PHILLIP MASUKO

versus

MAUREEN MASUKO

HIGH COURT OF ZIMBABWE

UCHENA J

HARARE, 31 January 7, 8, 9 February 20,

27 March and 17 May 2012

**Civil Trial**

Miss *N D Munharira*, for the plaintiff

*E T Moyo*, for the defendant

UCHENA J: The plaintiff and the defendant where initially married to each other in 1985 in terms of customary law, but solemnized their marriage in terms of the Marriage Act [*Cap 5*:*11*] on 29 September 1994. They were blessed with four children of which only the last one Manhla Takudzwa Masuko born on 1 April 1996 is still a minor. Their marriage has irretrievably broken down.

At the opening of the plaintiff’s case Miss *Munharira* for the plaintiff informed the court that her client had agreed that custody of the minor child be granted to the defendant, and that the parties had agreed that the type writer and scortcart were not part of their matrimonial property. She further informed the court that the parties had already shared their other movable property and that each party was to keep the shared property in his or her possession.

Mr *Moyo* for the defendant, confirmed the agreement and indicated that the only outstanding issues which are to be determined by this court are, the distribution of the homestead, the determination of whether or not the Goromonzi stand and the grinding ill are part of the parties, matrimonial property and the quantum of maintenance to be paid by the plaintiff for the maintenance of the minor child.

**The Homestead**

The parties worked hard and harmoniously during the happy days of their marriage. They pooled their resources together. They had a joint account into which their salaries were deposited. They then used the money from the joint account to build their homestead in Madongo Village Goromonzi. They were allocated that stand during the subsistence of their marriage. They both contributed to its development financially and through the provision of labour and other services. Though the plaintiff’s financial contribution might have been slightly higher than the defendant’s, the defendant’s contribution through labour and services was higher than his because she stayed and worked from the homestead while the plaintiff worked in Harare. This must result in both parties having contributed equally in the development of the homestead.

The evidence led at the trial established that the parties are now of very limited means. The plaintiff is employed earning US$100-00. His net salary is US$97-00 per month. He currently has no other source of income. The company in which he and the defendant has shares, is not operating because the plaintiff decided to put its operations on hold until the divorce he sought had been granted. He thus contributed to the impoverishment of his own family.

The defendant left employment because of ill health. She was paid a lump sum through their joint bank account. She is now earning a very small pension which she arguments through vending in spite of her ill health. She told the court that she has no other place she can go to besides their homestead in Madongo village. She said she and the plaintiff can co-exist at the homestead after the granting of the divorce as they have been staying in separate bedrooms and using different kitchens for five years. At the clarification of the parties’ written addresses on 20 March 2012 it was submitted on her behalf that all she wants is a roof over her head. She offered her share of the homestead to their children provided she is granted a life usufruct over it. The defendant told the court that the stand is big enough to accommodate her and the plaintiff. She suggested that the developed part be granted to her and the plaintiff be granted the undeveloped part which he can develop as he is employed and has control of their company. It was submitted on her behalf that if she is granted a life usufruct of the developed part of the homestead, which she wants to donate to their children, she would abandon her claim to the grinding mill, and the company, to enable the plaintiff to raise money to develop the undeveloped portion which she suggested should be granted to him.

The plaintiff wants the whole homestead to be granted to him. He wants the defendant to be ordered to live the homestead. However at the clarification of the parties written addresses Miss *Munharira* for the plaintiff indicated that she and the defendant’s counsel needed a postponement to 27 March 2012 so that they could with their clients draft a consent paper on the terms suggested by the defendant. Mr *Moyo* for the defendant agreed to the postponement, which I granted.

On 27 March Miss *Munharira* indicated that her client the plaintiff had declined to sign the consent paper, and requested the court to determine the dispute between the parties in terms of the evidence adduced at the trial.

The circumstances of this case present an unusual difficulty situation in that the parties are of limited means, and their only asset of value is a rural homestead which has become home for the parties and their children. The facts of improvements to the case established that neither party is able to buy out the other’s share in the homestead. The sale of improvements to the homestead and the sharing of the proceeds will render both parties temporarily homeless before they can be able to reestablish themselves through the proceeds of such a sale. The defendant’s counsel’s submission on sharing the homestead though sensible and a possible solution to the parties’ dispute is not consistent with the principle of the parties having a clean breakaway from each other on the granting of divorce. While the idea of sharing the homestead could have been acceptable if both parties had agreed to it, it is fraught with danger. The parties may want to remarry and bring in new spouses to the homestead. That may lead to serious conflicts. Therefore while the defendant’s suggestion is attractive it will not be followed as it does not give the parties a clean break from each other, and may lead to serious conflicts in the future.

The homestead is a well developed rural property. It is an electrified 8 roomed house. It is connected to running water supplied by Goromonzi District Rural Council. It falls under the authority of the village head and the local authority, who will have a say as to who can buy the improvements on the parties’ rural homestead as the land can not be sold, but be allocated by the local authority. This diminishes the value of the parties’ improvements, but that is a consequence of divorce. It comes with loses which could never have visited them if they had continued with their marriage. It is not possible to break something and at the same time maintain its original value.

I am satisfied that there is no option but to order that the improvements to the parties’ homestead be sold and each party be awarded an equal share of the proceeds of the sale.

**The Goromonzi Stand 806 Juru Township**

It was established during the trial that the stand belongs to Goromonzi District Council, which is leasing it out to Landmark Agro and Industrial Development (Pvt) Ltd a company in which the parties have shares. It is thus clearly not part of the parties’ matrimonial property.

**The Grinding Mill**

The evidence led on this issue established that the grinding mill belonged to the plaintiff’s brother. The plaintiff said his brother loaned it to him and his family for use. The defendant who was not present when the grinding mill was handed over assumes from the usual generosity of her brother in law that the grinding mill was donated to them. She did not adduce evidence to prove her claim that the grinding mill was donated to them. In the result I hold that the grinding mill is not part of the parties’ matrimonial property.

**Maintenance**

There is not much dispute on the maintenance of the minor child. The plaintiff accepts the responsibility to maintain his minor child. He however offered to do so within his limited means. He offered to pay a monthly maintenance of US$ 20-00 per month. He further offered to pay the minor child’s school fees and meet his other school requirements including school uniforms. He earns a monthly salary of US$ 100-00 from which he gets a monthly net salary of US$ 97-00.

The defendant in evidence said the child’s needs can not be met by a monthly maintenance of US20-00. That may unfortunately be so, but the responsible person’s means is the determinant factor in every maintenance application. The courts can not order a responsible person to maintain his dependants beyond his own means. The responsible person and his dependants must live within his means even if that may not be enough for them. They can only share what they have.

I am thus satisfied that the plaintiff’s offer of US$20-00 per month plus payment of school fees and meeting the minor child’s other school needs including uniforms, is reasonable in the circumstances.

In the result it is ordered as follows:

1. That a decree of divorce be and is hereby granted.
2. That the custody of the minor child Manhla Takudzwa Masuko be granted to the defendant. The plaintiff shall be entitled to reasonable access to the minor child. He shall be entitled to have the minor child on every alternate school holiday.
3. The plaintiff shall pay maintenance for the minor child at the rate of US$20-00 per month, and shall pay the minor child’s school fees every term and meet all of the minor child’s school requirements including uniforms.
4. The improvements at the parties Homestead in Madongo Village in Goromonzi shall be valued by a valuer to be appointed from the Master’s list of valuers within two months of the date of this order and be sold by an Estate Agent to be appointed by the Master within six months of the date of this order.
5. The parties shall equally contribute to the cost of valuation and the sale of the property.
6. The parties shall share the proceeds of the sale at the rate of 50% for the plaintiff and 50% for the defendant.

*Legal Aid Directorate*, plaintiff’s legal practitioners

*Scanlen & Holderness*, defendant’s legal practitioners