

FRANCIS MANGWENDEZA

Versus

LIZZY MANGWENDEZA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 24 JULY 2006 AND 5 APRIL 2007

K I Phulu, for the plaintiff
J Tshuma, for the defendant

Trial Cause

NDOU J: The parties were married out of community of property in accordance with the laws of Zimbabwe, on 23 February 1991, and the said marriage still subsists. Prior to the civil marriage, the parties had been married to each other under customary law and started living together in 1987. There are two children born of the marriage, namely, T., now a major born 25 February 1988, and T.M., a minor, born [day/month] 1991. T. was doing his “A” levels at C.B.C. at time of trial in 2006 and T.M. was a boarder at M.C.C.. The parties agreed that in addition to paying school fees, buying school uniforms and providing for all school activities including extra curricula activities, the plaintiff will pay a sum of \$10 000 00,00 per month being contribution for T. for his transport to school.

The contested issues are the following. First, whether or not plaintiff should contribute any amount in addition to the school fees, school uniforms and all school expenses including extra curricula activities, in the case of T.M., if so, how much.

Second, how the movable assets of the parties should be divided. Third, how the immovable assets of the parties should be divided. Fourth, whether or not the assets of Adjustable Potty Products (Pvt) Ltd in which the defendant is a shareholder

were absorbed by Asphalt Products (Pvt) Ltd. If the above contention is correct, whether as consequences thereof, the defendant is entitled to compensation. The first and only witness for the plaintiff is the plaintiff himself:

Francis Muvirimi Mangwendeza

He testified that the parties started living together in 1987 and solemnised a civil marriage in 1991. He said that the cause of the marriage breakdown was family tensions. There was absence of communications and frequent fights as early far back as 1997. The marriage was finally irretrievably broken down in May 2000. Initially he would spend nights away from the matrimonial home as a consequence of the fights. Eventually, he moved out of the matrimonial home completely to stay with another woman in May 2000. He said he had planned this move in 1999. It is beyond dispute that thereafter he started nurturing an adulterous relationship with another woman, i.e the woman he is currently staying with. He said that the matrimonial assets were acquired after hard work by both parties over the years with him being a major breadwinner. He said that although he already took the tools and equipment he felt that he should get more movable assets currently in the matrimonial home, if one still call it that, as claimed in his plea to the defendant's counter claim. He said he had already collected a refrigerator and a DStv decoder. He said the latter was not in working condition. As regards the acquisition of the matrimonial property being stand number 120 Iona Road, {120 Marvel according to Bulawayo City Council records} Killarney, Bulawayo ["the Killarney property"] he said it is registered in their joint names. He said he bought the land in question in 1989 from the Bulawayo City Council. The parties then subsequently improved the stand by the erection of a house thereon. He said this was done with the funding provided to the defendant by her employer Beverley Building Society who registered mortgage bond as security for the loan. The payment of the bond was partly granted to the defendant as staff benefit and the other part through salary deductions from her. He said initially her salary could not cover the entire bond repayment so he had to subsidise such repayment. The defendant subsequently took over the repayments of the bond until it was paid off. He said he wants the Killarney property to be preserved for the children or transferred into their names. As far as the maintenance of their children is concerned he said he was solely responsible for the payment of their school fees and allied expenses. Still on the Killarney property, he said the best case scenario is for the property

to be jointly owned by the parties to safeguard the future of their children. He said he jointly owned another property with the other woman at Willsgrove. In fact that is where he was resident at the time of the trial. He bought the Willsgrove property towards the end of 2004. On the history of the acquisition of the Willsgrove property he said initially in 2000 around January to February he took out a loan and bought a property in Romney Park. He was no longer living in Killarney when the loan was finally paid up. He said he sought a loan from Asphalt Products Company in anticipation of his moving out of the matrimonial home. When he applied for the loan he said he indicated that it was for alternative accommodation. What comes out from testimony is that he applied for and was granted the loan when he was still residing in the matrimonial home. He had not disclosed his intention to move out of the matrimonial home to the defendant. He purchased this so-called alternative house when he was still resident in the matrimonial home with the defendant and the children. He said in March 2000 he registered this alternative house in joint names i.e. of himself and his girlfriend. He said the defendant did not contribute anything towards this Romney Park property. He did not say what his girlfriend contributed to

deserve the joint registration. He conceded that he did not consult the defendant when he bought the Romney Park property notwithstanding the fact they were still living together as husband and wife. He also furnished the Romney Park property in 2000. At the time of the purchase, his girlfriend was expecting their child having conceived in 1999. He said they sold the Romney Park property and using proceeds thereof bought another property known as 77 St Julian Street, Worringham, Bulawayo. The latter property was registered in the plaintiff's sole name. After the divorce summons were served on the defendant, the plaintiff sold the Worringham property and with proceeds thereof, he purchased property known as Number 3 Caboll Road, Willsgrove, Bulawayo. This property was registered in the joint names of the plaintiff and his girlfriend. This was done notwithstanding the fact that the defendant had claimed that the Worringham property was matrimonial property in her claim in reconvention.

He further testified that he has three other children outside his marriage to the defendant one, being Emmanuel who was born before the marriage and two with his girlfriend born during the subsistence of this marriage. He said that he also has other dependants at school courtesy of his two late brothers. He said that he believed that the defendant earned enough to sustain herself and their two sons.

He testified that he formed Adjustable Potty Products (Pvt) Ltd with the defendant. He came up with the idea of the formation of this company. It was formed to promote the adjustable toilet effects market. The idea did not take off and they ended up marketing broom handles. Later they took out a loan with the Zimbabwe Development Bank to invest in trenchless technology. This was after the demise of the toilet effects and broom handles business. They bought a mole (i.e trenchless equipment). They used it from around 1995 to 1997 but the costs of

running this type of trenchless technology became prohibitive. The operations of the company ceased but it was not properly wound up. He disputed that the assets of Adjustable Potty Products were absorbed by Asphalt Products (Pvt) Ltd. Adjustable Potty Products did not sell the mole or any other assets to Asphalt Products. He said the Zimbabwe Development Bank loan used to acquire the mole was liquidated by himself. He said he had not been mandated or appointed to represent Asphalt Products in these proceedings although he is its Managing Director. He said the other directors of Asphalt Products are/were Alfred M Dube and the late Gwinyai Mahachi. Initially, the latter two were the only directors and he said he was involved when Mahachi became ill and unable to work. Mahachi offered him the share but he could not afford to buy it and he approached his (plaintiff's) sister Mrs Ruth Mudimu who bought Mahachi's share. He produced company registration documents in support of this testimony. He later acquired more shares through employment incentive scheme based on the profitability of the company. Asphalt Products specialises in road construction which is his own field of specialisation. He said he is the mainstay of the company in terms of the skills and expertise. He rose through the ranks from being a General Manager to Managing Director. He said at the

time of the trial, the shareholding of Asphalt Products was as follows: 20% for A Dube, 52% for Mrs R Mudimu, 16% for Khahle and he held the remaining 12%. He produced annual returns and CR14 forms for the period 2000-2005. He concedes that there was a problem with the registration of shares involving a shareholder P Sithole. He said he was unable to say how much Mr Sithole 's shareholding was, but Mr Sithole had since left and the secretary for the company was working on the registration. In a nutshell, he testified that Asphalt was a *bona fide* separate entity from him and had its own directors. It employed around eighty [80] workers and had a reasonable amount

of equipment. He said the company gave him limited authority to avoid putting other directors and company into disrepute by dragging the company into these proceedings. Under cross-examination he conceded that the parties had been married for nineteen [19] years. He agreed that when the parties started staying together in Harare, the defendant was a temporary school teacher and he was a civil engineer technician. Defendant changed work and became a teller at Founders Building Society. He agreed that in 1988 he found employment with Bitman's Construction and was posted to Bulawayo resulting in the defendant resigning her job as a teller at Founders Building Society in order to join him in Bulawayo. In December 1988 the defendant got employment with Beverley Building Society in Bulawayo. When the parties got to Bulawayo in 1988 they did not own a residential property and had to rent a house in Newton West. They thereafter rented another house in Richmond. In 1990 the parties purchased stand number 120 Marvel Road, Killary, Bulawayo and started constructing the current matrimonial home. He conceded that on account of the defendant's employment with Beverley Building Society they benefited from subsidised instalments and low interest rates on the loan they took out to construct a dwelling at the Killarney property. They started living in the Killarney property when there was just one bedroom and staff quarters. It was not electrified. The parties were actually living in the staff quarters and only moved into the main house in May 1992. The plaintiff accepted that they were a happy family then and put their children in good

primary schools in Hillside and Khumalo. In 1994 they bought a motor vehicle a Honda Civic for the use by the defendant as the plaintiff enjoyed the use of a company vehicle. In 1995 the parties agreed that the plaintiff's son Emmanuel could come and live with them. He agreed that the parties were working together as a family and provided for themselves and their children. From her income, the defendant was paying for the mortgage and insurance of the house through deductions from her salary. The servicing of the parties' insurance that was used as a collateral was also deducted from her salary. The surrender value of the said insurance was used to pay off the mortgage on 15 April 2004 in the sum of \$155 821-18. He conceded that even when the defendant was paying for the mortgage and the insurance, part of her income was used for household expenses, food and so on. This enabled the plaintiff to use his income for other family requirements such as the purchase of furniture and business investments. The plaintiff said he also paid for electricity, water rates, school fees etc. They formed Adjustable Potty to generate more income for the family. The tenders for the business were under the name of the defendant. In 2000, the borehole in the Killarney property developed problems and defendant asked him to fix it and he conceded that he refused to do so. The defendant had to obtain a loan from her employer in order to effect the repairs. He conceded that on 14 July 2000 he bought a Nissan Sunny and registered it in the defendant's name. He, however, said it was so registered against his will. The same month he took the Honda Civic that the defendant had been using all along and changed it into Asphalt Company name for use by one of its employees. This is not consistent with the company being entirely a separate entity from the plaintiff. Was the family vehicle being donated or sold to the Asphalt? It is not clear what the position was from the testimony of the plaintiff. From his testimony the overall picture that emerges is that the problems came into marriage around 1999-2000. This was the period when the plaintiff brought upon himself of the Herculean task of starting a new happy "family" (with a girlfriend) whilst his own marriage needed all his attention to overcome the challenges. His marriage was

falling apart and he had become happy outside the matrimonial home. His conduct of impregnating a girlfriend, secretly buying a house and furnishing it enervated the parties' marriage. Although he was not sure of the date he conceded that there were attempts to reconcile the parties emanating from concerned relatives and friends. In pursuit of such resolution, the parties went out to Masumu River Lodge for a holiday with common friends viz Mr and Mrs Ndlovu, Mr and Mrs Gila and Mr and Mrs Kaira. The plaintiff's late father was also in attendance. This outing generated a turbulence of its own with the result that it was worthless. He agreed that after he moved out of the matrimonial home he returned on 28 October 2001 and took away a DStv decoder and turntable. He further confirmed that the Willsgrove house is 3 bedroomed with elevated sun lounge. It has a swimming pool, electric fence and alarm system, two lounges and dining room, double door garage, 3 roomed staff quarters, a children run, horse stables, 3 boreholes, 3 water tanks and covers 5 hectares. The plaintiff and his girlfriend are doing market gardening. The Killarney property is comparatively smaller. The defendant lives there with her two sons. The plaintiff conceded it would be unfair for either party to lose his/her place of residence. He is staying with his girlfriend and their children born out of wedlock and the defendant is staying with the two children of the marriage. He justified his assertion that that parties continue to be joint owners of the Killarney property in the interests of his children. He conceded that such continued joint ownership will result in the parties not having a clean break after the divorce. He had no comment when it was put to him that during the clean up operation known as Murambatsvina he refused to give the defendant the plans for the extensions carried out on the Killarney property. As a result of this she ended up paying \$12 million to save the extension from demolition. He also conceded in September 2004 the asbestos roofing sheets were ripped off he did not bother to repair them, the defendant ended up arranging and paying for the repairs. He also did not dispute that the defendant contributed indirectly in the up keep of the family. From his evidence the Willsgrove property is well furnished. It is clear that plaintiff furnished his alternative house in Romney Park whilst still staying at the matrimonial home. He disputed the

suggestion that he was involving his girlfriend in the registration of the properties in order to defeat just claims of the defendant. He also denied that it was “matrimonial money” used to buy the Romney Park, later the Worringham, and, finally the Willsgrove properties in the way described above. He said it was up to the court to decide whether it was possible for to acquire a separate immovable property with a girlfriend whilst still staying with his wife and children and claim that the wife had no interest i.e. whether such property was matrimonial property notwithstanding the fact that it was purchased for the girlfriend. Put in another way, does the wife’s interest cease when the plaintiff connects with another woman? He conceded that at the time of issuance of divorce summons the other property (Worringham) was registered in the Deeds Registry in his sole name but he denied that he disposed it because the defendant had claimed it in her counter claim. He agreed that Asphalt Products was registered at the time when the parties were happily married. He agreed that at the time Asphalt Products was registered he was still employed by Bitman’s Construction. He conceded that for one to know the beneficiaries of the company i.e the dividends one has to go through the audited accounts and not the CR14 and the other documents that he produced. He also agreed that the defendant asked for the audited accounts of Asphalt Products for the last three years and he refused to provide them. He disputed that he refused to produce the

audited accounts because they would have vindicated the defendant’s case that he was the sole beneficiary. He conceded that at the commencement of Asphalt Products the defendant used to work with the accounts. He had no documentary proof that shares were sold to his sister Ms Getrude Mudimu. He agreed that he is aware of the contents of the audited accounts but was not prepared to avail them to the court as he did not have the company authority to do so even though he is the Managing Director. He conceded that according to the return of service of 20 August 2005 there are only two directors i.e plaintiff and his sister Ms Mudimu. Mr Dube is no longer a director but a Company Secretary. He conceded that Asphalt Products had immovable property, namely, an office and a workshop under title 14999 Donnington, Bulawayo. He

agreed that this property is insured but does not know the value insured. He said the workshop is roofed shed. The workshop is used to do repairs for plant equipment. He refused to say what type of equipment is in the workshop citing the corporate veil as alluded to above. He disputed that his action throughout had been aimed at disadvantaging his wife by dissipating matrimonial assets using his girlfriend and the Asphalt Product Company. Under cross-examination he further conceded that Asphalt Products had two Toyota Hilux motor vehicles (which he says were sold a year before the commencement of the trial), a 1993 model Mercedes Benz vehicle and three Mitsubishi trucks (i.e. 1 tonne tippers lorries). He said he had a joint business with his girlfriend at Nkulumane opened a month before the commencement of this trial. Under examination he conceded that he endeavoured to involve his wife wherever possible in the business of Asphalt Products as evinced by her involvement in the tennis court product. He said he did so to protect his interest and also to get her involved. He said after selling the Romney Park property, the Worringham property

was registered in his sole name merely out of convenience because his girlfriend was out of the country, she was in South Africa at the time of registration. He said they decided to buy the Willsgrove property in order to expand their market gardening they had successfully embarked on at the Worringham property. The Willsgrove property was far much bigger. He said his girlfriend did most of the gardening. He clarified that he took out the initial loan to buy the Romney Park property in March 2000 when he was still living in the matrimonial home with defendant as husband and wife. He said he moved out of the matrimonial home two months later (this is disputed by the defendant). He said he repaid part of the loan in 2001 and balance in 2002 and such payment was mostly from the above-mentioned incentive scheme. He explained that he bought the Worringham property mainly from the proceeds of the Romney Park property with a slight top up. He said the Willsgrove property was bought from the proceeds from the sale of the Worringham property and top up from proceeds from their market gardening project. He said he felt that his girlfriend contributed towards the purchase of

Willsgrove property because she runs the market gardening venture. She started it and managed it well.

The only witness for the defendant's case was the defendant herself:

Lizzy Mangwendeza

She confirmed most of the facts that are common cause between the parties and I will not repeat that part of her testimony. She said that from the time they got married up to 1999 they were budgeting together as husband and wife and generally conducted their matrimonial affairs together. In 1999 she discovered that the plaintiff was cheating on her. She discovered the existence of the extra-marital relationship because she found hotel bills under Mr and Mrs and also photographs of his escapades

with his girlfriend. [The photographs were produced in court] She was put in an invidious position when these photographs of the plaintiff kissing his girlfriend found their way to their son. Such unlimited amorous conduct of the plaintiff and his girlfriend destroyed their marriage. Their connubial happiness was destroyed by the plaintiff's adulterous affair. After the discovery of the hotel bills and the photographs she attempted to salvage their marriage but the plaintiff was obviously not interested. As for the Romney Park property, the plaintiff did not tell her that he was buying it. She had to discover this on her own accord. She also discovered he was buying furniture which was destined for the Romney Park property. She was adamant that the plaintiff moved out of the matrimonial home on 6 October 2001. She produced documentary evidence to show that the last holiday together (i.e with friends and plaintiff's father alluded to above) was in September 2001. She said that she believes that the plaintiff is disputing this date in order to defeat her just claims. On the question of Asphalt Products she said the company was the brainchild of the plaintiff and his friends Mr Mahachi and Mr Dube. She was involved even at the time that it was formed. She provided the curtaining for its offices in Fort Street. She said as Asphalt Products was used when plaintiff was still in the employ of Bitman's Construction they designed a plan to conceal his involvement by the use of

his sister Gertrude Mudimu's name. She said to show that Asphalt was their personal business it shared the same postal box number with Adjustable Potty. The mobile phone number and the e-mail address on the Asphalt Products letterhead are those of the plaintiff. This level of personalisation is indicative of their family involvement. She said Dube was merely Company Secretary/Accountant. She said the fact that the plaintiff bought her a Nissan Sunny using Asphalt Products funds and took the family

Honda Civic to the company is further proof it was family business. Even when Asphalt Products could not meet its financial obligations in 2001, plaintiff took out a personal overdraft of \$950 000,00 to rescue the situation. She knew of this fact as she was still doing salaries for Asphalt Products at the time and the plaintiff had not moved out of the matrimonial home. She said the plaintiff was using money which was supposed to further the family interests to further the interest of Asphalt Products. Whilst the plaintiff was doing this her own income went to the day to day requirements of the family, mortgage bond repayments, insurance payment for the property. She said it is on account of the security of her income that the plaintiff was able to resign from Bitman's Construction and concentrate on the business of Asphalt Products. Her further submission was that in fairness the plaintiff should retain the Willsgrove property and she in turn retains the Killarney property. She will live with the two children of the marriage and plaintiff will live with his girlfriend and their children. Even assuming that he only has a half share of the Willsgrove property, as it is 5 acres, the half share remains many times bigger than the Killarney property. She said she wants to move on with her life and the distribution plan that she offers will give the parties a clean break. She said if the Killarney property was to be sold and proceeds thereof shared, she would not be able to buy a similar property. She said, she afterall, solely saved part of it from demolition during the Murambatsvina clean-up exercise by paying penalties to the local authority. The plaintiff refused to assist. She said the status *quo* has deprived her of progression in life. She said what she is claiming is intended to maintain a standard of life that she and the children had been accustomed to. All the assets that the plaintiff

is claiming are within his financial reach.

As for her claim of \$10 billion for her share of Asphalt Products, she said she went as far as the Deed Registry to search for its immovable assets. As indicated above she found out that Asphalt Products has substantial assets, so her claim of \$10 billion reflects a small fraction of the value of the company. She wants the plaintiff to continue with the business after payment of this \$10 billion.

Under cross-examination she denied that the arrival of her step son Emmanuel caused friction between the parties. She said that she suggested that they take Emmanuel as she believes in family and she wanted him to grow up in the family with his brothers. She denied ill treating Emmanuel. She was also taken to task on why Emmanuel was in a boarding school when the children of the parties were day scholars. Her explanation was that this was agreed upon by the parties and had nothing to do with the breakdown of their marriage. She said, the plaintiff did not mention this in his pleadings. She said she tried all that she could to salvage their marriage but the plaintiff refused to go with her to the counsellor or the clinical psychologist. She denied that she ever used muti to try and resolve the marital problems. She said all these are mere fabrications by the plaintiff as the root cause of their marital problems is clearly his open infidelity. In her view, it was unnecessary to cite Asphalt Company as it was a small company with the plaintiff as its Managing Directors. The documents that they sought to be produced are in his custody and it is within his powers to do so. She defended her claim of \$10 billion (old currency). She said that looking at the assets of the company the amount is affordable. She said that is the reason why the plaintiff refused to produce the company's audited accounts for the last three years i.e. the accounts for income tax purposes. Further, she asked for the plaintiff's personal account and he refused to disclose it. She said the company was the parties' vehicle of the family investments. She said if she was granted the Killarney property, the plaintiff will have a home i.e. the Willsgrove property.

Findings of fact:

The factual issues in this matter depend mainly on the findings of credibility. In this case it is the word of the plaintiff against that of the defendant. I am satisfied that the plaintiff is not a truthful witness. To illustrate, in his particulars of claim and subsequent pleadings and his synopsis of evidence he never mentioned that his son Emmanuel was the cause of the breakdown of the parties' marriage yet in his testimony he made it out to be the main cause. This alleged ill treatment of Emmanuel was clearly an afterthought. The plaintiff did not deal with the court with candour as he did not state the effect of his relationship with a girlfriend on the marriage. This open infidelity was obviously the main cause of the breakdown. He secretly set up a home with a girlfriend. They were so much in love to an extent that they took photographs showing romantic kisses. The photographs ended up with the defendant and the plaintiff's son. Obviously the plaintiff tried to conceal his involvement with the girlfriend as being the cause of their marital problems. Even if I accept that defendant ill treated Emmanuel, I do not see how that is relevant to his infidelity with another woman who is not even Emmanuel's mother. Overall the plaintiff made a very poor showing as a witness. I am, however, satisfied that the defendant is a credible witness. She did not seek to exaggerate her testimony. Her version was consistent throughout.

Classification and distribution of matrimonial assets

As alluded to above, it is common cause that the marriage has irretrievably broken down. The only issue left is the determination of matrimonial assets and their distribution between parties. This issue is not necessarily determined by my above

findings on credibility. The findings of fact provided the basis on which the issue is to be resolved.

Asphalt Products: There is no doubt in my mind that, whatever its origin, the company has grown a life of its own. It is a separate legal entity with a life of its own. But there is no doubt it is in a way part of the net worth value of the Mangwedenza estate. I must, however, state that I will give due recognition of the legal persona that constitute the estate. Unless it is

absolutely necessary a court will endeavour to make an apportionment that does not interfere with the right of parties who are not part of the proceedings. It is trite that a company duly incorporated is a distinct legal entity endowed with its own legal personality – *Salomon v Salomon & Co Ltd* [1897] AC 22. However, the veil of incorporation may be lifted where necessary in order to prove who determines or who is responsible for the activities, decision and control of a company – *Sibanda and Anor v Sibanda* SC 117-04. In this case the plaintiff was selective in disclosing company records in his custody as the Managing Director and shareholder. In matrimonial matters, where the court enjoys vast discretion in the apportionment of assets, I believe it is important that litigants approach the court with candour and utmost good faith. Each party must disclose to the court every material fact, whether for or against him or her, for the court to make a fair and just assessment. There is always a temptation to mislead the court. This should be discouraged as it affects the proper exercise of the discretion by the court. This discretion should result in the fair apportionment of the fruits of a marriage partnership. From the credible evidence there is no doubt that Asphalt Products was incorporated then expanded and flourished as a result of activities undertaken mainly

by plaintiff for the most part during the period of the marriage. Plainly the accretion to the plaintiff's wealth during the marriage as a result of the work he did during the marriage was substantial indeed. In the result, I am entitled to regard the high standard of living enjoyed by the parties during the marriage as a key feature. That is not a standard of living the defendant would likely want to achieve for herself. As alluded to above, division of matrimonial property in terms of the Matrimonial Causes Act [Chapter 5:13] is essentially a matter of discretion, aimed at achieving a fair and practicable result in accordance with common sense – *Little v Little*, 1990 SLT 785. From the credible evidence in this matter, the couples' finances had become ever-more inter-linked and inter-dependent. The parties also owed one another duties of support, so that what started as individual income was used for the benefit of the whole family. Gender

roles were flexible within the parties' marriage, with bread-winning and bread-making responsibilities being shared and changing over time. This is evinced by the responsibility the defendant shouldered in raising funds for the purchase of the Killarney property and the resultant role she played in the liquidation of the bond. So the parties' financial arrangements also became flexible and changed over time. This is a marriage where it has become less and less relevant to ask who technically is the owner of what. The defendant bore both home-making and bread-winning responsibilities. At divorce, my powers must also be flexible. They clearly can no longer be based on the assumption that there is one male breadwinner to whom all or most of the resources belong and one female home-maker in need of his support, and entitled to it only as long as she remains deserving. I have to take into account all the parties' resources from every source and exercise my wide range of discretionary powers to reallocate all these resources in terms of section 7 and 9 of the

Matrimonial Causes Act, *supra*. Further, it would be unfair not to acknowledge that the defendant did not seek to end the marriage, nor did she give the plaintiff any remotely sufficient reason for doing so. The plaintiff fell in love with another woman and decided to terminate the marriage. I am therefore, entitled to take into account that plaintiff was to blame for the breakdown of the marriage even though his conduct would not merit advancing under the Matrimonial Causes Act. I should take into account the obvious and gross misconduct of apportionment – *Beaumont v Beaumont* 1987 (1) SA 967 (A); *Watchel v Watchel* [1973] ALL ER 829 (CA); *Marimba v Marimba* 1999(1) ZLR 87 (HC); *Miller v Miller* and *McFarlane v MacFarlane* [2006] UKHL 24 and *Takawira v Takawira* HC 924/97 (unreported and undistributed). This is a long marriage of around nineteen years. This has to be taken into account. With all this in mind, I find that the defendant is entitled to a share of Asphalt Products. Her claim of \$10 billion is based mainly on the assets of the company and the nature of operations. I have already dealt with the lack of co-operation by the plaintiff and his selective production of company records. In the circumstances I find a claim of \$10 billion as

fair and as one which will not adversely affect the other shareholder (if any at all). This lump sum payment represents the financial closure of the parties' failed marriage as succinctly expressed by Lord Scarman in his familiar words in *Minton v Minton* [1979] AC 593 at 608:

“An object of the modern law is to encourage [the parties] to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down.”

The uncooperative conduct of the plaintiff has made the present value of Asphalt Products inestimable and its future value unfathomable. Estimating the value

of the moveable assets such as motor vehicles and trucks, a payment of \$10 billion will not bring the company to its knees.

The Killarney property: The plaintiff's proposal is that the parties remain joint owners. This proposal offends against the clean break principle as alluded to above. I have already highlighted the undesirability of the continuing ties between the parties. The most practicable apportionment is one suggested by defendant i.e. she is awarded 100% of the Killarney property and the plaintiff 100% the Willsgrove property. The latter, is in my view, part of the plaintiff's estate. Even if the plaintiff shares the Willsgrove property in equal shares with his girlfriend, his own half share will still be far more valuable than the entire Killarney property. I base this on the conspicuous disparity in the sizes and the improvements on the two properties.

Section 7(4) of the Matrimonial Causes Act gives this court considerable discretion but such discretion has to be judicially exercised. It has a broad guideline to the court for trying to achieve fairness between the parties – *Takafuma v Takafuma, supra; Ncube v Ncube* 1993(1) ZLR 1993 (1) ZLR 39(S); *Masimiremba NO v Chipembere* 1996(2) ZLR 378(S) and *Mashave v Chinyowa* HH-115-01. This court is enjoined to take factors set out in section 7(4), *supra* and try as far as it is practicable and reasonable, to place the spouse and the children of the marriage in a position they would have been had a normal marriage relationship continued. In this case,

the defendant and the parties' two children have to stay at the Killarney property. That is the only home they have. The defendant has abandoned her claim to the Willsgrove property as she views it as the plaintiffs home. From the evidence she was entitled to lay claim to the Willsgrove property notwithstanding the plaintiff's

deceit in registering it in his girlfriend's name. The parties' two sons are of school going age. I am of the view that it is practicable and reasonable that the defendant and the two sons remain in occupation of the Killarney property and the plaintiff continues with his alternative arrangement at the Willsgrove property.

Movable assets: It is clear that the plaintiff is entitled to some, but not all of the assets claimed in paragraph 10 of his declaration. Some of the items he is claiming he already has similar items at the Willsgrove property. I find that he has made out a case for the award of defendant's stepson's bed, book cabinet, all his personal tools and equipment and his personal records and CD collections.

Additional contribution towards T.M.

As far as providing for his children the plaintiff has not been found wanting. He has carried out his paternal responsibilities well and I do not think there is justification for the order sought in this regard.

Accordingly, I make the following order:

It is ordered that:

- a) a decree of divorce be and is hereby granted;
- b) the custody of the minor child T.M. [a boy born [day/month] 1991] be awarded to the defendant with plaintiff enjoying reasonable visitation rights;
- c) the defendant is awarded all the movable assets in the Killarney property as her sole and exclusive property save the defendant's stepson's bed, book cabinet, plaintiff's personal tools and equipment and plaintiff's records and CD collection which be awarded to the plaintiff as his sole and exclusive property;

- d) the defendant be and is hereby awarded property known as number 120 Iona, (Marvel), Killarney, Bulawayo as her sole and exclusive property;
- e) the plaintiff pays the defendant the lump sum of current revalued equivalent of \$10 billion (old currency) as a once and for all payment for her interest in Asphalt Products (Pvt) Ltd;
- f) Each party is to bear its own costs.

Coghlan & Welsh, plaintiff's legal practitioners
Webb, Law & Barry, defendant's legal practitioners