

CLEMENCE MACHEMEDZE
versus
SHARON TSITSI MACHEMEDZE (nee Marombedze)

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 23 July 2016, 12 October 2016 and 14 June 2017

Civil trial

J Mandevere, plaintiff's legal practitioners
H Nkomo, defendant's legal practitioners

NDEWERE J: The parties entered into a customary union on 25 May, 2007 and on 2 April 2011, they registered their marriage in terms of the Marriages Act [*Chapter 5:11*]. The couple had two minor children born on 27 December and 12 February, 2012, respectively. The agreed issues were:

- (i) That the marriage had irretrievably broken down for the reasons stipulated in their pleadings.
- (ii) That the defendant shall have custody of the two minor children, namely, Clemence Naishe Machedmedze, born 27 December, 2007 and Timothy Takunda Machedmedze, born 12 February, 2012.
- (iii) That the plaintiff shall have access to the children every alternate weekend and alternate holiday with prior arrangement with the defendant.
- (iv) That in terms of an existing maintenance order, the plaintiff shall pay maintenance for the two minor children in the sum of \$250.00 per month for both children through a bank deposit into the defendant's bank account till the children reach 18 or become self-supporting.
- (v) That the plaintiff has accrued some maintenance arrears.
- (vi) That the parties have agreed on how to distribute the movable property between them.

At the beginning of the trial, the Court directed the parties to separate the detailed issues to do with the company from the divorce action. It was thereafter agreed that any issue to do with the shares in Shyntime Investments (Pvt) Ltd and in Makney (Pvt) Limited will be dealt with separately in terms of the Company Law.

The only issue which remained before the court in terms of the Joint Ptc Minute concluded on 16 September, 2015 was;

“What is a fair and equitable distribution of the parties assets?”

Following further agreements between the parties before the trial, the only asset whose distribution was an issue during the trial was House No. 2 Rock Street, Clovelly, Masvingo.

Both parties accepted in principle that they had to share No 2 Rock Street between them. Their only dispute was on how much the other party should get.

In his summons issued on 21 October, 2014, the plaintiff claimed 70% of the house, with 30% going to the defendant.

In her claim in reconvention filed on 15 January, 2015, the defendant asked to be awarded 95% of the property with 5% being awarded to the plaintiff.

The plaintiff's evidence was that when he married the defendant, she had nothing besides her clothes. She moved from Harare to Masvingo where he was based and was just a housewife for sometime. He said he later bought a shelf company called Shyntime Investments for \$200 to run a motor spares business and he resigned from his previous job to focus on the family business. He said in 2008 he injected 500 rands as start-up capital for the company business and this is the money the defendant used to buy the first batch of spares for re-sell from South Africa.

He said he was a director and assisted in running the business since most of the time she would be out of the country buying the ordered goods. He said he helped in running a shop in Chiredzi town, another in Masvingo and a third one in Zvishavane.

He said using proceeds from the above business, on 2 March, 2012, they acquired No. 2 Rock Street, Clovelly from one Kenias Musasa. He produced the agreement of sale as Exh 2. He said it was a residential stand with a complete cottage while the main house was on slab level. The purchase price was US\$26 000 and it was paid for with funds from the motor spares business. Both parties were cited in the agreement as purchasers. He said they jointly developed the main house to completion and the money was coming from the company. He

admitted that the defendant had more acumen in the motor spares business as she had been employed within the motor spares industry before. He said when they separated the building structure had been completed, but the final touches like the built ins and painting had not yet been done.

The defendant's evidence was that after purchasing the property, she involved the plaintiff in building the property. During cross examination she accepted that the plaintiff was an equal owner of the property she bought on 2 March 2012. She said they sought builders jointly and negotiated with them jointly. She would pay for building materials and the plaintiff would give the builders any additional material they required. The plaintiff was also the one who physically handed the money for labour to the builders. She said the plaintiff never made a direct financial contribution towards the construction of the property. Whenever he used his own money, she would refund it. But she admitted that he contributed indirectly to the development of the property up to slab level. She said her source of funds were the motor spares business and the sale of broiler chickens. The defendant said at the time proceedings were instituted, the house was at roof level. She said the plaintiff used to steal the funds from the business till she started hiding money from him. She also said she bought three trucks for him to enable him to start his own trucking business since he seemed to have a passion in trucks.

An analysis of the evidence of the parties reveal their respective contributions to the purchase and construction of the property in dispute. The plaintiff's evidence was that he worked together with defendant to buy and construct the property. He said the major source of funds was the family business of selling motor spares. The defendant said in addition, she reared and sold broiler chickens.

The plaintiff did not dispute that in addition to the company funds the defendant also sold broiler chickens. So that piece of evidence is taken to be the correct position. The defendant herself corroborated the plaintiff's evidence that the major source of funds was the motor spares business. She also confirmed that the stand was bought mainly from funds from the motor spares business which paid the \$10 000, plus a borrowed \$15 000, 00 which got paid back from proceeds from the motor spares business. She confirmed that during construction of the house up to slab level, the plaintiff was involved in contracting the builders, ferrying building materials and supervising the builders especially if she was away from the country.

The court took into account the fact that the stand was purchased jointly by the plaintiff and the defendant, using mainly funds from the motor spares business which was started jointly by the parties in 2009 when the plaintiff bought a shelf company whose trade name the defendant used. The court also took into account the 5000 rands capital injection by the plaintiff into the motor spares business and noted that the fact that the amount was repaid later does not detract from the fact that the defendant received some capital injection from her husband, the plaintiff, which enabled her to start the motor spares business. That capital injection which was interest free is a notable contribution from a husband to this major source of funds for the property in dispute.

The plaintiff said he actually resigned from his job to focus on the family business. The defendant did not dispute that. In fact, she corroborated that when she said the plaintiff was employed as an administrator and he occupied this position for about six months.

In view of the above, the court is of the view that the family business, which was the major source of funds for the project started off as a joint effort between the plaintiff and defendant.

From this major source of funds the parties jointly acquired No. 2 Rock Street for \$26 000.00. On the developments, the defendant confirmed in her evidence that the plaintiff was involved up to slab level. They contracted builders together they bought building material together, with the defendant paying while the plaintiff collected the material using his truck. She also confirmed that he supervised the builders and gave them what they needed while she was out of the country so from the evidence; up to slab level, the parties worked together as a couple on the development. That is why defendant said she could offer the plaintiff 40% up to slab level.

Things appear to have fallen apart later on and the defendant appeared to be working alone on the project. This too is borne out by the evidence of both the parties.

The stand was bought on 2 March, 2012 and the defendant said parties started having problems towards the end of March, 2012. So it appears after constructing the property the parties' relationship deteriorated further, with the defendant getting a Protection Order and parties separating in October, 2014. According to the evidence, the house was on roof level when the parties separated, but the plaintiff was no longer involved. The defendant's evidence is that she carried on with both the business and the construction of the property on her own. This appears to have been the case because plaintiff's evidence shows that he was

not really involved in the goings on in the family business or in the development of the property. An extract of some of the plaintiff's responses confirm the situation.

“ Evidence in chief

Q. After formation of the company what was your role in the company?

A. Defendant managed the business. I was a director.”

“Q. Are you still actively participating in this business?

A. No I last participated when she got a protection order.”

Cross examination

Q. But the man is the head of the family?

A. Yes

Q. So the head of the family must lead in major acquisitions, why do we see the opposite?

A. Behind every successful man, there is a woman; you allow women to do things.”

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Q. Defendant will produce receipts to show that she purchased building materials.

A. Her name just appears on the receipts.”

Q. Was there a durawall?

A. No

Q. Gate : No

Q. Fence : Yes”

“Q. What colour is the interior paint?

A. I was barred before painting. It was incomplete.

Q. Colour of interior?

A. I don't know

Q. When you were barred, were ceilings installed?

A. Not yet, but the material had been bought

Q. Do you know Mangwandi?

A. I bought ¾ stones from Mangwandi

Q. How much did you pay?

A. Don't remember

Q. Do you have receipts for the purchase?

- A. No receipts
- Q. Which construction company built the house?
- A. ZMC
- Q. How much did they charge?
- A. They were part payments, I don't know the figures
- Q. Timber came from Chimanimani?
- A. Defendant went to purchase the timber
- Q. Why send wife to purchase timber in Chimanimani? Why didn't you go?
- A. I sent her
- Q. Why did you send her? Choosing roof trusses and timber is a man's duty
- A. I was organising transport
- Q. Who drew the plan?
- A. Someone working for Masvingo City Council
- Q. What is his name?
- A. I don't remember
- Q. How much was paid for the plan?
- A. I do not remember
- Q. Can you describe the current structure ?
- A. I do not know everything because I am not allowed to visit in terms of the protection order
- Q. What type of tiles are in the rooms?
- A. Ceramic Tiles
- Q. In all rooms?
- A. I don't know
- Q. How many rooms have ceramic tiles?
- A. Five Rooms
- Q. The kitchen?
- A. I don't know
- Q. Bathrooms?
- A. I don't know

- Q. The type of tub?
- A. I don't know. I just know there was a tub
- Q. Durawall on the house now?
- A. Yes
- Q. Gate?
- A. Yes
- Q. When was timber purchased?
- A. 2014
- Q. That's incorrect, it was 14 May, 2013
- Q. Glass and aluminium?
- A. I don't know
- Q. Labour costs?
- A. I don't know
- Q. Who installed them?
- A. I don't know
- Q. Tiles?
- A. Defendant bought them
- Q. Why send a woman to buy tiles?
- A. Buying and carrying are two different things
- Q. Plumbing?
- A. I don't know
- Q. Paint?
- A. I don't know
- Q. Painter?
- A. I don't know
- Q. Perimeter wall?
- A. I don't know
- Q. Gate?
- A. I don't know

- Q. So would you agree that you are not aware of the source of the material and cost for most of the house?
- A. Yes
- Q. Rentals for shops?
- A. I don't know the figures. Defendant was taking care of that
- Q. Did you submit tax returns?
- A. I think she did
- Q. What are you doing, since separation to look after yourself and the children?
- A. I want to go back to Makney Investments
- Q. From October, 2014, you haven't done anything?
- A. Yes
- Q. You want the court to believe that you contributed much to the asset when you have failed to look after yourself and the children since October, 2014 when you separated from your wife?

Re-examination

- Q. When you separated, was house complete?
- A. Building and roofing complete. Plastering done. Durawall, built ins, painting and ceiling not yet done, cottage not extended.
- Q. Why have you not paid in terms of the maintenance order?
- A. I am not working but I bring the children food from the rural areas
- Q. Were you involved in the \$15000 borrowing?
- A. I was told about it
- Q. How were payments for property made?
- A. She did the payments

Questions from the Court

- Q. What are your plans for your children's accommodation if the house is sold to give you a share?
- A. I will build a place for them
- Q. Why did the defendant do all the acquisitions?
- A. She did it on my behalf
- Q. Where was defendant going when she left you and the maid with a 3 month old baby?
- A. She was going to Dubai about the business."

The extracts from the plaintiff's evidence above clearly show that he was not seriously involved in the business which was the major source of funding. Neither was he seriously involved in the construction of No. 2 Rock Street, Clovelly, Masvingo

His evidence does not leave the court with any basis to award him the 70% share which he wanted because the evidence shows that the defendant played the major role in both the motor spares business and the construction of No. 2 Rock Street Clovelly, Masvingo.

Accordingly, No. 2 Rock Street, Clovelly, will be distributed in line with the contribution of the parties. However the defendant herself admitted that at the point of purchase, their share in the property was equal. She also admitted that up to slab level, the plaintiff contributed and was prepared to give him 40%. The justification for the differentiation up to slab level is from her major contribution as evidenced in the business and the additional income from the sale of broilers.

The evidence also revealed that the plaintiff has failed or neglected to comply with the existing maintenance order and was doing very little to look after the children. His own evidence was that he brings the children food when he goes to rural areas.

Accordingly it is ordered as follows:

1. That a decree of divorce be and is hereby granted to the parties
2. The plaintiff's claim of 70% of No 2 Rock Street Clovelly, be and is hereby dismissed
3. The defendant's claim in reconvention partially succeeds as follows:
 - (a) The defendant is awarded 50% of the value of No. 2 Rock Street Clovelly at the time of purchase, with plaintiff retaining the other 50%.
 - (b) The defendant is awarded 60% of the value of developments on No. 2 Rock Street, Clovelly, up to slab level, while plaintiff gets 40% of the value of the developments.
 - (c) From slab level up to the roof level, the defendant be and is hereby awarded 70% of the value of improvements, with plaintiff getting 30% of the value of the developments.
 - (d) Defendant be and is hereby awarded 100% of value of all the improvements effected after the separation in October, 2014.
4. The parties shall agree on a professional evaluator to provide the value of the property at the different stages. Failing agreement within 7 days from the date of this order, the High Court Registrar shall appoint a valuator from the High Court

list of valuers within a further seven days. The parties shall equally share the costs of valuation.

5. Defendant shall have the option to buy out the plaintiff. The parties shall conclude a buyout agreement within a month after the date of this judgment.
6. The defendant shall have the option to offset the plaintiff's share against arrear maintenance.
7. In terms of s 7 (1) (b) of the Matrimonial Causes Act, [*Chapter 5:13*] from his share the plaintiff is hereby ordered to make a lump sum payment for future maintenance obligations in terms of the Court Order from the Maintenance Court till the children become 18 or self-supporting.
8. Each party shall pay its own costs.

Mhishi Legal Practice, defendant's legal practitioners
Kadzere, Hungwe and Mandevera, plaintiff's legal practitioners