

JEFFERSON GUTU  
versus  
ESTHER GUTU

HIGH COURT OF ZIMBABWE  
MUNANGATI-MANONGWA J  
HARARE, 21 November 2016, 28 February 2017 and 13 March 2017

### **Civil Trial**

*Ms E Chizengera*, for the plaintiff  
Defendant In Person

MUNANGATI-MANONGWA J: In this case, the parties being husband and wife agreed that the marriage of over 12 (twelve) years had to come to an end. No drama or acrimony which usually characterizes divorce matters was experienced. The parties solemnized their marriage under the Marriage Act [*Chapter 5:11*] on 23 June 2004. There is one minor child born of the marriage namely T (born on 21 February 2004).

At pre-trial conference stage parties had agreed that custody of the minor child was to be awarded to the defendant. The parties also agreed on distribution of the movable property except one item a Plasma Television. It was further agreed that the plaintiff is to pay school fees, buy uniforms twice a year and meet all school expenses until the minor child attains the age of 18 years. It is also common cause that parties have an A1 plot No. 37 in Banket. The following outstanding issues remained to be determined at trial:

1. What access rights are in the best interest of the minor child in regards to the plaintiff?
2. How much maintenance should the plaintiff pay for the minor child T.
3. Whether defendant is entitled to spousal maintenance and if so, what amount?
4. Whether the Plasma Tv is still available or not and if so how it should be shared.
5. Whether stand 676 Stoneridge is still in existence, if so.
6. Whether defendant is entitled to 50% share of the value of the stand.

The following facts are common cause:

The minor child goes to boarding school and the plaintiff the father is paying school fees and is supposed to pay for all related expenses as per the parties' agreement. The plaintiff is employed as a soldier and he staggers payments for the child's school fees, being unable to pay the full amount at once. He is currently paying \$25-00 per month maintenance for the child. The defendant is staying with relatives, and when the child returns from boarding school she joins the mother thereafter.

### Plaintiff's Case

The plaintiff gave evidence that he is struggling to meet the school fees obligation. It is out of love for his only child that he has put her in boarding school for her to get the best education. He is unable to pay the amount of \$80-00 per month which the defendant wants. He stated that he buys groceries for the child and produced receipts (exh 4) with amounts expended in May and September 2016 averaging \$20-00 per receipt. The plaintiff stated that the defendant must also play a role in looking after the child. He has the child on his medical aid hence his contribution is immense.

On the spousal maintenance, the plaintiff disputed that the defendant is entitled to maintenance on the basis that : she is young and able to work, at one time she used to go to South Africa to order items for resale, and in any case he simply cannot afford the amount claimed.

The plaintiff produced his payslips for September, October, November 2016 and February 2017 which show a gross monthly salary of \$596-00 before deductions. The net salary fluctuates between \$312-00 and \$288-00. He is repaying loans which include a loan for US\$3 000-00 he utilised to pay his legal practitioners although initially meant to develop the stand. The plaintiff gave evidence that the loans will be paid up by October 2017.

The plaintiff wants access to the minor child for a period of two weeks during the school holidays. He argues that he wants to bond with the child and since the child is in boarding school, it is only during holidays that he can enjoy time with his child. It was put to plaintiff during cross-examination that he is impatient with the child and abuses the child which allegation was vehemently denied by the plaintiff. The defendant raised a further issue that for nearly the whole

of last year the plaintiff did not visit the child at school which shows he has no interest in the child. The plaintiff explained that he was going through courses and hence he could not manage to visit.

The issue of the plasma television fell on the wayside as the defendant later advised that she was no longer pursuing the issue.

Regarding the immovable property, the plaintiff gave evidence that he was in the process of buying stand No. 676 Stoneridge by way of instalments up till February 2015. He then discontinued the scheme at the end of February 2015 as he could no longer afford to pay the instalment. He ceded his rights to one Shylet Gutu a niece. An affidavit to that effect was produced as exh 2. The plaintiff stated that by the time he ceased contributing he had paid up to \$1 580-00. Conceding that the stand was acquired during the subsistence of the marriage and that the defendant contributed indirectly he offered the defendant 35 % of the amount paid as contribution. Suffice to say the offer was not accepted by the defendant as she insisted on 50 % contributions.

Although the plaintiff acknowledged the existence of plot 37 in Banket and conceded that he has an offer letter he insisted that the plot may be recalled as it is not productive and he urged the court not to put much consideration into it *viz* the sharing of assets. He insisted there is no development on the plot although this was denied by the defendant who indicated there is one room and farming was being carried on.

#### Defendant's Case

The defendant gave evidence that the \$25-00 plaintiff is paying is insufficient. The child is visited at school every month and the plaintiff is not providing bus fare and the plaintiff only bought groceries for the child at the beginning of term. She has had to fend for the child in difficult conditions. It was her evidence that she needs to buy the child clothing and requires \$10-00 a month for that, the child needs food for \$80-00, also attends extra lessons at \$40-00 per holiday which works out to \$10-00 a month.

Regarding maintenance for herself, she stated that she is of poor health and can no longer travel to South Africa as she used to do, that she once got a job that paid on commission and she failed to meet expectations due to ill health. That plaintiff had removed her from his medical aid made her situation even dire. She needs to be assisted by \$100-00 as she needs to house herself and the minor child and at the same time pay for her medical bills. The defendant objected to the

plaintiff having a longer access period with the child on the basis that he does not treat the child well. The child has had to run to neighbours in the face of abuse so she alleges. She indicated that a shorter period is in the best interests of the child moreso when the father has not shown any interest to visit the child at school.

The defendant abandoned her claim for the TV. She insisted that she is entitled to 50% of the value of stand 676 Stoneridge. She basis her claim on the contribution she made in financially supporting the family through her trading in goods. It was her evidence that the stand still belonged to the plaintiff as she had made enquiries at UDICORP where it was confirmed that the plaintiff still appears as the owner. A membership card No. 010048 had been issued to the plaintiff and such information had been furnished to her by one Netsai Sakutemba. The informant had not given her any written document rather stating that such information could be provided to court upon request. She stated that the plaintiff could have the plot but it was fair for her to get 50% of the stand.

The law provides that a non-custodian parent has an inherent right to enjoy reasonable access to his or her child. However, any issue to do with a minor child has to be informed by the best interests of the child. The learned author I D Schafer in *The Law of Access to Children* aptly stated as follows:

“When a court is called upon to resolve a disputed access case, it has to resort to two basic principles. The first and overriding principle which runs like a golden thread through the fabric of our whole law relating to children is that the interests of the children are paramount. The second principle is that reasonable access is subject to the custodian parent's right of control.”<sup>1</sup>

That the best interests of the child is the overriding principle is confirmed by the Guardianship of Minors Act [*Chapter 5:08*] and reiterated in the Constitution specifically s 81 ss 2 which provides:

“ A child’s best interests are paramount in every matter concerning the child”

That being so, any court faced with an issue pertaining to a child, is bound to assess the evidence before it and arrive at a conclusion based on what is in the best interests of the child concerned. In matters pertaining to access, where the child concerned is old enough the court is at liberty to also get to know the child’s attitude which though not decisive it together with other

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1.The Law of Access to Children p44

factors cumulatively assist the court in deciding what the best interests of the child are in the circumstances. I decided to interview the minor child T in chambers in the company of her deputy headmistress whom she was quite comfortable with. It emerged in the interview that when the minor child visits the father she spends most of the time alone in a seven roomed house. She does some chores and cooks lighter meals and awaits the father to cook the main meal. There is no maid or any person to interact with when the plaintiff is at work. Whilst the father reprimands the child, no issues of abuse surfaced during the interview.

However, his conditions are not very good for a 13 year old. To have a child alone behind closed doors for 2 (two) weeks is undesirable as she needs to interact. No arrangements or plans were presented to court by the plaintiff regarding supervision and care of the child. Her stay with the father needs not be miserable and bonding can only takes place if the father is around. I am not convinced that the father abuses the child. It is every parent's right to reprimand a child within acceptable limits which do not destroy a child's dignity or self-worthy. Nothing in my interview or in evidence led proved an extreme regarding the plaintiff's treatment of the child. It is in the best interests of the child that the plaintiff has custody for one week (7 days).

In *Kamuko v Mapiro & Another*<sup>2</sup> the court held that a party who is legally liable to maintain a minor child is expected to contribute to whatever maintenance according to his means. The court is enjoined to make a proper assessment and come up with a reasonable figure within the means of the responsible person the fact that the income itself is low not being a bar to an order being made. Evidence led shows that plaintiff earns a net salary of between \$288-00 and \$312-00. The loan obligations he has are not permanent and will cease thereby increasing his take home income. I find that an amount of \$25-00 which the plaintiff is paying as maintenance for the minor child is inadequate. This is because the child is visited at school every month and 50% of the amount goes to bus fare. The minor child needs clothing, food and shelter when she is not at school. The defendant has at the moment managed to provide accommodation by staying with a relative, thus temporarily taking away the burden of having to pay full rentals. I find that an amount of \$100-00 although justified is beyond the plaintiff's means given the obligations he is shouldering. The court has to look at the means and ability of the persons to pay. In balancing the child's needs and the

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<sup>2</sup> 2014 (2) ZLR 677(H)

ability of the parent to pay I find that \$45-00 per month is reasonable given the circumstances of the matter.

Whilst the plaintiff has sought to underplay the defendant's health, it is common cause this matter was delayed on about two occasions when the defendant had asthmatic attacks. She gave evidence of how an operation has incapacitated her as her reactions to weather changes make it impossible to work. Although she is 34 years old, she is unemployed and of ill health. The court cannot however lose sight of the fact that the cake to be shared is small. The plaintiff has taken up the burden of educating the child. His earnings cannot sustain a further burden of \$100-00, proper though the claim might be. A spousal maintenance award of \$20-00 per month for three years meets the justice of the case.

The sharing of the immovable property in this case has been made easy by the fact that the plaintiff is not disputing that the defendant is entitled to a share by virtue of her indirect contribution. Often the court has to bring litigants' attention to the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] which lays out the considerations to be taken into account in division of matrimonial assets. It is common cause that the plaintiff will retain plot No. 37 as agreed to by the parties, and is legally the holder of rights to that land given the offer letter he holds. Regard being made to that position, a share of 35% of the contributions made for stand 676 Stoneridge is in my view inadequate given that the plaintiff acknowledges the indirect contribution by the defendant and also the fact that the defendant is not sharing in Plot 37. Land remains an important and rare commodity in our economy. The defendant's loss can only be compensated by an increased share in stand 676 Stonebridge. I find that whilst the defendant could have stumbled on information which shows that the stand is in the plaintiff's name no documentary evidence has been placed before the court to prove same. Meanwhile the plaintiff furnished an affidavit sworn to in March 2015 showing alienation of the stand long before the institution of the divorce proceedings in 2016. I have no doubt that the stand is no longer in existence. A share of 45% of the sum of \$1 580-00 the amount paid for the stand would be equitable in the circumstances.

Accordingly the following order be and is hereby granted:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child T (born 21 February 2004) is awarded to the defendant.

- 2.1 The plaintiff shall have access to the said minor child during one week of every school holidays and on alternate public holidays.
3. Plaintiff shall pay maintenance for the minor child in the sum of \$45-00 per month. In addition plaintiff shall pay school fees, and meet all school expenses including buying uniforms twice a year as agreed to by the parties until the child attains 18 years or becomes self-supporting whichever occurs first.
4. The plaintiff shall pay defendant spousal maintenance in the sum of \$20-00 per month for three years or such amount as varied by a court order.
5. The plaintiff shall pay defendant 45% of the sum of \$1580-00 as her share of the contributions towards the purchase of stand 676 Stoneridge. Payment to be done within 90 days of this order.
6. No order as to costs

*Legal Directorate*, plaintiff's legal practitioners