

RUTENDO TANDI  
versus  
THERESA TANDI

HIGH COURT OF ZIMBABWE  
**TSANGA J**  
HARARE; 5 & 12 & 22 November 2024

### **Civil Trial**

Plaintiff in person  
*B M Machanzi*, for defendant

TSANGA J:

The parties herein married in 1999. The plaintiff, Rutendo Tandi, seeks divorce from the defendant, Theresa Tandi on the grounds of irretrievable down of their marriage. There are two children from the marriage both of whom have reached the age of majority. It is also common cause that the plaintiff is in agreement that the two immovable properties that are already in his wife's name should be retained by her. The parties are also agreed in general that household movables acquired during their marriage should go to the defendant save for contestation regarding two motor vehicles. The issues that brought the parties to trial were captured in their joint pre-trial minute before the judge who dealt with their matter as follow:

- i. Whether or not there is irretrievable break down of the marriage.
- ii. Whether or not Defendant is entitled to the two motor vehicles.
- iii. Whether or not the Plaintiff should pay post-divorce spousal maintenance to the Defendant. If so, what is the quantum thereof?
- iv. Whether or not the Plaintiff should contribute towards the Defendant's legal costs and at what rate.

In his evidence, the plaintiff stood by his position that what he wants is simply a divorce and maintained his standpoint on the immovable properties in defendant's name that she should have them. Under cross-examination, he told the court that the cars which she wants had been disposed of during the marriage and the proceeds used in the course of their marriage for both their benefit. The Toyota Corsa had been sold sometime in 2013-2014 whilst the Hilux had been sold sometime in 2020. He had obtained US\$2000.00 for the Corsa and US\$ 3000.00 for

the Toyota Hilux. There were therefore no vehicles to talk about. He highlighted that if indeed the vehicles had been sold without her consent then the defendant would have made a complaint to the police, which she did not.

As for spousal maintenance, he disputed that the defendant is entitled to any. His submissions was that she can look after herself. His response in cross examination was that the properties she gets to keep would cater for her needs. He stated that he on the other hand had been involved in an accident and sustained multiple fractures to his leg and has not been able to work. His stance was also that there was no need to contribute towards her divorce costs as it was the defendant's choice to engage a lawyer when there are really no disputes between them that could not be settled.

Defendant's evidence on the vehicles was that she had purchased the Toyota Corsa from the plaintiff in 2013 for US\$3000.00 after selling a Corolla vehicle that she had. The plaintiff had been working in South Africa at the time and had indicated his desire to sell the vehicle which she had then offered to buy from him. Regarding its eventual disposal, her evidence was that the defendant had merely advised her that he had replaced the vehicle with a tractor. She was unable to say whether any money had changed hands.

As for the Toyota Hilux, she said she had put down the bulk of the money for its purchase as she was part of a *stokvel* where members take turns in giving a member money. The plaintiff had only topped up with US\$ 600.00. This particular car had been sold in order to buy sewer pipes and a smaller car. According to her the sewer pipes had been bought for no more than US\$100. 00. She also later clarified to the court that indeed a lorry had been bought at some time and that the plaintiff currently owns a Vitz which she traced as emanating from the initial sale of the Hilux. She maintained that the plaintiff had promised to pay her which he never did and yet was now living off those proceeds with another wife. When asked how much she wanted to be paid she insisted that she does not want money but the two vehicles. When it was highlighted that these were no longer available she clarified that what she wants is the Toyota Vitz and the tractor which she deemed to have been acquired using the proceeds from the two vehicles.

Regarding maintenance, she justified this on account that she now suffers from hypertension and is no longer able to travel as frequently as she used to, to Tanzania to sustain herself as a cross border trader. She is 46 years and he is 49. She now goes there quarterly and makes a profit of approximately US\$ 500.00 from every such trip and this gives her an average income of US\$ 166.00 per month. In the joint pre-trial minute her claim for maintenance was

US\$ 100.00 per month but at the hearing she said she would like between US\$100- US\$200 a month. She disputed that she can be sustained by the two properties as she resides in the Budiriro property which has a three bedroomed cottage and the other property has only been developed up to roof level. She listed her expenses as follows:

Water purchase	US\$ 40.00
Gas	US\$ 35.00
food	US\$.200.00
Blood pressure meds	US\$ 50.00

She disputed that the plaintiff is not working given that he had purchased a new car and also pays rentals.

On contributions towards costs she wanted him to contribute half her costs as she had been forced to find a lawyer since the plaintiff was initially represented before he became a self-actor. In cross examination she admitted that money amounting to US 4800.00 that was refunded by a certain doctor following an unsuccessful sale to them of a stand had been paid to both of them although the plaintiff's position was that she had received all of it and used it to develop her stand.

The court sought clarification on how much money she was getting from him during the marriage in light of her claim for maintenance. She said he rarely gave her money and she bore the brunt of the house household expenses. Neither parties placed before this court direct evidence of earnings as self-employed people. He is a mechanic and also ploughs urban land using his tractor for hire.

### **Analysis**

With the plaintiff persisting in getting a divorce, the marriage has irretrievably broken down even if the defendant would want to stay married. The marriage has irretrievably broken down and case law is clear that the two characteristics of irretrievable breakdown are a) that the marriage relationship is not normal anymore and b) there is no reasonable prospect of the restoration of a normal marriage relationship. (See *Murada v Murada* HB 119-08. As stated in *Magaya v Magaya* HB 67-13 love cannot blossom if it is not reciprocated. The plaintiff has made it clear that he wants to move on and the circumstances do not lend themselves to a reconciliation. The court therefore finds that there is irretrievable break down and that the divorce ought to be granted.

Turning to the two motor vehicles that she says she is entitled to, it is accepted that the original vehicles were sold during the course of their marriage. This court is inclined to find in

favour of the plaintiff that the proceeds were ultimately used for the benefit of the family. It was not disputed that he bought a tractor and that he makes a living through ploughing fields for hire. This court also takes into account that no claim for sharing of property has been made by the plaintiff. The defendant mistakenly thinks that the plaintiff was not entitled to make any claim to the immovable properties because the properties were in her name though acquired during marriage. As expounded in *Gonye v Gonye* SC 15-09, what the court looks at in deciding what is fair upon divorce are the assets of the spouses. This includes assets owned individually and those that are jointly owned. He has simply forgone making any claim, leaving her to benefit without contestation. Under these circumstances, the claim for the surrender to her of vehicles that are currently in his possession lacks merit.

As for the maintenance claim, the criteria to be taken into account in a claim for maintenance at the time of divorce is set out in s 7 (4) of the Matrimonial Causes Act [*Chapter 5: 07*] and include 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;

In this instance the defendant is certainly the one walking away with assets acquired during their marriage. She has a roof over her head. He will have to seek accommodation or pay rentals. According to her own evidence she already bore the brunt of looking after the family during their marriage. One of the aims of the Matrimonial Causes Act is to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses. Nothing has changed. He has not suddenly won a lottery. She is 46 years old and is thus middle aged. She has largely worked for herself. She told the court that she commenced going to Tanzania in 2011 for cross border trading. He is 49 so they are more or less even when it comes to their age. The children are majors. If she had no source

of income at all and he was better off than her, I would say she would need rehabilitative maintenance. (See *Chiomba v Chiomba* 1992 (2) ZLR 197 (S C). In this case she has always had a source of income. As stated, neither of the parties who are self-employed placed proof of their earnings before the court but it is evident that she fends for herself. There is no justification for post-divorce maintenance under these circumstances. He cannot be punished simply for wanting a divorce which she does not want.

As regards the contribution towards costs in *Dube v Mavako Dube* 2006 (2) ZLR the requirements for a contribution towards costs were set out as follows:

- a) There must be a subsisting marriage
- b) The suit in question is a matrimonial one
- c) The applicant has reasonable prospect of success
- d) The applicant is not in a financial position to bring or defend the action as the case may be and
- e) The other spouse is able to provide the applicant with this contribution

The claim has been made in the context of a divorce claim. The plaintiff has not been successful in the issues referred to trial. The onus is also said to be on an applicant to show that he or she does not have the necessary means while the other spouse is able to make a contribution. The defendant has not shown that the plaintiff is able to contribute. He came to court as a self-actor. He was not making a claim for any property. It was her choice to seek to argue that the marriage has not broken down when love cannot be forced. It was also her choice to pursue cars which she knew were no longer in existence and to insist that what she wants are the present cars. This was a matter that could clearly have been settled.

In the circumstances this court makes the following order:

1. A decree of divorce be and is hereby granted.
2. The defendant shall retain immovable property being stand 14081 Budiro and Stand 1155 Tushasha Homestead Msasa which are already registered in her name.
3. There shall be no order for spousal maintenance.
4. Each party shall pay their own costs.

*Marowa Machanzi Attorneys*, defendant's legal practitioners,