

IN THE SUBORDINATE COURT OF THE FIRST

2016/CRMP/LCA/294

CLASS FOR THE LUSAKA DISTRICT

HOLDEN AT LUSAKA

(Divorce Jurisdiction)

BETWEEN:

**MONDE SUSAN NYAMBE
AND
MWANGALA LUBINDA**

PLAINTIFF

DEFENDANT

**Before the Hon. Magistrate Mr. Humphrey Matuta Chitalu, in open court
at 09:00 hours this 21st day of September, 2017.**

For the Appellant: Ms. B. Musukwa from National Legal Aid Clinic for Women

For the Defendant: In Person

JUDGMENT

LEGISLATION REFERRED TO:

- 1. Local Court Act, Cap 29 of the Laws of Zambia, ss: 35, 56, 58**
- 2. Partnership Act, 1890, s, 1**

CASES REFERRED:

- 1. Rosemary Chibwe v. Austin Chibwe SCZ Judgment No. 38 of 2000**
- 2. White v. White (2001) 1 All ER 827**

This matter was commenced by way of an appeal from the local court. On the 22nd September, 2015 the appellant sued the respondent in the Chilenje local court for divorce on the ground of adultery. I will maintain the parties in this

matter as they appeared in the court below. The appellant and respondent shall herein be referred to as plaintiff and defendant respectively.

The local court on the 24th June, 2016 dissolved the customary marriage. At the conclusion of the matter, the local court made the following pronouncements:-

1. Divorce granted;
2. Defendant to compensate the plaintiff with K6,000 with an initial payment of K1,500 at the monthend of July and thereafter K500 every month; and
3. All properties acquired together during marriage to be shared equally.

The Plaintiff aggrieved by the decision of the lower court appeals to this court in accordance with section 56 of the Local Court Act, Chapter 29 of the Laws of Zambia. The grounds of appeal advanced by the plaintiff are as follows:

1. The trial court erred in law and fact when it ordered that the defendant to compensate her with K17, 000 payable monthend of September, 2016. That the court did not consider the 12 years the parties had lived together;
2. That the court did not give the parties an opportunity to value the car;
3. That the court erred in law and fact by not considering the fact that the plaintiff also contributed K25, 000 towards mortgage redemption;
4. The plaintiff prayed that this court must increase the compensation; and
5. That the plaintiff must also benefit from the shares of the company/business which was started by the couple during the marriage.

This appeal from the local court is dealt with by way of rehearing the matter *de novo* in accordance with section 58 of the Local Court Act, Chapter 29 of the Laws of Zambia.

In civil matters the plaintiff bears the burden of proving her claim on the balance of probabilities.

The plaintiff, PW1 gave evidence on oath and she called no witnesses. According to the plaintiff the K6,000 compensation that was awarded by the court below was inadequate considering the 12 years the parties had been married.

It was contended that during the subsistence of the marriage the parties started a business and had a good life. It was asserted that the plaintiff currently has no financial means but that she is depending on a sister for financial support.

That the plaintiff's needs per month are as follows: rent between K1, 500 and K2,000; K1,500 for food; K200 electricity; K200 water; and K2,000 for health care. The plaintiff further asserted that the defendant is a business man who makes an estimated monthly profits or income of K50, 000. The plaintiff submitted that the defendant lives in his own house as such he does not pay rent. That on average the defendant spends K2, 000 on food, K800 school fees per year for his school going children. It was submitted that the children are in day schools and walk to their schools located within the vicinity of the residential area. The plaintiff argued that she was not aware of any defendant's obligations.

It was submitted that during the marriage the couple acquired the following property namely Nissan premier, a shop situate in Mongu in the Western Province of Zambia on a land where a three roomed structure is also built. That the couple also had a furniture and electronic business in the name of Trymore Enterprises which is registered with Patents and Companies Registration Agency (PACRA). The PACRA receipt was produced into evidence as Exhibit MSN1. According to the plaintiff she contributed towards the formation of the business in that she got K25, 000 loan from a lending firm called Pulse. That the money was invested into the business. The loan application form was produced into evidence as Exhibit MSN2. It was submitted that the couple had various household goods mentioned on the record. That after the dissolution of

the marriage the plaintiff did not get anything. The plaintiff prayed to this court to be given a fair share of the business and an equal share of the household goods and the car. That the plaintiff also want to benefit from from the shop the couple built together.

In cross examination the plaintiff stated that at the time of the marriage the defendant was already running a wholesale and retail business. It was submitted that the plaintiff became a business partner when she contributed K25, 000. According to the plaintiff the business under the name and style of Trymore Enterprises was started by the couple in 2011. It was submitted that there was no document to support the claim that the plaintiff is a business partner. It was further submitted that an examination of Exhibit MSN1 will show that only the defendant appears as a proprietor of the business. The plaintiff further stated that the couple never shared the profits of the business. The plaintiff asserted that the loan was acquired by her in 2012. That the amount was used to revive the business which was going down. It was stated that defendant was servicing another loan and that the business was not profitable. That the plaintiff got a loan to recapitalize the business. The plaintiff asserted that she used the defendant's collateral to acquire a loan.

It was stated that Trymore Shop which was located in Kamwala, Lusaka was closed in 2012 but that the business was relocated Dorafa House opposite Kabendekela House. It was submitted that the plaintiff had no evidence to show that Trymore Enterprises was still in existence.

According to the plaintiff she presumed the defendant earns K50, 000 considering his customers. It was submitted that the plaintiff had no evidence to show proof that the business makes a profit of K50, 000.

The plaintiff submitted that she was not able to tell how the shop was purchased as the defendant keeps all the documents. That there was no proof that the shop was bought by the couple. It was asserted that the defendant had a mortgage running which he only redeemed with the plaintiff's loan.

The first defence witness DW1, was the defendant himself. DW1 gave evidence on oath and he called no witnesses. According to the defendant he married the plaintiff in accordance with Lozi customary law.

It was submitted that before he married the plaintiff the defendant was a business man. It was asserted that from 1997 up until 2002, the defendant had been operating under a business name called Nakasheki Trading. The registration certificate from PACRA for the business name was produced as Exhibit ML7. The defendant produced into evidence a registration receipt from PACRA and a receipt from Zambia Revenue Authority (ZRA) as Exhibits ML1 and ML2 respectively. It was contended that it was through this business that the defendant managed to buy a shop in 2002 from Dominic Mubiana. That the plaintiff completed paying for the shop in 2003. It was stated that the defendant married the plaintiff in 2004. It was contended, as such the plaintiff cannot claim ownership of the shop. The defendant produced into evidence a letter of sale of the shop situate on Plot 1553 Independence Avenue in Mongu, in the Western Province of Zambia as Exhibit ML3. It was submitted that by 2009, the business in Mongu was not favourable that the defendant opened another business registered at PACRA in the name of Trymore Enterprises which started operating in Lusaka. The registration certificate for the business from PACRA was produced as Exhibit ML4.

It was submitted that the business premises were located in Kamwala Shopping Center along Karachi street. It was contended that the documents will show that the defendant was a sole trader and not in partnership with any person. That the defendant did not share any business interest with the plaintiff. It was asserted that by 2012 Trymore Enterprises was dealing in electronic goods but was closed due to the fact that the defendant was swindled. That ZRA was notified of the closure of the business and that the defendant was issued with a closure certificate. The certificate was produced into evidence as Exhibit ML5.

It was contended that Exhibit ML5 will show that the business was closed and not shifted as suggested by the plaintiff. That after the closure of the business the defendant decided to get a loan from Pulse Financial Services as an old client. According to the defendant he was advised that he could not be given the loan under his names but could be allowed to use property under his names as collateral. That the defendant was given an option to suggest to Pulse the name of another person he could use to get the loan. That the defendant trusted his wife and used her to obtain a loan. It was asserted that the purpose of the loan was pay off or clear all outstanding obligations of the closed business in the name of Trymore Enterprises. That the amount of the loan obtained was K25, 000. The loan agreement was produced into evidence as Exhibit ML6. It was contended that the defendant met all the conditions and obligations of the plaintiff under the loan agreement. That the defendant's Toyota Hilux was submitted as collateral. That the only money the plaintiff contributed towards acquisition of the loan was K2,000. That there was a requirement to pay K5,000 before the loan could be acquired. That the defendant contributed K3,000 towards the K5,000. It was asserted that in fact the defendant borrowed the K2,000 the wife purportedly contributed which he later paid her back. It was further submitted that the defendant got the K2, 000 from her sister.

According to the defendant after the closure of Trymore Enterprises he used his expertise and entered into agency with a Chinese national one Zen Lee. It was submitted that the plaintiff would operate on commission basis at rate of 2 percentum for every product he sold on behalf of Zen Lee. The defendant submitted he was engaged in selling of electrical and furniture goods. It was argued that the defendant operates from Dorifer House contrary to the plaintiff's assertion that Trymore Enterprises was still running. To that effect the defendant produced into evidence the agency contract he signed with the said Zen Lee. According to the defendant his clients makes orders and he supplies the goods. It was contended that the defendant does not make

monthly profits or income of K50, 000. That the defendant's income depend on the business. It was stated that if the business is good the defendant would make K3,000 and that after expenses are deducted he earns K500. It was contended that sales cannot be taken to be profits or income. That the plaintiff is a teacher by profession and not a business lady. That the defendant took the plaintiff to school where she obtained a diploma in Secondary School Teaching.

The defendant submitted that the plaintiff is a beneficiary to an estate of her late father one Nyambe Mombola. That the deceased left a 10 bedroomed house and another house on rent. That the deceased also left shops along Independence avenue at Mongu town centre. It was contended that the administrator of the estate is the elder sister.

It was contended that the defendant did not contribute anything towards the business. That the only property acquired during the marriage is non-runner car. That the value of the car was estimated at K12, 000.

It was submitted taht it was very difficult for the defendant to maintain the plaintiff as he did not have a regular income. That the defendant has responsibilities of paying school fees for his children and dependants.

In cross examination it was submitted that the defendant pays tuition fees for Lubinda Lubinda at UNZA. That he pays K3, 500 per term for the said Lubinda Lubinda who is on 50% government bursary. It was stated that the defendant did not give evidence to proof the claim. It was further indicated that the defendant was unable to tell how much the plaintiff was getting from the estate. That Trymore Enterprises was closed early in 2012 and has never opened to date. It was submitted that ML6 was payment statement. That the defendant's car was used as collateral. The defendant submitted that it was sufficient contribution on the part of the plaintiff by getting a loan. That the plaintiff would stay home when he was out for business.

Having considered all the evidence I now state my findings of fact. I am quite satisfied that the parties were married in April, 2004 in accordance with Lozi customary law. The parties cohabited at unknown address in Mongu in the Western Province of Zambia. There were no children born during the 12 years marriage but that there are now living two children born to defendant before the marriage namely Mwangala Lubinda, aged 16 years in grade 9 at Libala High School and Lubinda Lubinda aged 12 years in grade 7 at Libala Primary School. The defendant is currently keeping four dependants namely Chuma Mutelo aged unknown in grade 10 at Chilenje High School; Charity Kalaluka aged unknown in grade 10 at Chilenje High School; James Kalaluka aged 20 years in grade 12 at Arakan Barracks High School and Lubinda Lubinda aged 22 years years in second year at the University of Zambia in the faculty of engineering.

The local court found as fact that the plaintiff was using charms on the defendant causing marital disputes that culminated into a divorce. The divorce was not contested by either party in this court. The matter before this court was not presented around the grounds of appeal. However, it would appear from the facts on record that the only issues for determination are:

1. Maintenance of divorced spouse; and
2. Property adjustment.

On the aspect of property adjustment the plaintiff contended that after the marriage she has not had a share of the household goods that were tabulated on the record before this court. The defendant did not dispute that fact. Further it is not in dispute that a motor vehicle namely Nissan premier, a non runner valued at K12, 000 was acquired during marriage. The dispute is largely about the shop or plot number 1553 situate along Independence road in Mongu in the Western Province of Zambia. The plaintiff contended that the same was built during the marriage. The defendant produced documentary

evidence, Exhibit ML3 showing that the shop was bought by the defendant in 2002. The parties were married in April, 2004.

The other issue relating to property settlement is that the plaintiff is asking this court to grant her a fair share of the business shares or interest in Trymore Enterprises. The defendant contended that Trymore Enterprises was closed or is no longer in existence. To that effect ZRA closure certificate was produced into evidence as Exhibit ML5. Exhibit MSN1 shows that only the defendant appears as a proprietor of the business. The plaintiff in cross examination stated that the couple never shared the profits of the business. These are the facts in brief.

In deciding the issue of the maintenance of divorced spouse (plaintiff), I am guided by the provisions of **section 35(1)(d) of the Local Court Act, Chapter 29 of the Laws of Zambia** which reads as follows:

“S.35(1) Subject to the provisions of this Act or of any other written law, and to the limitations imposed by its court warrant, a local court, in cases of a civil nature, may-

(d) make an order for the payment of such monthly sum for the maintenance of a divorced spouse as the court may consider just and reasonable having regard to the means and circumstances of the parties for a period not exceeding three years from the date of divorce or until re-marriage whichever is the earlier.”

Whether the K6, 000 ordered by the local court towards the maintenance of the divorced spouse is sufficient, is a question of the means and circumstances of the parties. In the case of **White v. White** (2001) 1 All ER 827, it was held that:

“In considering maintenance in divorce cases the court should not look at or treat the parties’ reasonable requirements as a determining factor.”

In the same case it was said that the available financial resources is what court must consider. The number of years the parties have been married and lived together during wedlock is not a factor for consideration of the question of maintenance. I have carefully examined the defendant's means. He is a business man whose income is not ascertained but depends on the performance of the business. He is also a family man with a huge responsibility of supporting his two children and four dependants who are all school going children. However, the maintenance or compensation ordered by the local court is quite unreasonable. In my view the defendant shall maintain or compensate the plaintiff with K15, 000 which shall be paid in 6 equal monthly instalments of K2, 500 beginning on the 30th day of October, 2017. As such grounds of appeal number 1 and 4 have succeeded.

I now come to the last issue of property adjustment. It is not in dispute that a Nissan premier, non-runner valued at K12, 000 was acquired during the marriage. However, it is very clear from documentary evidence, Exhibit ML3 that the shop situated at plot number 1553 along Independence road in Mongu in Western Province of Zambia was acquired by the defendant in 2002 before the marriage.

The Supreme Court has been very clear on what type of properties are ordinarily subject of property adjustment after the dissolution of marriage. In the case of ***Rosemary Chibwe v Austin Chibwe SCZ Judgment No. 38 of 2000*** in which case the Supreme Court, *inter alia* stated:

“What was the issue before the High Court and us was the percentage of sharing the family assets. Family assets have been definedas items acquired by one or the other or both parties married with the intention that these should be continuing provision for them and the children during their joint lives and should be for the use for the benefit of the family as a whole. Family assets include those capital assets such as

matrimonial home, furniture, and income generating assets such as commercial properties.”

I have carefully considered the issue of property adjustment before me. When the issue of settlement of property arises, the court is obliged, among other things, to have regard to all the circumstances of the case and so exercise its powers as to place the parties, so far as it is practicable and having regard to their conduct in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities toward the other. The local court held:

“All properties and household goods acquired together whilst in marriage to be shared equally.”

I honestly do not see any reason why this issue should now be controverted in this appeal. For the avoidance of any doubts, all the household goods including a motor vehicle namely Nissan premier valued at K12, 000 acquired during the marriage must be shared equally between the parties. Therefore, ground of appeal number 2 has succeeded. The shop was bought by the defendant before the marriage as such not subject to property adjustment.

On ground of appeal number 5, that the plaintiff must also benefit from the shares of the company/business which was started by the couple during the marriage. I have carefully considered the alleged business association. Trymore Enterprises was registered under the Registration of Business Names Act, Chapter 389 of the Laws of Zambia. According to exhibit MSN1 the registered sole proprietor of the business is the defendant. I am mindful of the legal nature of shares, that they are property. However, the type of business association under consideration is a sole proprietorship. There are no shares under this type of business and no distinction exist between the business and its owner. The plaintiff asserted that she was a business partner with the defendant. There is one crucial fact, the couple never shared any profits of the business registered as Trymore Enterprises. The ***English Partnership Act***,

1890 which is law in Zambia defines the word, “**partnership**” under **section 1** in the following terms:

“S1 (1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.”

From the clear wording of section 1, the receipt by a person of a share of the profits of a business is *prima facie* evidence that he/she is a partner in the business. As the couple never shared profits of the entity named Trymore Enterprises, they were not business partners. Furthermore, the sole proprietorship has since closed down and by its nature, there are/were no shares to be adjusted between the former wife and husband.

I have considered, the submissions of the plaintiff that in 2012 she obtained a loan from Pulse Financial Services in the sum of K25, 000 to recapitalize the business. It is not in dispute that she used the defendant’s motor vehicle namely Toyota Hilux as collateral. The defendant’s story that he met all the conditions and obligations of the plaintiff under the loan agreement was not challenged or contradicted. As such, ground of appeal number 5 has failed.

I do not order any costs.

Delivered in open court this 21st day of September, 2017.


HUMPHREY MATUTA CHITALU

RESIDENT MAGISTRATE

