

LIBERTY MATIZA
versus
CROGINESS MATIZA (NEE JUDAH)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE; 17 March 2025 & 9 May 2025

Civil Trial

N Chengeta, for the Plaintiff
P Muchada, for the Defendant

MAXWELL J:

BACKGROUND

The Plaintiff and the Defendant married each other customarily before they upgraded their union into a civil marriage. The parties married each other on 26 February 2019 in terms of the then Marriage Act [*Chapter 5:11*], now the Marriages Act [*Chapter 5:15*]. The marriage was blessed with one child, Lee Mufaro Matiza (born on 24 April 2024). On 6 March 2024, the Plaintiff sued out summons for divorce and ancillary relief. He stated in his declaration that the relationship between the parties has irretrievably broken down to such an extent that there are no prospects of restoration of a normal marriage relationship between the parties. He prayed that custody of the minor child be granted to the Defendant, with the Plaintiff having reasonable access every school holiday. He also prayed for an order that the Defendant pay maintenance as per maintenance order M08/21 for the upkeep of the child until the child reaches eighteen years of age or becomes self-supporting, whichever comes first. The Plaintiff stated that during the subsistence of the marriage, the parties did not acquire any immovable assets but movable property only. He proposed that all the matrimonial property be awarded to the Defendant.

The Defendant filed her notice of entry of appearance to defend. In her plea, she stated that the Plaintiff should be awarded access to the minor child every last weekend of the month and every last week of the school holidays. She asserted that it is unfair for her to pay maintenance for the child since she is currently staying with the child. She proposed that the Plaintiff should pay towards the upkeep and maintenance of the minor child until he attains the age of eighteen or becomes self-supporting. She pointed out that her personal belongings

acquired before she was married are with the Plaintiff. She proposed that the Plaintiff should return a wardrobe, bed, 2 plate stove, kitchen utensils, blankets and fifty percent of four thousand one hundred and seventy dollars (US\$ 4,170.00).

In his replication, the Plaintiff insisted on having access to the minor child every school holiday and paying maintenance for the child as per the maintenance order M08/21 granted by Bindura Magistrates Court. He stated that when he moved out, he only carried a satchel with his clothes, hence he denied being in possession of the movable assets listed by the Defendant. He pointed out that there was never at any point during the subsistence of the marriage where the parties had savings of US\$ 4,170.00.

Joint Pre-Trial Conference

A Joint Pre-Trial Conference was held. The parties agreed on the following issues:

1. The Plaintiff to have access to the child every second week of each school holiday
2. Plaintiff to pay school fees and buy school uniforms on top of the US\$ 50 he is paying as maintenance
3. The movable property acquired during the subsistence of the marriage be taken by the Defendant
4. Defendant shall get the movables she left at Plaintiff's parents' place

The parties agreed to refer the following issues to trial:

1. Whether or not the Plaintiff took US\$4000.00 upon separation
2. Whether or not the Defendant is entitled to a half share of the US\$ 4000.00

TRIAL

The Plaintiff was the first to testify. His evidence was that he never took any money from their home, and they did not have such savings in their house. He stated that the issue of the money was only raised after he instituted the present divorce proceedings. He denied taking any money from the house on the day he left. Under cross-examination, the Plaintiff admitted that they were engaged in what is commonly referred to as "Mukando" with three of his friends. He explained that the money from this Mukando was used to buy household goods. He also confirmed that the Defendant was transferring money to people and not the other way round.

The Plaintiff disputed the allegation by the Defendant that he refused to go to the Chaplain. He stated that he refused to go to Chief Kandeya's court since that Chief is related to the Defendant and he was not told why they wanted him there. The Plaintiff pointed out that he was called by some people who claimed to be from Ministry of Women Affairs. He further stated that he never bought a car and did not own one.

The Defendant's testimony was that when the Plaintiff left the matrimonial home, that is when she realised that the money was missing. She tried to call the Plaintiff; it was impossible to get through to the Plaintiff because his phone was ringing in the bathroom. She confronted the Plaintiff when she returned home after three days, he told her that he had used the money.

It was the Defendant's testimony that the first office she approached was the office of the Chaplain of the police force. The Defendant was summoned three times by the Chaplain but he did not show up. She further stated that the Plaintiff was also summoned to appear at Chief Kandeya's Community Court, but he did not show up again. Judgment was given in default. The Defendant pointed out that she approached the Ministry of Women's Affairs in Mt Darwin, trying to get assistance concerning the money, but it was not fruitful as the Defendant refused to go there again.

The Defendant testified that soon after the Plaintiff left the matrimonial home, he bought a car. She believed that the Plaintiff used the US\$ 4000.00 to purchase the motor vehicle, which she said he is driving to date. She averred that the motor vehicle is still registered in the seller's name because the Plaintiff wanted to conceal the evidence that he bought a motor vehicle with the money he took from the house.

ANALYSIS

Defendant, in her plea, claimed that Plaintiff should return 50% of US\$4170.00, which she alleged Plaintiff took on leaving the matrimonial home. In the Round Table Conference minutes, the amount is stated as US\$4000.00, which is said to be the only issue to be determined by the court. The Joint Pre-Trial Conference Minute also has the issue of whether or not Plaintiff took US\$4000.00 on separation and whether or not Defendant is entitled to 50% of the said amount. The Defendant sought an order against the Plaintiff in circumstances where she did not utilise the provisions of Rule 38 of Statutory Instrument 202 of 2021. She cannot obtain an order against the Plaintiff without instituting a counterclaim. In any event, even if she had counterclaimed, she had no prospects of success. In civil cases, the standard of proof is none other than proof on a balance of probability. In normal circumstances, the Plaintiff has

to prove its case on a balance of probability. In the present matter, the onus shifts from the Plaintiff to the Defendant because the Defendant is the one who is alleging that the Plaintiff took the money. In the case of *Lewenod Enterprises (Pvt) Ltd v Freight Africa Logistics* HH653/15, the court reiterated that:

“The standard of proof in civil proceedings is proof on a balance of probabilities. What this brings to mind is a mental picture of the scales of justice, the embodiment of the underlying principle that underpins the justice system. It entails a balancing of the Plaintiff’s claim against the Defendant’s defence. It necessitates a decision of which of their versions of events is more likely to be true. In other words which version is more believable, or most likely to have transpired, than the other? It is my view that the preponderance of probabilities is an exercise which involves an evaluation and an assessment of the likelihood of the Plaintiff’s version being the correct one as opposed to the Defendant’s, or vice versa. In making this determination we look at the pleadings, at the documentary evidence, at what the parties’ representatives said and did when they were in the witness stand, and finally at what the law says in light of the evidence that we will have accepted. Then we determine what ought to be done in order to do justice between the parties.”

In the case of *Zimbabwe Electricity Supply Authority v Dera* 1998 (1) ZLR 500 (SC), the court said that:

“... in a civil case the standard of proof is never anything other than proof on the balance of probabilities. The reason for the difference in onus between civil and criminal cases is that in the former the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims. In a criminal matter, on the other hand, the trial is an attack by the State, representing society, on the integrity of an individual. The main concern is to do justice to the accused. If the prosecution fails, the State does not lose”.

In *Zimbabwe Electricity Supply Authority v Dera* supra the court said the following on the issue of proof in civil case:

"The degree of proof required by the civil standard is easier to express in words than the criminal standard because it involves a comparative rather than a quantitative test. The civil standard has been formulated by Lord Denning as follows:

"It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not".

The Defendant was supposed to approach a local Chief to whom she is subject. She chose to approach Chief Kandeya’s Court, which has no jurisdiction over both parties, thus the judgment of Chief Kandeya was not binding on the Plaintiff. In addition, it was not proper for the Defendant to approach Chief Kandeya’s Court since the Plaintiff stated that they are related, which would lead to an apprehension of bias and a miscarriage of justice. Though under cross-examination, Plaintiff admitted that they were engaged in what is commonly referred to as Mukando, he explained that the money from this Mukando was used to buy household goods.

The Plaintiff submitted that the money issue was only raised after he instituted divorce proceedings.

The Defendant's action of approaching Chief Kandeya raised a lot of questions. Why would she go to a faraway court, by-passing a court within the area she resided in? Plaintiff was justified in concluding that he would not have a fair hearing. In any event, it was not proved to the court what issue was referred to Chief Kandeya to determine. There was no summon from the chief's court or any other evidence to that effect. The Defendant also failed to produce a judgment from Chief Kandeya's Court to help this court in ascertaining whether or not the issue of US\$4000.00 was ever raised before that court. The Defendant's mere assertion that she approached Chief Kandeya in Mt Darwin with the issue of the money was not substantiated.

The Defendant stated in passing that she approached the Ministry of Women's Affairs but did not call even a single witness to support her claim. No one from the Ministry of Women Affairs was called to confirm that Defendant once approached them with the issue. Government departments keep records. In *casu* there was no letter or memorandum addressed to Plaintiff, let alone even to the Defendant herself acknowledging that they are seized with her matter. In the absence of all that, there is no basis for the court to believe that the people who were calling Plaintiff were genuinely from the Ministry of Women's Affairs. The Defendant could not even give the name of an official from the said Ministry who handled her case. I find that the Defendant was not being truthful. No tangible evidence was presented on that issue.

The Defendant alleged that the Plaintiff bought a car from someone. She claimed knowledge of the seller's address and that she went to the Central Vehicle Registry to ascertain the details of the car. She, however, could not produce an agreement of sale or any other evidence from the alleged seller to support her allegation. Her case falls on its back as there is no basis to suggest that the Plaintiff bought any vehicle. There was no evidence that the Plaintiff moved out with the sum of US\$4000.00. The evidence by the Defendant shows that the parties indeed at some point raised the amount of US\$4000.00, but they used it together. The Defendant is now raising allegations that the Plaintiff took the money as a way to counter the divorce instituted by the Plaintiff.

It is trite that

“The basic principle at law is that he who alleges must prove.”

See *Bonnyvies Estate (Pvt) Ltd v Zimbabwe Platinum Mine (Pvt) Ltd & Anor* CCZ 6 of 2019 in which MALABA CJ stated that where an affirmative assertion of a fact is not self-evident, he

who asserts has an obligation to prove the same. The Defendant had the obligation to prove that the Plaintiff took the money when he left the matrimonial home, that the issue of the money was raised before Chief Kandeya's Court and the Ministry of Women's Affairs and that Plaintiff bought a motor vehicle with that money. She did not discharge that onus and as such her claim fails. The evidence before the court is inadequate, and insufficient, to tilt the probabilities in the Defendant's favor.

DISPOSITION

1. A decree of divorce be and is hereby granted
2. The Defendant be and is hereby awarded custody of the minor child namely Lee Mufaro Matiza born on 19 April 2019, with the Plaintiff exercising reasonable access to the minor child during school holidays.
3. Plaintiff is to continue paying maintenance for the child as per the maintenance order M08/21 granted by Bindura Magistrates Court.
4. Each party bears its own costs.



Kajokoto and Company, Plaintiff's legal Practitioners
Legal Aid Directorate, Defendant's legal Practitioners