

DOREEN SAGANDIRA
and
PATRICK SAGANDIRA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 14 and 26 October, 16 November 2009 and 28 October 2010

Divorce Action

W.T. Pasipanodya, for the plaintiff
H.H. Mukonoweshuro, for the defendant

MAVANGIRA J: The plaintiff and defendant are husband and wife. The parties were married on 2 September 2000. They were blessed with three children, O, F and A, all of whom are still minors. Certain unhappy differences have arisen in the marriage and the plaintiff has instituted this action for divorce. Pre-trial conferences which were held before this trial, resulted in the execution of a joint pre-trial conference minute in which it is recorded that the parties are agreed that their marriage has irretrievably broken down to the extent that there are no prospects of the restoration of a normal marriage relationship between them. The minute also records, amongst other things, that it is agreed that there is no dispute insofar as household goods are concerned. With regard to the children it records that the parties are agreed that two of the minor children were born of the marriage. It then records that the following are the issues for trial:

- “1. Custody of the minor child O born 31 December 2000 be granted to the plaintiff with defendant having access to the child half the duration of the school holidays and on alternated holidays.
2. Paternity of the minor child A born 25 December 2006.
- 2.2 The defendant shall meet all the costs of the Paternity test and in the event that the results of the said paternity tests show the defendant is indeed not the biological father of A then the plaintiff shall reimburse the defendant the costs incurred for carrying out the tests.
3. What would be adequate maintenance for the minor children born of the marriage.
4. Which assets constitute matrimonial property namely;

IMMOVABLE PROPERTY

- 3.2 The business known as Million Hardware
- 3.3 Stand CBD 2473
- 3.4 Stand 242 Lease MKN 153 Headland
- 3.5 Plot No. 17 Lee Farm
- 3.6 Kriste Mambo Stand Homestead
- 3.7 Shop No. 5 Pamusika

MOVABLE PROPERTY

- | | |
|---------------------|------------------|
| 3.8 ISUZU TWINCAB | REG NO. AAL9911 |
| 3.9 MAZDA B1800 | REG NO. AAM1183 |
| 3.10 MAZDA B1600 | REG NO. AAM 1146 |
| 3.11 TOYOTA DYNA | REG NO. AAJ 3536 |
| 3.12 TOYOTA COROLLA | REG NO. 840 722C |

5. What constitutes a fair and adequate distribution of the matrimonial property.”
(sic).

Notably no evidence was led by either party with regard to the purported dispute as implied in the joint pre-trial conference minute regarding the paternity of the youngest of the three minor children. The conduct of the parties suggests that the paternity of the said child was no longer an issue at least as at the time of trial. Even in their closing submissions none of the parties addressed this issue. The defendant’s closing submissions also appear to portray that certainly as at the date of preparation of the closing submissions, there was no longer any dispute on this issue. This conclusion is arrived at because in addition to the above observations, both parties’ in their closing submissions, address the payment of maintenance for all three and not merely two of the minor children. The parties’ efforts throughout the trial have been directed solely at giving spirited evidence and making submissions on matters relating to the proprietary dispute. It appears to me therefore that no further comment is necessary on the issue of the paternity of the said minor child as there does not seem to be any dispute about it any more.

MAINTENANCE

During cross-examination by the defendant’s legal practitioner, it was put to the plaintiff that the defendant could not afford to pay maintenance in the sum of USD200 per child per month as he does not realise sufficient income from his only source of income, being Multimillionaire Investments, as to enable him to pay the claimed amount. She asked how much the defendant could afford to pay. She was advised that the defendant could afford to continue paying the USD60 per month for the three children that he is currently paying in

addition to paying their school fees and buying their school uniforms and clothes as he has been doing. The plaintiff said that she was agreeable to the proposal. An order for the three minor children's maintenance will therefore be made in those terms as agreed.

ASSETS

When asked by her legal practitioner as he led her in her evidence in chief as to what she wanted from the property listed in the joint pre-trial conference minute, the plaintiff said that she wanted everything to be awarded to her because she had solely raised the funds that resulted in the acquisition of all the listed property.

The plaintiff's evidence was that she was employed by the Council in Rusape in 2001 and that the defendant was employed by the then Post Office Savings Bank (POSB) as from 1995. She said that in 2003 she was working in the front office at the Council. During the execution of her duties she would be given gifts in the form of agricultural produce from councillors, headmen, farmers and chiefs in appreciation of the service that she was providing. She would then, together with the defendant, repackage these gifts into five and ten kilogram packets which they would sell. An amount of ZW\$33 million was realised in this way. This amount was then used to start up a general dealer business called Millionaire Investments in Rusape. She said that she did the repackaging of the produce given to her as gifts, together with the defendant. She also said that the defendant did not make any financial or monetary contribution to this business. She produced as an exhibit, with the defendant's consent, a document titled "P. Sagandira Trading as Millionaire Investments 31 December 2003". The document records that the business Millionaire Investments received a loan in the sum of Z\$33 920 400 apparently from one D.M. Sagandira, presumably the plaintiff. It further states that the loan was unsecured with no fixed terms of repayment.

Despite having said that the defendant had not made any contribution to the business the plaintiff proceeded to state that **they** (notably not **she**) used the money from the business to purchase a commercial stand No. CBD 2473 and develop on it a single storey building which is not yet complete. Throughout her testimony she kept interchanging "We" and "I" as she narrated how various items of property were acquired. She then said that **she** also used proceeds from the business to purchase a commercial stand No. 242 Headlands which she developed to slab level only. She said that **she** was also given an agricultural plot, No. 17 Lee Farm, Nyazura, by Chief Makoni. She said that from the proceeds from this business **they** acquired the Kriste Mambo homestead in Rusape. She said that **they** also acquired Shop No. 5

Pamusika, Rusape and a residential stand, No. UVE 2606 Vengere Township. She said that after they had acquired the residential stand **she** then built a ten roomed house from foundation to roofing level and that the defendant only contributed the last 6 asbestos sheets that were needed for the roofing. She said that **they** then did the finishing touches using funds generated from the business. The finishing touches included painting, putting up a perimeter wall, commonly referred to as a durawall, putting up a gate and a carport. She said that all this was possible as she continued receiving gifts as described above which they continued to repack and sell.

The plaintiff was asked by her legal practitioner whether the defendant was not assisting in all the businesses that she was conducting. Her answer was as follows:

“In terms of monetary value the business was just flowing because of the \$33 million which had been ingested (*sic*) (injected?) in 2003 and the defendant was assisting me in terms of administration and I want to point out that on these properties whatever we acquired, because of love, trust and respectable teachings from background, I together with defendant were putting all these properties in defendant’s name as we have been instructed by our background teachings that the man is the head of the house.”

She said that they were running a hardware shop and that when she eventually left the matrimonial home in February 2007 and filed for divorce, there was stock in the shops; at shop No. CBD 2473, shop No. 5 Pamusika and another shop at Matema in Nyanga, which property is not on the list of their properties as reflected in their pleadings. She said that she was also a director of the company Multimillionaire Investments but she had been surprised to discover that her name had been removed from the directorship without her consent. She said that she has not been deriving any benefit from the businesses since 2006.

Whilst being cross-examined the plaintiff said that although the Plaintiff’s Declaration states that the defendant moved out of the matrimonial home in July 2006, that in fact was not a formal separation and that the formal separation was only in February 2007. When asked how the defendant’s salary from the POSB was spent, the plaintiff’s answer was that both parties’ salaries were expended on household expenses. It was put to the plaintiff that the defendant would accept that she had lent money to the business but would dispute that the said money was raised from sale of goods received as gifts as she alleged. Furthermore, that the defendant would say that the plaintiff stole the money from her employer, Makoni Rural District Council which money she had to pay back in order to prevent the law taking its course. The plaintiff denied this. It was further put to her that this issue was the sole cause of the break-down of their marriage because in 2005 she demanded payment of the loan that she

had given to the business and on her instructions the defendant paid her family, the Kasu family, the sum of \$73 200 000. The plaintiff also denied this.

The plaintiff further said that she wished to emphasise that she resigned from Makoni Rural District Council in February 2005 whilst the defendant resigned from the POSB in June 2006. The parties then separated in February 2007. When the defendant resigned from his formal employment with the POSB as stated above he had no other no other source of income apart from what he would get from the business in which she had singly invested the \$33 million loan. She thus wanted all the stock that was in the business as these were proceeds from her investment. She however thereafter conceded that at the time of their separation the stock in trade at Multimillionaire Investments belonged to the company and not to individuals. She also conceded that from the time of their separation to the time of this trial the company has been operating without her assistance or involvement.

It was put to the plaintiff that the defendant would say that during the period preceding dollarisation, the business lost all its stock-in-trade due to price controls and that with the dollarisation of the economy the defendant had to start with a zero balance without the plaintiff's involvement at all. The plaintiff's response was that this was not a valid argument because even as from August 2006, she was no longer allowed to set foot in any of the shops and was not deriving any benefits on her investment.

It was also put to the plaintiff that insofar as Shop No. 5 Pamusika was concerned there was nothing to distribute as the defendant only enjoys the right to lease the shop. Her response was that the defendant is earning money from the business. The defendant's legal practitioner asked the plaintiff if she would accept the valuation of Stand 242 Lease MKN 153 Headlands that they had caused to be made in May 2009. She said that as the valuation was in the form of a letter and not a proper valuation report she would not accept it. The said letter was not at any stage presented to the court and was not produced as an exhibit. Regarding Plot No.17 Lee Farm, it was put to the plaintiff that the defendant would say that he had given it to her at the same time that the lump sum payment of \$73 200 000 was made and that he has no control over it as it is her property. The plaintiff denied this. It was put to the plaintiff that at the Kriste Mambo homestead there was no structure of value like a modern house. She said that it is approximately 5 hectares in extent and that they had built two huts on it. She said that its value was in the fact that it is meant for cattle ranching.

It was put to the plaintiff that the defendant would admit that she owned an Isuzu twin cab motor vehicle registration number AAL 9911 but that when the parties separated he exchanged it for a Nissan Patrol. Furthermore, that the defendant would have no objection if it be awarded to the plaintiff. The plaintiff's response was that the said transaction was done without her consent and she therefore wanted her Isuzu twin cab back. It was also put to her that the defendant would say that they never owned a Mazda B1800 registration number AAM 1183. The plaintiff said that they did own such a vehicle but that the defendant donated it to ZAOGA Church in Rusape without her consent. She did not however have any documents on her to prove such ownership and such donation. It was put to the plaintiff that the defendant would deny owning a Mazda B1600 registration number AAM 1146. She said in response that they bought the said vehicle together but the defendant had it registered in his brother's name without her consent. She said that she did not have on her the documentary proof to support her allegation. The plaintiff also denied that a Toyota Dyna motor vehicle registration number AAJ 3536 is the property of Multimillionaire Investments. She said that they bought the vehicle in Nyanga and that it was thereafter registered in the defendant's name and not in the name of the company. It was put to the plaintiff that the defendant would admit that he purchased a Toyota Corolla registration number 840-722C from Brincom Trading (Pvt) Ltd in January 2007 after they had already separated. Her response was that the defendant purchased the said vehicle in January 2007 when they were still together and that they separated afterwards in February 2007.

It was suggested to the plaintiff that for her contribution to the marriage she should be awarded the Headlands business stand, that is, Stand No. 242 Lease No. MKN 153 Headlands and the Kriste Mambo homestead and that this would be in addition to Plot No. 17 Lee Farm which she was given in 2005. Her response was that all these properties were acquired from what she had worked for and that the defendant thus cannot apportion to her property that is hers anyway. She denied that she was exaggerating her contribution to the matrimonial property.

It was put to the plaintiff that she was a mere finance clerk at Makoni Rural District Council for a period of less than 5 years and that her contributions were commensurate with that job description or status and not what she was alleging. She said that she was an executive clerk. Furthermore, it was the defendant himself who had compiled the financial statements for Multimillionaire Investments which clearly indicated that she was the only contributor or

injector of financial resources into the company. She denied ever stealing any money from Makoni Rural District Council. She emphatically denied having been given Lee Farm by the defendant on separation. She emphasised that when they separated the defendant remained in possession, occupation and use of all the matrimonial property. She reiterated that all the matrimonial property must be awarded to her to the exclusion of the defendant.

The defendant gave evidence. He said that in June 2002 he applied to Council to be allocated a small shop to trade in kapenta fish. He was allocated shop No. 5 Pamusika on 10 June 2002. He produced as exhibit 2 a letter dated 10 June 2002 which was addressed to him by the town engineer of Rusape Town Council. It reads:

“RE: APPLICATION FOR A SHOP FOR WHOLESALING OF KAPENTA FISH AND FREZITS (sic)

Your application was tabled before Council and your proposal was approved by Council.

You will be allocated a shop once renovation to convert existing market stall into small shops has been completed.”

He started trading as a sole proprietor in July 2002 until 2004 when they registered a company called Multimillionaire Investments. He confirmed the contents of exhibit 1 to the effect that in 2003 the company obtained a loan of \$33 million from the plaintiff but added that this was at a time when the company had already been operating for some twelve months. He talked of having had humble beginnings, having started with a bag of fertilizer which he repacked into small packets for resale. He said that he worked tirelessly to bring his sole trader business into operation. The money that the plaintiff keeps talking about as having financed the business was in fact stolen money which the plaintiff stole from the drought relief programme in which she occupied the position of a paying officer. He later got to know that she had stolen this as he was summoned by the Makoni Rural District Council authorities who wanted him to pay the money back to Council. This became the source of their problems because when he sought to find out from the plaintiff why she had stolen the money that is when she started saying that she had done everything using that money, including building their house at Stand UVE 2606 Vengere. He said that he had purchased the stand at a time when they were having conflicts and they had almost broken up until the parents of both intervened. It was then resolved that he would pay to the plaintiff a lump sum in the amount of \$73 200 000 and that he would also give to the plaintiff Plot No. 17 Lee Farm as she was claiming that it had been given to her by Chief Makoni.

The defendant produced as exhibit 3 a handwritten document dated 7 October 2005. It reads:

“The case of *Sagandira vs Kasu*

We are paying the stand initially purchased by Doreen Kasu Patrick’s wife in Headlands. The building and completion of a residential house in Rusape and the amount she had invested into the business which they calculated and totaled \$73 200 000-00. She said she had stolen this amount from Makoni Rural Dist Council. This amount was to have been settled soon after 23 September 2005 the proceeds from Lee Farm Plot No. 17 The recipient being the Kasu

Signed (*no signature appears after this word*)

Witnessed by Elder Makuyana the paying person on behalf of the Sagandira = H. N. Sagandira (*a signature appears immediately after the name “Sagandira”*)

NB My signature is basing on the receiving of cash by Kasu family = \$73200000,00
(*a signature appears here as well as the date, “07/10/05”*)”

The defendant said that the plaintiff demanded that she be reimbursed the amount, as reflected in exhibit 1, which she had contributed to the business together with interest. She then personally calculated the amount and with interest, arrived at a total of \$73 200 000. He said that it was also the plaintiff who demanded Plot 17 Lee Farm which she had been given as a gift by Chief Makoni. He said that it was in fact not a gift but that she had used her influence as she worked for Council, to secure the plot. He then moved out of the plot in 2005 leaving it under the control of the plaintiff while he relocated to a rural resettlement area in Kriste Mambo area where he got a two hectare plot. He said that he moved out of the matrimonial home on 30 June 2006 after another dispute that had erupted between them.

The defendant disputed the plaintiff’s averment that when she moved out of the matrimonial home in 2007 they had almost completed building a structure on Stand 2473. He said they finished paying for the stand in July 2006 when he had already moved out of the matrimonial home and construction started in November 2006. He maintained that he started his business without any contribution from the plaintiff. He produced as exhibit 4 the memorandum of agreement of sale between him and Rusape Town Council in respect of Stand 2473. The agreement was signed on 19 July 2006. The agreement states among other things that the stand shall be used for commercial purposes only.

Regarding his employment history he said that he got employed by the then Post Office Savings Bank (POSB) in February 1995. He went on voluntary retirement in 2006 and was paid a retrenchment package in an amount of \$18 000 (revalued) which amount he invested in

the business. He said that the plaintiff's salary was always far less than his as she was employed as a clerk with Makoni Rural District Council whilst he was employed by a financial institution. He started off as a teller and was later promoted to an internal auditor with the bank. He would also benefit from soft loans from the bank and at one stage he was offered a housing loan which he however failed to utilise as he later found out that the house that he intended to purchase had been sold to two other people.

The defendant insisted that the capital used to construct the building where the company is now housed and to run the business was not generated from the capital which was contributed by the plaintiff at the beginning. He said that the business was self-sustaining. However because of the hyperinflation that was then experienced in the country all business was eroded. The money that was in the banks was frozen and price controls affected the stocks of the business. In 2009 the defendant had to start all over to revive the business and he is still struggling to put it back in good standing.

With regard to the Isuzu twin cab the defendant agreed that they purchased it together. It was his personal car and because it was giving problems he exchanged it for a Nissan Patrol which he still has in his possession. He denied that they ever owned a Mazda B1800 as claimed by the plaintiff. However they once owned a Mazda B1600 which the plaintiff sold some time in 2006 while they were still together but after they had both agreed to sell it. He was not involved in the sale transaction. The Toyota Dyna vehicle is owned by the company Multimillionaire Investments and it is still in the possession of the company. The vehicle referred to as a Toyota Corolla is in fact a Toyota Corona and it was purchased in January 2007 after they had separated. He produced as exhibit 5 the agreement of sale pertaining to the vehicle. It is dated 19 January 2007. He said that the plaintiff did not contribute in any way to the acquisition of the vehicle.

As regards how the property which he agrees that they acquired together should be distributed, the defendant said that Plot 17 Lee Farm has already been given to the plaintiff; she could also have Stand 242, Headlands which they acquired together and on which construction is at slab level; she could also have the Nissan Patrol although it used to be his personal car. He said that the Kriste Mambo homestead was given to them by the headman and there are no title deeds to it. He acquired Stand 2473 on his own after they had separated and this is the premises from which he is running the business which generates the money for the support and sustenance of the children and the plaintiff. He has no other source of income.

The defendant said that the plaintiff was only a director and not a shareholder in the business known as Multimillionaire Hardware. It is a family business in which he is the executive director and owns 75% shareholding while one Paul Sagandira owns the other 25%. He found it difficult to give a value or net worth of the company because of the effect of the dollarisation of the economy. As to the value of the stock in trade he said that they are currently selling consignment stock. They get stock from companies without making any payment and they are then paid a commission depending on how much they would have sold. However because there is not much money in circulation the profit margin has gone down and this is the reason why he is failing to pay more than he has already offered for the children's maintenance.

The defendant called one Phibeon Makuyana whose testimony was to the following effect. He was the go-between during the time when the parties got married. He confirmed that he signed exhibit 3 as a witness and that he was thereby signifying that he was present when an amount of \$73 200 000 was handed to the Kasu family. When the defendant approached him he said that he had some money to pay to the Kasus. However, under cross examination he said that he did not agree with the narration that appeared at the top of exhibit 3 as his role in the parties' affairs was only insofar as payment of lobola or bride price is concerned. The only portion of the document which he agreed with is the last section beginning from where it reads:

“Witnessed by Elder Makuyana the paying person on behalf of the Sagandira = H.N. Sagandira”

to the end of the document. He however agreed with the record that the amount paid was \$73 200 000 but not with the narration of what the amount represents. He also said as the defendant had not finished paying lobola for the plaintiff, he thought that the said amount was part payment for lobola. He said that the payment was not made to the plaintiff but to her family. In answer to the court's quest for clarification he said that when he signed the document there were no writings on the top part of the sheet of paper where the disputed portion now appears.

A perusal of exhibit 3 shows that the sentence which reads “She said she had stolen this amount from Makoni Rural Dist Council” is an insertion which was added after the document had been scripted. The sentence was inserted on a clear line that had been left clear between two lines and it cuts into the middle of another sentence such that if it is read in

sequence with the portion which immediately precedes it, the sentence would be nonsensical.

It would read:

“...and the amount she had invested into the business which they she said she had stolen this amount from Makoni Rural Dist Council calculated and totaled \$73 200 000.”

Besides this observation, it is also of significance that the defendant’s explanation of what the document represents differs with that given by his witness, Phibeon Makuyana. A closer look at the document also shows that there is an endorsement immediately before Makuyana’s signature and that the endorsement purports to limit what Makuyana is witnessing. It reads:

“NB My signature is basing on the receiving of cash by Kasu family =\$73 200 000.00”

This endorsement raises further suspicion as to its reliability for the purposes intended by the defendant. When this is viewed against the fact that the plaintiff denies that she demanded and was paid the stated amount, it becomes even more unsafe to place any reliance on this document in the resolution of the outstanding issues between the parties. If this was part payment of lobola as said by Makuyana, then certainly the document is of no assistance to this court. If this was the paying back of a loan advanced to the business by the plaintiff, one would expect the payment to be made to her. In any event, there is no indication as to who in the Kasu family the money was handed to; neither is there a signature acknowledging receipt of the stated amount by any such alleged recipient. For these reasons this court will place no reliance on this document in the resolution of this matter.

It is at this stage also appropriate to comment about the defendant’s allegation that the plaintiff stole some money from the Drought Relief Programme and that this is the money which she later claimed to have invested in the family’s business. The plaintiff denied the allegation. The defendant did not place any evidence before the court to substantiate the allegation. The court will not make any further comment or rely on this allegation for any purposes.

While the source of the money remains unexplained, it is not in dispute that the plaintiff lent the sum of ZW\$33 920 226 to “T. Sagandira trading as Millionaire Investments’. This is reflected in exhibit 1 and although I have already indicated that exhibit 3 will not be relied on in the resolution of this dispute, it does not escape observation that therein the defendant mentions that the plaintiff invested some money in the business.

It appears to me that this is a matter in which during the happier times of their marriage the parties pooled resources and efforts with a view to building a viable and successful matrimonial estate for their mutual benefit in the setting of a family unit. It also appears to me that having come upon stormy times each party now seeks to minimize the other party's contribution and in the process enhance, if not exaggerate their own contribution. More of this attitude is discernible in the plaintiff's case. This is no indication that the defendant is an angel in this regard. Indeed, it is a fact that summons having been issued on 7 February 2007 the plaintiff had to approach the court by way of urgent chamber application and on 7 May 2009 in HC 1961/09 this court issued an order interdicting the defendant from "further alienation of matrimonial property" The plaintiff claimed that she was forced to approach the court for the said relief as the defendant had unilaterally sold the matrimonial home and donated a Toyota pick-up truck, registration number AAM 1183 to the church without her consent. He had also traded their Isuzu twin cab, registration number AAL 9911 without her consent. She had also discovered that Plot No. 17 Lee Farm Nyazura which from a pre trial conference held earlier she had understood would by consent be allocated to her was now in the name of a third party; this had also been done without her consent. She derived no benefit from these disposals which were all made unilaterally by the defendant.

In the circumstances of this case, because of the respective parties' lack of candour with the court, the court is not in a position to evaluate the levels of their respective contributions to the matrimonial estate. What cannot be denied however is that both parties must have made great contributions thereto regard being had to the number and type of assets that have at one stage or another been part of it. Whether the injection of ZW\$33 million into the business was done by the plaintiff before or after the business was already running (the parties disagree on this) does not in my view alter the fact of her financial contribution and it may be noted that the amount in question, ZW\$33 million was not an insubstantial amount during that time. Yet it is not only the levels of their contribution that the court is enjoined by s 7 of the Matrimonial Causes Act, [*Cap 5:13*] to take into account in arriving at an appropriate distribution. The court must also consider a host of other factors including those listed therein.

One of the factors that the court is enjoined to have regard to is the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future. The three minor children of the marriage were born 31 December 2000, 26 March 2003 and 25 December 2006 respectively. They are thus all below

the age of ten. None of them has any income-earning capacity. None of them has any assets or other financial resources and there is no indication of this state of affairs changing in the foreseeable future.

The defendant is apparently a director and shareholder in the company which runs the business Millionaire Investments, apparently from Stand CBD 2473. He is also licensed to conduct wholesale trading of Kapenta fish and freezits at Shop No. 5 Pamusika. This has been the family's source of livelihood after both parties left formal employment. The plaintiff is no longer benefiting from these ventures except for the contribution towards the minor children's maintenance which is currently being made by the defendant in the sum of US\$60.00. She no longer participates as she says she used to do, in the businesses. She must have been very enterprising hence her capacity or ability to lend money to the business and to also participate therein and enter into asset acquiring ventures. There is however no evidence she is now earning a living besides the money received from the defendant. She did not favour the court with this information. She did not however state that she has tried or is trying and failing to find employment or other means of sustaining herself and also making her contribution to the upkeep of the children.

The court is also enjoined to consider the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future. The children's basic needs include the need for a roof over their heads, food, clothing, education and incidental matters as well as medical attention as and when necessary. The children are and will be in the plaintiff's custody and their day to day care thus falls on her alone. The court must also consider the standard of living of the family including the manner in which any child was being educated or trained. No peculiar information was placed before the court in this regard. The age and physical and mental condition of each spouse and child must also be taken into account. Again, the court was not alerted to any peculiar condition of any of the members of this family.

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 is another factor that the courts should consider. I have already commented on this aspect, though it was mainly in relation to the parties' financial contributions which I estimate to be of equal value. I would only add that it was not contended by the defendant that the plaintiff did not carry out her wifely and motherly duties in this family. Indeed she continues

to carry out her motherly duties and is likely to do so for several more years. By the same token the defendant will also have to contribute to the children's maintenance for several years to come. The court is also called upon to take into account 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. In this regard no pertinent information or evidence was placed before the court. The duration of the marriage of the marriage is another pertinent factor. The parties' marriage was solemnized on 2 September 2000. The parties have thus been married for ten years.

In *Hatendi v Hatendi* 2001 (2) ZLR 530 at 533 B-D SANDURA JA stated:

"As KORSAH JA said in *Ncube v Ncube* 1993 (1) ZLR 39 (S) at 40H-41A, whilst referring to the facts which the court should take into account in the division of matrimonial assets in terms of s 7(1) of the Matrimonial Causes Act [*Cap 5:13*]:

"The above provisions, to my mind, do no more than furnish broad guidelines for deciding what is a fair order in all the circumstances, adjusting property rights if need be, under the wide powers bestowed n the court. The determination of the strict property rights of each spouse in such circumstances, involving, as it may, factors that are not easily quantifiable in terms of money, is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion."

From the evidence adduced by the parties it would appear that the from the property listed in their joint pre-trial conference minute the following are the only assets that might still be within the estate even though each asset will need to be considered separately and individually for purposes of clarity;

"IMMOVABLE PROPERTY

3.2 The business known as Million Hardware; 3.3 Stand CBD 2473; 3.4 Stand 242 Lease MKN 153 Headlands; ... 3.6 Kriste Mambo Stand Homestead; 3.7 Shop No. 5 Pamusika

MOVABLE PROPERTY

3.8 Nissan Patrol (allegedly swapped with Isuzu Twin cab); ... 3.12 Toyota Corolla." _

Of the above listed assets the defendant has indicated already that he has no objection to the following being awarded to the plaintiff; Stand 242 MKN 153 Headlands, the Kriste Mambo stand and homestead and the Nissan Patrol. These will be awarded to her. The plaintiff's insistence that she specifically wants the Isuzu twin cab and not the Nissan Patrol to be given back to her is no longer capable of enforcement at this stage, the vehicles having been

swapped. Although he states that the plaintiff is already in control of Plot 17 Lee Farm and that it may be awarded to her, it was also the plaintiff's undisputed evidence that she has discovered that the said piece of land is now registered against another person's name and that this happened without her knowledge. She did not however, say that the defendant was instrumental in this "dispossession". The fact is that this property is no longer within the realm of the matrimonial estate and it would thus not be competent for the court to now award it to either of the parties.

The result of the defendant's proposal would be that of the listed items the plaintiff would be awarded two, being one vehicle and one stand on which has been constructed a slab only, whilst the defendant would be awarded and or benefit from five. It is also pertinent that it is the defendant's undisputed claim that the business which he runs under the auspices of a private company is his only source of income from which he sustains himself and also supports the children. Of the five vehicles listed in the joint pre-trial conference minute, the defendant has by various explanations placed them outside the realm of the matrimonial estate. It is not clear whether their inclusion in the dispute, presumably by the plaintiff was based on a misconception of prevailing facts or whether this is a case of the defendant trying to frustrate the plaintiff's bid to benefit from the matrimonial estate.

Consideration has been given to awarding Stand CBD 2473 to the plaintiff yet the likely result would be to disable the operations of the business which the defendant is running. The consequences would impact adversely on the minor children. Yet it cannot also be disregarded that the plaintiff had to approach the court to obtain an interdict restraining the defendant from further disposing of matrimonial property pending the determination of this matter. This was apparently occasioned by the defendant's conduct in that he was allegedly disposing of matrimonial property after the institution of these proceedings. It is this conduct, then exhibited by the defendant, which tends to lend credence to the contention that the defendant has deliberately sought to minimize to the lowest possible limit the extent to which the plaintiff ought to benefit from the matrimonial assets.

It appears, in my view, that all considerations being taken into account an appropriate award to the plaintiff would include not only the three assets in respect of which the defendant has agreed that an award be made in the plaintiff's favour. Note is taken in this regard of the plaintiff's legal practitioner's following statement amongst other things, in his closing submissions:

“It was undeniable in the proceedings that the defendant was in possession of all the motor vehicles listed in the joint pre-trial conference minute. It again cannot be a factor admissible from the defendant that he alleges that he knows nothing of item 3.9, that he sold vehicle 3.10, that he exchanged vehicle 3.8 with a Nissan Patrol. It is submitted that vehicles 3.11 and 3.12 should be awarded to the plaintiff and a proportionate replacement value of the rest of the motor vehicles should be paid by the defendant to the plaintiff. This especially in light of the fact that the defendant was disposing of the motor vehicles after the issuance of the summons for divorce and he actually had to be stopped by way of a court order under Case No. HC 1961/09. It is common cause that prior to the commencement of business the parties had not acquired any property of value. According to the defendant under cross examination the parties acquired property after commencement of trading as Millionaire Hardware” (sic)

Vehicle 3.11 the Toyota Dyna, undisputedly belongs to the company. The defendant’s evidence was that he and a brother are shareholders and directors in the company. The company is not a party before the court. It would thus not be competent for the court to award the vehicle to the plaintiff. It would also not be competent for the court to include in the matrimonial estate the Mazda B1600 registration number AAM 1146 which the plaintiff claims was purchased by the parties but was registered by the defendant in his brother’s name without her consent. The said brother is not a party in these proceedings.

The defendant did not dispute the allegation that it was because of his disposal of the matrimonial assets that the plaintiff had to obtain the interdict referred to above. The court can and will also consider this factor in determining a fair division of the matrimonial assets. In my view the award to the plaintiff should also include the Toyota Corolla registration number 840-722C despite the defendant’s claim that he purchased it after they had separated.

Regarding the custody of the minor children, the joint pre-trial conference minute is silent on the child “A”. I see no reason and none have been advanced why the minor child should not also be in the custody of the plaintiff. All three minor children will thus be placed in the custody of their mother, the plaintiff.

None of the parties was candid with the court. For that reason it shall be ordered that each party pays its own costs.

For the above reasons the following order is made.

It is ordered:

1. That a decree of divorce shall issue.
2. That custody of the minor children O, F and A be and is hereby awarded to the plaintiff.

3. That the defendant shall be entitled to reasonable access to the said minor children during half the duration of school holidays and on alternate public holidays.
4. That the defendant shall contribute to the maintenance of the said minor children by paying to the plaintiff the sum of US\$60 per child per month, such payment being made in advance by the last working day of the preceding month.
5. That the plaintiff be and is hereby awarded as her sole and exclusive property the following assets:
 - a. Stand 242 Lease MKN 153 Headlands
 - b. The Nissan Patrol currently in the defendant's possession
 - c. Toyota Corolla Registration No. 840-722C
 - d. The Kriste Mambo stand and homestead
6. That the defendant shall, where applicable and or necessary, in relation to the assets listed from a to d above, take all the requisite steps including the signing of any necessary documents to effect registration or change of ownership as necessary into the plaintiff's name.
7. That the defendant be and is hereby awarded as his sole and exclusive property the following:
 - a. The business known as Millionaire Hardware
 - b. Stand CBD 2473
 - c. Shop No. 5 Pamusika
 - d. Toyota Dyna Registration No. AAJ 3536.
8. That each party shall pay its own costs.

Manase & Manase, plaintiff's legal practitioners
Mukonoweshuro & Partners, defendant's legal practitioners