

CONFIDENCE MUZA (nee NYAKUDYA)  
versus  
TEERERAI MUZA

HIGH COURT OF ZIMBABWE  
**MAXWELL J**  
HARARE; 14 October 2024 and 28 January 2025

*Civil Trial*

*F. Murisi*, for the Plaintiff  
Defendant in person

MAXWELL J:

Summons, in this case, was issued on the 5<sup>th</sup> of September 2023. Plaintiff stated in the declaration that she married the Defendant on 22 May 2004 in terms of the then Marriage Act [*Chapter 5:11*] now Marriages Act [*Chapter 5:17*]. The marriage was blessed with four children, three of whom are still minors. The marriage relationship has irretrievably broken down to such an extent that there are no reasonable prospects of the restoration of a normal marriage relationship. She proposed that she be awarded custody of the minor children with Defendant having access. She also proposed that Defendant pays all the children's medical aid, school fees, other school related expenses and contributes \$500.00 per child per month until each child attains the age of eighteen (18) years or becomes self-supporting, whichever comes first. She also claimed spousal maintenance of \$1000.00 per month for two years from the date of granting of a decree of divorce. Plaintiff also stated that during the subsistence of the marriage the parties acquired both movable and immovable property. She proposed how the movable property should be distributed between them and that each party should be awarded 50% of the immovable property, and also that there be no order as to costs.

Defendant gave notice and entered his appearance to defend. In his plea he requested that the matter be referred to the Alternative Dispute Resolution Centre in Harare to be determined by a panel of three arbitrators. He disputed that the marriage relationship had broken down

irretrievably. He requested that the matter be postponed to enable the parties to attempt a reconciliation in accordance with the Matrimonial Causes Act [*Chapter 5:13*].

Defendant claimed custody of the minor children with Plaintiff having rights of access. He disputed that Plaintiff was entitled to spousal maintenance. He proposed that the immovable property be not distributed until all the minor children attain the age of eighteen (18) years. In the alternative, he proposed that the property be sold and the proceeds be used to acquire three apartments to be registered in a Family Trust for and on behalf of the children, and that any residue be shared equally between the parties.

In her replication, Plaintiff pointed out that the parties had undergone counselling and the relationship between the parties remained sour. She insisted on her claim and pointed out that the matter should not be referred to arbitration.

Pleadings were exchanged and a Pre-trial Conference was held. The following issues were referred to trial.

- a) Whether or not the marriage relationship between the Plaintiff and the Defendant had irretrievably broken down.
- b) Who should get custody of the parties' minor children in the event that a decree of divorce is granted?
- c) What will be an appropriate order of access to the parties' minor children by the parent without custody of the children?
- d) What will be an appropriate order of maintenance of the parties' minor children that achieves their best interests?
- e) Whether or not Plaintiff is entitled to spousal maintenance and the quantum thereof.
- f) What will be a fair and equitable distribution of the immovable assets being Stand Number 463, Off Portgen, Pomona, Borrowdale, Harare, both registered in the name of the Defendant?
- g) Whether or not the immovable property should only be sold when the youngest child reaches the age of eighteen (18) years.

A trial was held in which the parties were the only witnesses. Plaintiff was the first to testify. Her evidence was as follows. The parties have been married for twenty (20) years now. Defendant is abusive and she cannot continue in the relationship. The parties no longer share the

matrimonial bed even though they are still under the same roof. She sleeps in the lounge with her daughter sharing the room with chickens whilst Defendant uses the main bedroom. She had to get a protection order awaiting the finalization of the divorce. She suffered abuse for close to fifteen (15) years and was enduring for the sake of the children. She survives on vending whilst Defendant collects rentals from a shop in Mabvuku and also earns as an agent of a tour company. Defendant is responsible for meeting all school obligations.

She is seeking spousal maintenance as Defendant asked her to leave her job. She suffered complications during birthing and she is no longer as fit as she should be. She revised the figures claimed for maintenance to \$500.00 per month for herself and \$200.00 for each child per month. The maintenance for the children will be over and above the school expenses.

At the commencement of the marriage she was employed. Defendant was selling drinks. They pooled their resources and opened a shop in Mabvuku, selling groceries. The business grew and outlets were opened in other locations across Harare. They acquired immovable property in Cranborne and Borrowdale and a stand for a shop in Mabvuku. The Cranborne property was subsequently sold to cover debts, for injection into the business and to finish construction of the Borrowdale property. The groceries outlets subsequently closed due to economic challenges and only the Mabvuku shop is left.

Under cross – examination she insisted that she was entitled to a 50% share of the Borrowdale property as it was acquired and constructed from proceeds of a business they were both involved in. That was the Plaintiff's case.

Defendant gave evidence to the following effect. The matter was prematurely brought to court as twelve months is not yet up since the parties separated for the matter to come in line with section 5(2) of the Matrimonial Causes Act [*Chapter 5:13*]. He is seeking that the matter be deferred for twelve months to allow for possible reconciliation and meetings among their families. He believes that if the parties are to divorce, it should be after he handed over the Plaintiff to her father who handed her over to him on their wedding day. He believes the reason for the parties' problems is that Plaintiff failed to adjust her life after the family business started struggling. He denied abusing the Plaintiff.

He stated that as the marriage is out of community of property he owns both the Borrowdale and Mabvuku properties as they are registered in his name. Plaintiff did not contribute anything

directly even though she contributed indirectly, He acquired the Mabvuku property after serving the community and he has a sentimental attachment to it. The business started before he was married to the Plaintiff. He was not on equal earnings with the Plaintiff when they got married as in 2006 she was earning what he paid his supervisor.

He disputed that Plaintiff requires spousal maintenance and alleged that she runs businesses of selling hats and clothing, party packs and school supplies. He claimed full custody of the children but invited the court to interview them and ascertain what they want. He confirmed that he did not appeal against a peace order that was granted against him. That was the Defendant's case.

**WHETHER OR NOT THE MATTER SHOULD BE REFERRED TO THE ALTERNATIVE DISPUTE SOLUTION CENTRE**

Defendant advocated for the referral of the matter to alternative dispute resolution in his plea. In his opening address at trial, he sought for the postponement of the matter for twelve months for the parties to try and find each other. He also indicated that the traditional route should be followed in terminating the marriage relationship. This was opposed by the Plaintiff who stated that this court has power to hear the divorce matter in terms of section 3 of the Matrimonial Causes Act [*Chapter 5:13*]. Plaintiff also submitted that the parties have received counselling several times before and Defendant persisted with his abusive behaviour. According to her there is no room for reconciliation.

Section 4 of the Arbitration Act [*Chapter 7:15*] lists what may be arbitrated. Subsection 2 thereof gives a list of matters that shall not be capable of determination by arbitration. These include:

- “(d) matrimonial cause or a matter relating to status, unless the High Court gives leave for it to be determined by arbitration; or
- (e) a matter affecting the interests of a minor or an individual under a legal disability, unless the High Court gives leave for it to be determined by arbitration, or”

As submitted for the Plaintiff, no leave was obtained for the matter to be referred for determination by arbitration and such leave cannot be sought in response to be Plaintiff's claim. Summons in this case was issued on 5 September 2023. I am of the view that any other alternative ways of settling the matter between the parties was given enough time. I am therefore not persuaded that a basis has been laid for the referral of the matter to arbitration or for the deferment

of the matter for another twelve months. In terms of section 5(3) of the Matrimonial Causes Act [*Chapter 5:13*] a postponement should only be granted where there is a reasonable possibility that the parties may become reconciled through marriage counsel, treatment or reflection. As stated above, Plaintiff indicated that any such attempts have failed before and there is no possibility of reconciliation. Defendant's request will therefore not be granted.

### **THE IMMOVABLE PROPERTIES**

Section 7(1) of the Matrimonial Causes Act [*Chapter 5:13*] regulates the division, apportionment and distribution of assets of the spouses on dissolution of the marriage. Section 7(4) of the same Act sets out factors which the court must have regard to in dividing, distributing and apportioning the assets of the spouses.

These are;

- a) the income earning capacity assets and other financial reserves which each spouse and child is likely to have in the foreseeable future.
- b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future.
- c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained.
- d) the physical and mental condition of each spouse and child.
- e) the direct or indirect contribution made by each spouse to the family including contributions made by looking after the home and caring for the family and any other domestic duties.
- f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage.

### **HOUSE NO 463 OFF PORTGEN, POMONA, BORROWDALE & STAND NO 205 MABVUKU SHOPPING CENTRE, MABVUKU, HARARE**

Plaintiff claimed 50% of these properties on the basis of having contributed directly and indirectly to their acquisition. Defendant accepted that Plaintiff made indirect contribution to the acquisition of the Borrowdale property only. Defendant proposed that the properties be sold and the proceeds of the sale be used to acquire three apartments to be registered in a Family Trust on

behalf of the minor children. In the event that there is a balance after the apartments are purchased, Defendant proposed that it be distributed equally between the parties. The proposal for equal distribution of the balance is indicative of the fact that Defendant accepts that Plaintiff is entitled to 50% share of the properties. The proposal of a family trust cannot be imposed on the Plaintiff. Each party is free to deal with the share he/she gets from the property as he/she thinks fit.

Though the parties are entitled to an equal share of the properties, Defendant submitted that Stand No. 205 Mabvuku Shopping Centre, Mabvuku, Harare is his only source of income as the breadwinner of the family. In her declaration, Plaintiff prayed that the Defendant pays all the children's expenses as well as maintaining her. She therefore cannot get 50% of the source of income and still get the children's expenses paid from Defendant's 50%. One of the factors to be considered outlined in section 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] is the financial needs, obligations and responsibilities which a party will have or is likely to have in the foreseeable future. The parties' youngest child is only eight years old. Defendant has a minimum of ten years to cater for that child's financial needs. For that reason, I am of the view that the source of income should not be distributed until the youngest child reaches the age of 18 years or become self-supporting whichever occurs first.

Defendant prayed for an order that the Borrowdale property be not distributed until the youngest child turns 18 years. Plaintiff did not respond to that prayer. As the standard of living of the family is one of the factors to be considered in the division, apportionment and distribution of the assets of the spouses, the Defendant's prayer will ensure that the minor children have accommodation. Accordingly the Defendant's prayer will be granted.

#### **MAINTENANCE OF THE MINOR CHILDREN**

It is trite that when dealing with the maintenance of the minor children the best interest of the children is the primary consideration. The children must continue to live the life they lived before the divorce of their parents as far as it is possible. Defendant is paying all the school expenses and buying food. Plaintiff is claiming \$200.00 per child per month in addition to all the expenses Defendant is meeting. Defendant submitted that he has no problem meeting that obligation as long as he retains the Mabvuku property. He submitted that in the event that the property is shared, the parties must meet the children's expenses in proportion to their shares.

#### **SPOUSAL MAINTENANCE**

Plaintiff indicated that she is claiming spousal maintenance for two years after divorce. Initially she had claimed \$1000.00 per month but in her oral evidence she reduced the amount to \$500.00 per month. She gave the basis of the claim as the fact that Defendant asked her to leave her job and they have been married for 20 years. In addition she indicated that she cannot go back to school or start looking for a job at 44 years of age. She also stated that her health was compromised at child birth and she is no longer as fit as she used to be.

Defendant disputed that Plaintiff is entitled to post divorce spousal maintenance. He indicated that she is not crippled and is still young and is able to sustain herself.

The law on post-divorce spousal maintenance is stated in various case law. One of the leading cases on the subject is Chiomba v Chiomba 1992 (2) ZLR 197 in which it was stated that a marriage certificate is not a guarantee of maintenance after the marriage has been dissolved. Further that if a young woman has given up work she will be awarded a short term maintenance to tide her over until she finds a new job. It is also stated further that;

“middle-aged women who have devoted themselves to the management of the household and care of the children should be given rehabilitative maintenance for a period long enough to enable them to be trained or retrained for a job or profession.”

The Plaintiff falls within the category of middle-aged women. She however did not produce any medical evidence which would have helped in assessing the extent to which the complications during child birth compromised her ability to work. Section 7 of the Matrimonial Causes Act [*Chapter 5:13*] requires the court to as far it is practicable place the parties in a position they would have been had the marriage not been dissolved. I believe that position is Defendant meeting the Plaintiff's needs. Defendant testified that Plaintiff earns something from vending. Plaintiff indicated that she wanted maintenance “whilst she is getting on her feet.” The period of two years claimed is in my view reasonable. A number of factors are to be considered in determining the quantum of maintenance. The factors include the income earning capacities of the parties, financial obligations and the parties' needs. See Gwachiwa v Gwachiwa SC 134/86.

Plaintiff indicated that she gets about \$100.00 or less per month from her vending business. Defendant was not forthcoming on how much he realised from the business. However during cross examination, Plaintiff indicated that in making her claims for maintenance she used a figure of between \$2000.00 and \$3000.00 United States dollars as proceeds from the shop. She also

indicated that Defendant also earned an undisclosed amount from being an agent for a touring company for trips to Israel. I am of the view that the amount she claimed must be reduced by the amount she said she realises per month from vending and also on the basis that Defendant will be solely responsible for meeting all the children's expenses. An amount of \$300.00 per month should meet the justice of the case.

### **CUSTODY**

Section 5 of the Guardianship of Minors Act [*Chapter 5:08*] applies where parents begin to live apart. Custody of the minor children is granted to the mother and it is only until it is proved that it is not in the best interests of the minor children to be with the mother that custody is awarded to the father. See *Chiwenga v Chiwenga* SC 86/20. In this case the parties are still under the same roof even though on separation. What came out in the course of the trial was that both parents are playing significant roles in the lives of the children. Both have aspects they criticize in the other's behaviour and conduct with the minor children. Defendant stated that Plaintiff is not a responsible mother. On the other hand Defendant is letting the youngest child live in uncomfortable conditions with the mother. Despite the house having several bedrooms, Plaintiff and her daughter share a room with chickens. I decided to interview the children to understand their preferences. The parents indicated that they would abide by the outcome of the interviews. The minor children are aged 7, 12 and 15. They are in a position to understand what is happening in their family. The youngest children prefer to be in their mother's custody whilst the older one prefers his father. It is not desirable to separate siblings. I am of the view that it is appropriate to award custody of the minor children to the mother. Awarding custody of the oldest minor child to the father was going to be appropriate if the parties had more than one house resulting in each one having accommodation pending the minor children attaining the age of 18 years. There is only one house and it is in the best interest of the minor children that their accommodation is guaranteed until they reach the age of 18 years.

### **DISPOSITON**

1. A decree of divorce be and is hereby granted.



2. Custody of the minor children Earl Muza born on 20 December 2008, Ellis Muza born on 6 December 2011 and Edlyn Muza born on 12 December 2016 be and is hereby awarded to the Plaintiff.
3. Defendant shall have access to the minor children on alternating weekends, public and school holidays or as the parties may agree.
4. Defendant shall be responsible for the minor children's food, clothing, medical aid, school fees and other school related expenses until the children reach the age of 18 years or become self-supporting whichever comes first.
5. Defendant shall pay \$200.00 as maintenance per child per month in respect of the minor children until they reach the age of 18 years or become self-supporting whichever occurs first.
6. Defendant shall pay \$300.00 per month to the Plaintiff for a period of two years from the date of this order as maintenance.
7. Each party is awarded 50% of House No. 463 Off Portgen, Pomona, Borrowdale.
  - 7.1. Plaintiff is granted the sole right of occupation in the immovable property until the youngest of the minor children is 18 years old.
8. Each party is awarded 50% of Stand No 205 Mabvuku Shopping Centre, Mabvuku, Harare.
  - 8.1. Defendant is granted the sole right to run the business until the youngest of the minor children is 18 years old.
9. After the youngest of the minor children attains the age of 18 years the parties shall by consent appoint an Evaluator within 14 days of the youngest becoming 18 years old, failing which, one shall be appointed by the Registrar of the High Court from the list of registered evaluators.
10. The appointed evaluator shall evaluate both properties and submit his report to the Registrar of the High Court and the parties within 14 days from the date of his appointment.
11. The cost of the evaluation shall be borne by the Defendant.
12. The Plaintiff shall have the first option to buy the Defendant's share in House No. 463 Off Portgen Pomona, Borrowdale within six months of receipt of the evaluation report.
13. The Defendant shall have the first option to buy the Plaintiff's share in Stand No. 205 Mabvuku Shopping Centre, Mabvuku within six months of receipt of the evaluation report.

14. In the event that the parties fail to buy each other out within the period stated in paragraphs 12 and 13 above, the option shall move to the other party for a period of 30 days.

15. In the event that the parties fail to buy each other out, the properties are to be sold to the best advantage and the proceeds thereof are to be shared equally between the parties.

16. The Plaintiff be and is awarded the following movable property;

- Mercedes Benz C1800 Reg No. ACH - 3800.
- One generator
- 2 point of sale machines
- One functional television set
- One non-functional television set
- One double bed
- One king bed
- One dressing table
- One room divider
- Two office desks
- One office chair
- One kitchen table with 6 chairs
- One microwave
- One coffee table with 4 side tables
- Kitchen utensils

19. The Defendant be and is hereby awarded the following movable property:

- Mercedes Benz Reg No. ACH – 7368
- One generator
- One butcher display fridge
- 3 point of sale machines
- One functional television set
- One non-functional television set
- One double bed
- Big photocopying machine
- Two office desks

- One office chair
  - Four piece lounge suite (sofas)
  - Shop shelves
20. The property in 18 and 19 above pertaining to the business at Stand No. 205 Mabvuku Shopping Centre, Mabvuku shall be shared after the youngest of the minor children reaches 18 years of age.
21. Each party shall bear its own costs.



**MAXWELL J:**

*Murisi and Associates, Plaintiff's legal practitioners*