

VIOLA MAUNGE (NEE MUPFUMIRA)  
versus  
EDMORE MAUNGE

HIGH COURT OF ZIMBABWE  
MAXWELL J  
HARARE, 4 June 2024 & 19 September 2024

### **Civil Trial**

*T Chakurira*, for the Plaintiff  
*N Karimatsenga*, for the Defendant

MAXWELL J

The Plaintiff and the Defendant (the parties) are husband and wife having married each other in 1989. Their marriage was solemnized under the Marriage Act [*Chapter 5:11*] now the Marriages Act [ *Chapter 5:17*] on 7 August 1989 at Harare. On 6 March 2019, Plaintiff issued out summons claiming an order for a decree of divorce and ancillary relief. In her declaration she averred that the marriage of the parties had irretrievably broken down and there are no prospects of restoration of a normal marriage between them. The reason for the break down was given as physical and emotional abuse by the Defendant, lack of conjugal rights and love. Plaintiff stated that the marriage of the parties was blessed with two children who are now majors and that the parties acquired movable and immovable assets during the subsistence of the marriage. She proposed how the assets should be distributed.

Defendant entered an appearance to defend the action. In his plea he agreed that the marriage between the parties had irretrievably broken down but disputed the reasons thereof. He disputed the distribution of the assets proposed by the Plaintiff and counter- claimed. In his counterclaim he ascribed the breakdown of the marriage to Plaintiff's conduct. He counter – proposed the sharing of the assets acquired during the subsistence of the marriage.

After an exchange of pleadings, a Pre- Trial Conference was held and the following issues were referred to trial.

- 1) Whether or not the Company called Vee's Boutique (Pvt) Ltd should be made part of the matrimonial assets and subjected to sharing. If so, in what ratio should stock, alleged assets and shares in the company be apportioned to the parties?
- 2) Whether or not the Toyota Land Cruiser Motor vehicle registered number ADX 9893 owned by the Plaintiff should form part of the Matrimonial assets of the parties and if so, what percentage should each party be entitled to?
- 3) Whether or not stand 4724 Crowhill forms part of the parties' matrimonial assets. If so, in what percentages should it be shared?

The matter proceeded to trial on the three issues highlighted above.

### **TRIAL**

The Plaintiff testified on her behalf. She testified as follows. She is a director in Vee's Boutique (Pvt) Ltd. (The company). The company was incorporated in 2016. Her daughter Ruvimbo is the other director. The company is in the business of selling clothes it operates from rented premises at the corner of Cameroon and Albion Streets. There are no shares in the company. Defendant is not entitled to anything in the company as he put nothing in it. The company belongs to their daughter.

She purchased the Toyota Land Cruiser ADX 9893 around 2015 from B-forward. She did not get any assistance from Defendant. She paid for it through proceeds from cross-border trading and savings club. The parties are both teachers and Defendant buys expensive clothes for himself only. The motor vehicle is registered in her name and Defendant has never driven it. It should not be shared as Defendant did not contribute to its acquisition either directly or indirectly.

Stand 4724 was acquired in 2014 as a vacant stand. The building thereon is now at window level. The improvements were funded by her and her brother who is in the United Kingdom. She contracted the builder and during the time she would be outside the country her sister Hazviperi Mupfumira would oversee the construction process. The property is in her name. Defendant only signed as a witness at the acquisition of the property. When there were challenges regarding the property she was allocated, she had to be assisted by the engineer and architect. When materials were stolen from the construction site, the builder caused the arrest of the thieves. Defendant did not want anything to do with the property, to the extent that he would demand a refund of his money used to acquire building material. She has been shouldering the burden of meeting the family's needs including paying school and tertiary fees

for their children. Defendant does not deserve anything from the assets acquired during the subsistence of the marriage.

Under cross- examination she indicated that at the time the parties got married she was enrolled at Mkoba Teachers' College and was there for three years. Defendant was assisting her whilst she was at college. After qualifying Defendant was taking care of his brothers and sisters. She disputed that Defendant assisted in the sewing business. She disputed that Defendant would receive her stock from cross border activities in her absence. She said she was not aware of where Defendant would take the building materials whose receipts were produced before the court, as none of that material was used during the construction of the property in Crowhill.

The next witness to testify was Hazviperi Mupfumira, the Plaintiff's sister. She confirmed that when the Crowhill stand was acquired by the Plaintiff in December 2014 Defendant signed as a witness to the transaction. She confirmed that Plaintiff would give her money to buy building materials with the builder anytime she was not available. She confirmed that at one time she got money from Defendant to buy five (5) bags of cement which he demanded back and was reimbursed on Plaintiff's return. She stated that they bought river sand from a person who did not issue receipts therefore the ones produced by Defendant were not for the river sand used in constructing the Crowhill property. They would buy building material from Dzivarasekwa and Charter Road in Harare as there were cheaper there. The builder had a truck which they would use to transport the building materials. Defendant never contributed and was not involved in the Construction. Under cross examination she confirmed that the parties had taken her in after the death of her husband and they took care of her and her child. She confirmed that she was offered accommodation but contributed to the food stuffs as she was engaged in income generating activities at the market.

The next to testify was Clifford Zhou, the builder engaged by the Plaintiff for the Crowhill property. He confirmed that construction of the Crowhill property commenced in September 2015. He did not see the Defendant's involvement even on issues they expected him. He highlighted the fact that Plaintiff was assisted by the architect and engineer during the process of getting the stand allocated and that when building materials were stolen, he assisted the Plaintiff. He stated that he never saw Defendant buying any building materials and had no knowledge of the materials on the receipts produced in court. He indicated that in instances where Plaintiff was not available, he would be dealing with the Plaintiff's sister. According to him, all payments to him, to the fixers and electricians were paid by the Plaintiff. He was also

engaged to do renovations at the matrimonial home. Under cross-examination he confirmed that it was not unusual for a woman to be in charge of the construction and payment for labour. He had no knowledge of where the funds came from and had no knowledge of the Defendant's contribution. According to him there were no materials delivered to the site except what he and Plaintiff's sister bought. That was Plaintiff's case.

Defendant gave evidence on his own behalf. He indicated that the company was born out of sewing skirts for sale in 2004. It was profitable. Plaintiff started going to South Africa and she would sell her products at Mupedzanhamo, in the central business district and finally found a shop. He was there supporting the Plaintiff from the initial stages. Plaintiff would consult him on all her activities and he would always give his blessing. He would receive Plaintiff's bales of clothing from Tanzania and sort them out with the manager. In the festive season there would be a lot of business therefore he would assist in one of the shops, usually at the corner of Robert Mugabe Road and 2<sup>nd</sup> Street in Harare. He is the one who advised the Plaintiff to register a company in their daughter's name. He however never agreed to having the Plaintiff as a director. He is entitled to a 50 % share of the company. He testified that the land Cruiser was purchased for ferrying goods from home to the shop. Previously a Nadia was being used and it was too small for the job. He never requested to use the land cruiser as he had nowhere to go with it. Nevertheless, it belongs to both of them and therefore should be shared.

The Crowhill property was acquired using money from shops and from a project in Whitecliff. Funding of the construction was from the sale of clothing in V- Fashions. He was not advised of the theft of the building materials. He paid school fees for their daughter from grade one to Form 6. Plaintiff took over when the child was going to university. He also did the same for their son and paid utility bills as well as buying food stuff. He disputed buying expensive suits and shoes and indicated that Plaintiff would allow every member of the family to pick items for personal use from the clothes bought from South Africa and Tanzania for sale. He disputed that Plaintiff's brother had sent money for the construction of the Crowhill property. He confirmed that he never gave the Plaintiff money to start her own hustle. He however stated that when the Plaintiff started the side hustle, he shouldered extra responsibilities when she started going to work. He indicated that the fees for their two children were paid from his earnings and the proceeds from the Plaintiff's hustle were extra income. That was the Defendant's case.

## ANALYSIS

Section 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] governs the division of the assets of the spouses. The provision reads;

“(4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following—

- (a) the income-earning capacity, assets and other financial resources which each spouse and child has or 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 age and 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;
- (g) the duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses”

The Supreme Court interpreted the provision in the case of *Takafuma Takafuma* 1994 (2) ZLR 103 as follows;

The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term "his", "hers", and "theirs". Then it will concentrate on the third lot marked "theirs". It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked "his", plus the appropriate share of the items marked "theirs". And the same to the wife. That is the first stage. Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, "as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ... Only at that stage, I would suggest,

should the court consider taking away from one or other of the spouses something which is actually "his" or "hers".

The division of the parties' assets will therefore be considered in that light.

(1) Vee's Fashion Good Morning ( Pvt) Ltd

Plaintiff did not mention this company in her declaration. It was referred to by the Defendant in his counterclaim wherein he made a claim for a 50% share in the stock of this company which he called a family business. In her plea to the counterclaim Plaintiff submitted that the stock belonged to a separate legal persona and was not subject to distribution. In her evidence, Plaintiff stated that the company belonged to the parties' daughter Ruvimbo and that she was only a director. In his closing submissions, Defendant prayed that he be awarded 50% shares, stock and assets in Vee's Fashions Boutique. The claim for shares was not in the counterclaim. It will therefore be disregarded.

On the question of the stock, Plaintiff indicated in her summary of evidence that the stock was bought from the money she acquired from her profession as a teacher. In her evidence she stated that the money was from herself and her brother one Gregory Mupfumira. Defendant's claim is based on the fact that this is a family business. I have considered that the shareholding of the company was not established. I have also considered that it is probable that Gregory Mupfumira contributed to the business. The finances for establishing the business therefore involved a portion that does not fit in the category "his or hers". Defendant therefore cannot be entitled to 50 % of the stock. In my view a share of 25 % of the shock is appropriate in the circumstances. Considering that the contribution by the Plaintiff was at the inception of the business, Defendant will be entitled to a once-off share of the stock that is available at the date of this judgment.

(2) Toyota Land Cruiser Registration number ADX 9893

The motor vehicle is registered in Plaintiff's name. Plaintiff's testimony that Defendant did not want anything to do with the motor vehicle was not contradicted. Defendant confirmed that he never drove it or used it as testified by the Plaintiff. In terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] the court is enjoined to "*as for as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses*". In

my view, there is no justification for awarding Defendant 50% of the value of a vehicle he had nothing to do with during the subsistence of the marriage. His claim for 50 % of the value of the Toyota Land Cruiser therefore does not succeed.

(3) Stand 4724 Crowhill, Harare

In her declaration, Plaintiff prayed that she be awarded this property. In his counterclaim, Defendant prayed for a 50% share of the said property. Minutes of the Round Table Meeting held on 9 May 2019 and 31 July 2019 show that the parties agreed to the sharing of this property on a 50-50 basis. These Minutes were signed by both Parties' legal practitioners. On 2 October 2019, Plaintiff filed her plea to the Defendant's counterclaim. She indicated that she had no issues regarding the paragraphs in which Defendant proposed a 50-50 sharing of stand 4724 Crowhill Harare. On 18 October 2019, she filed a Pre- Trial conference minute that excluded this property. None of these pleadings were withdrawn.

Plaintiff's erstwhile legal practitioners renounced agency on 9 February 2023. A joint Pre- Trial Conference Minute was subsequently filed on 11 March 2024 in which the fourth issue was

*“What percentage should each party be entitled to in stand 4724 Crowhill, Goromonzi.”*

On 8 March 2024 a joint Pre Trial conference was held before a Judge and the third issue referred to trial was

*“whether or not stand 4724 Crowhill forms part of the parties matrimonial assets. If it does in, what percentages should it be shared?”*

During the trial, Plaintiff reverted to her initial position that she be awarded the property as hers solely. It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. As stated in *Kambuzi Nine Mine (Pvt) Ltd v Palframan & Ors* HB 26/16

*“ ..... where a person has two courses of action open to him and he unequivocally elects to take one of them, he cannot turn around afterwards and take the other course of action.”*

See also *S v Murutsi* 1990 (2) ZIR 370 and *Trinity Engineering v Karimazondo & Others* HH 672/15.

After Defendant counter proposed the sharing of the property, it was open to Plaintiff to insist on her proposal that it be awarded to her solely. Instead, she accepted Defendant's proposal that it be shared 50-50 That acceptance was not withdrawn. It does not matter that she changed legal practitioners. Her pleadings were not changed. She could have utilized the rule

for amendment of pleadings but she did not. Accordingly, the Crowhill property will be shared 50-50 as agreed by the parties in May and July 2019.

**DISPOSITION**

**A IT IS ORDERED BY CONSENT THAT**

1. A decree of divorce be and is hereby granted.
2. Plaintiff be and is hereby awarded a 50% share of House number 10175 Kuwadzana Phase 3, Dzivarasekwa Harare.
3. Defendant be and is hereby awarded 50% share of House Number 10175 Kuwadzana Phase 3, Dzivarasekwa Harare.
4. Plaintiff be and is hereby awarded a 50 % share in stand number 1698 Whitecliff South, Harare.
5. Defendant be and is hereby awarded a 50% share of stand Number 1698 Whitecliff South, Harare.

**B IT IS FURTHER ORDERED THAT**

6. Plaintiff be and is hereby awarded a 50% share of stand 4724 Crowhill, Harare.
7. Defendant be and is hereby awarded a 50% share of stand 4724 Crowhill, Harare.
8. Plaintiff be and is hereby awarded the Toyota Prado Registration Number ADX 9893 as her sole property.
9. Defendant be and is hereby awarded 25 % of the value of stock in Vee's Fashions Goodmorning (Pvt) Ltd.
10. The Immovable properties shall be valued by an independent valuer agreed by the parties within thirty days of this order.
11. If the parties fail to agree on a valuer one shall be appointed by the Registrar of the High Court from the list of Valuers within seven days of the failure by the parties to agree.
12. The Plaintiff shall have the option to buy out the Defendant's share of the Crowhill Property within three months from the date of receipt of the valuation report or such longer time as the parties may agree in writing.
13. Defendant shall have the option to buy out the Plaintiff's share of the Kuwadzana and Whitecliff properties within three months from the date of receipt the valuation reports or such longer time as the parties may agree in writing.



14. In the event that the parties fail to buy each other out within three months or such longer time as the parties may have agreed in writing, the properties shall be sold to the best advantage by an Estate agent appointed by the parties Legal Practitioners failing which one shall be appointed by the Registrar of the High Court.
15. The stock of Vee's Fashions Good morning (Pvt) Ltd shall be valued by a valuer appointed by the parties within thirty days of this order.
16. If the parties fail to agree on a valuer, one shall be appointed by the Registrar of the High Court from the list of valuers within seven days of such failure to agree.
17. Defendant is entitled to receive 25 % of the stock or the value thereof within thirty days of this order.
18. Each party shall bear its own costs.



*Zimudzi & Associates, Plaintiff's legal practitioners*  
*Madanhe Chigudugudze, legal practitioners*