes self-supporting whichever occurs earlier.
 - 3.1 Plaintiff shall pay maintenance for the minor child Evita Anashe Mahachi in the sum of U\$400-00 per month with effect from 28 February 2017 up till this minor child finishes tertiary education or becomes self-supporting.
 - 3.2 The plaintiff shall maintain both the minor children on his medical aid scheme and pay for any shortfalls thereto.
 - 3.3 The plaintiff shall pay all school fees and all school related expenses for the two minor children Soleil Jane Tanzwika Mahachi and Evita Anashe Mahachi until they finish tertiary education or become self-supporting whichever occurs earlier.
4. The plaintiff shall pay for the gardener and maid at the rate of \$100-00 per month per employee.
 - 4.1 The plaintiff shall pay for the rates in full for the Rosedene property, electricity to the amount of \$100-00, wifi amounting to \$50-00 and DSTV subscriptions.

- 4.2 The plaintiff shall supply defendant with fuel to the value of \$100-00 per month, comprehensively insure the defendant's motor vehicle, pay for registration licences thereof and attend to the servicing of the motor vehicle when it breaks down or attains the requisite mileage for service.
- 5 The plaintiff shall pay defendant the sum of US\$250-00 per month as maintenance for a period of 24 months with effect from the 28th February 2017.
 - 5.1 The plaintiff shall maintain the defendant on his medical aid for a period of 6 months with effect from 28 February 2017 whereafter he shall pay for an executive package with an alternate service provider of defendant's choice up to a maximum of \$200-00 per month for the next 18 months.
- 6 Plaintiff is awarded stand No 18 Westminster Avenue, Sentosa, Harare also known as stand 3022 Mabelreign Township 15 of Lot 3 of Sentosa Mabelreign as his sole and exclusive property. The defendant is granted leave to remain in occupation of this property up until the 31st August 2017.
- 7 The defendant is awarded the immovable property known as No. 21 Rosedene Gardens, Ashdown Park, Harare also known as undivided 2.76% share being share number 21 Lot 4 of Lot 1 of Lot 12 of Tynwald registered in the names of the plaintiff.
 - a. The plaintiff shall sign all necessary papers to effect transfer into the name of the defendant within 60 days of the granting of this order and shall pay for the transfer fees thereof.
 - b. Should the plaintiff fail to comply with terms of clause (a) above the Sheriff be and is hereby authorised to sign all necessary papers for effecting such transfer and the Registrar of Deeds shall accept the papers so signed and effect transfer.
 - c. The plaintiff shall at his expense attend to the plumbing of this property and effect all necessary repairs and install a security system thereto within 90 days of the granting of this order.
- 8 The plaintiff shall pay 50% of the defendant's costs on an attorney-client scale.

Mawere & Sibanda, plaintiff's legal practitioners
Mambosasa Legal Practitioners, defendant's legal practitioners