

SHYLET NJANIKE
versus
GODFREY NJANIKE

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 17, 18, 19, 25 & 26 February, 8 March 2010 &
13 October 2011

Divorce Action

C. Kwaramba, for the plaintiff
M.C. Mukome, for the defendant

MAVANGIRA J: The plaintiff and defendant are husband and wife. They got married customarily on 1 December 1993 and their marriage was solemnised in terms of the Marriage Act, [Cap 5:11] on 22 June 1994. They were blessed with three children all of whom are still minors. They have been experiencing marital problems since 1999.

In 2001 the plaintiff went to the United Kingdom to train as nurse. She would come back home whenever she had the opportunity to do so during her holidays. Their differences continued. Eventually, in 2003, the plaintiff took the minor children with her to the United Kingdom where she has been working since then, having completed her nurse training.

On 18 July 2007 the plaintiff instituted this divorce action. The parties are in agreement that their marriage has irretrievably broken down. They have also reached agreement on some ancillary issues leaving only one issue outstanding for determination by this court. A joint pre-trial conference minute executed on 18 November 2009 records the following, *inter alia*:

“A SETTLED ISSUES

DIVORCE

(1) That the marriage has irretrievably broken down and there are no prospects of restoring a normal marriage relationship.

CUSTODY:-

(2) Plaintiff will retain custody of the three minor children namely C.K. (born 01 April 1994) C.T. (born 01 April 1994) and R.C. ...(born February 1999)

ACCESS:-

(3) Defendant is to exercise reasonable access by visiting the children in the United Kingdom at least once every year upon reasonable notice to the plaintiff.

MAINTENANCE:-

(4) Defendant is to pay US \$200,00 per month for all the three minor children with effect from the end of November 2009.

IMMOVABLES:-

(5) The following constitute matrimonial property:-

- (i) Stand No. 2367 Chikanga Township Phase 2
- (ii) Stand No. 1927 Chikanga Phase 2
- (iii) Stand No 1362 Chikanga Township
- (iv) Stand No. 3267A Umtali Township

B. ISSUES REFERRED TO TRIAL

1. What would constitute an equitable distribution of the matrimonial property?"

The plaintiff's story is as follows. Neither of the parties owned any immovable property before their marriage. However, before their marriage, each party had individually applied to the City of Mutare for a residential stand. As at the time of their marriage they were both on the waiting list for allocation of residential stands. Subsequent to their marriage, the plaintiff was allocated Stand 2367 Chikanga Township Phase 2 and the defendant was allocated Stand 1927 Chikanga Township, Phase 2. The plaintiff was allocated the stand in her maiden name. Soon after the marriage the plaintiff who was then working for Standard Chartered Bank changed her personal bank account into a joint account into which they both deposited their earnings.

The plaintiff introduced the defendant to one Temba Mukwakwami whom she had met at her workplace. This facilitated the awarding of a building contract to the defendant who thereby earned an income. They thus jointly paid for the two stands from the joint account during the period from the end of 1993 to the beginning of 1994.

Over the following years they developed both stands from funds generated by the company "Njanike Construction Company" which they were both running and in which the two of them were the only directors and shareholders. The company was incorporated in 1995. Identical houses were constructed on these two stands and the construction was completed sometime between the end of 1999 and 2000. The plaintiff held one share and the

defendant two in the company's shareholding. During the time when they were effecting the developments on the two stands she was no longer employed at the bank having left in February 1995 on a voluntary retrenchment scheme as she intended to concentrate on working for the company. She said that she decided to leave employment having realised that whilst the defendant had the technical skills in construction, there was need for her to take charge of the administration side of the company's business. She thus concentrated or expended her energies on this as well as in looking after their twin daughters who had been born severely pre-term at 28 weeks gestation on 1 April 1994. The arrangement was workable as they were operating the company from home at that time.

After the two identical houses had been built at the two stands, they rented them out. The defendant would receive and administer the rentals from both properties. The plaintiff was only made aware by her legal practitioners after the issuance of summons in this matter and after they had received correspondence from the defendant's legal practitioners that the defendant had disposed of stand no. 1927 Chikanga Township Phase Two sometime in 2004 or 2005 while she was in the United Kingdom. She had not been aware of this disposal before then. She was not consulted about it. She does not know how much it was sold for and she did not benefit from the disposal. In the meantime the defendant continued, and continues to this day, to receive and benefit from the rentals for Stand 2367 Chikanga Township Phase Two. She asked that the court award to her as her sole and exclusive property Stand 2367 as the defendant had disposed of Stand 1927 which was a replica of Stand 2367.

The plaintiff also said that Stand 1362 Chikanga Township was acquired towards the end of 1995. The property cost \$100 000. The plaintiff paid \$35 000 from her retrenchment package. Through the facilitation of the plaintiff's brother-in-law who was working for the Zimbabwe Building Society (ZBS), the defendant successfully applied for a mortgage bond with the ZBS. The same brother-in-law introduced them to the ZBS management personnel at Mutare. Soon thereafter, and through the same brother-in-law their company was contracted by ZBS to do a construction job in Chimanimani. As they had no money to get the project started they approached the plaintiff's father and asked him for his title deeds to No. 8 Chimoyo Avenue Yeovil, Mutare, so that they could use them as security at the bank in their bid to secure finance for the ZBS project. The plaintiff's father acceded to their request and they were able to commence on the Chimanimani project. From the earnings from this project the company got back on its feet and they were able to pay off the mortgage bond for this property sometime in 1996 or 1997. She said that they moved into the property in January

1996. There was a fully constructed house on this property. They further developed it with funds generated from the company. Although the plaintiff continued working in the company, the children developed complex needs. The twins were experiencing seizures and needed her close attention. Thus her time was divided between caring for the children, closely monitoring their safety and at the same time contributing to the company.

The plaintiff has since learned that this property was also sold by the defendant sometime in 2004 or 2005 while she was in the United Kingdom. She was not consulted about the sale neither did she benefit from the proceeds of the sale

The plaintiff said that sometime during the period from the end of 1999 to 2000 the parties acquired another property, being stand 3267, Umtali Township. She said that after the parties had viewed the property and agreed that they would like to acquire it, the defendant obtained a mortgage bond from Beverley Building Society. The mortgage bond was paid for from funds generated by the company. At the time of the acquisition of this property her contribution in the company was limited because the defendant had stated resisting her involvement in the company after the birth of their third child who was born in 1999. It was after the birth of this third child that their marital problems started. After nursing the baby for a few months the plaintiff tried to go back to the company office but the defendant prevented her from gaining entry and went to the extent of asking the workers to lock the doors so that she would not be able to enter or access the office.

She said that payments for the mortgage bond were made from the company which was the only financial vehicle of the parties. The property was registered in the defendant's name, a practice which the defendant adopted in all the properties which they acquired together. She thus considered this, as the other properties as "theirs" not "his" property. They moved in and lived in it as their family home. She referred to this property, stand 3267, Umtali Township as "the Greenside house".

The plaintiff said that her prayer to the court in relation to this Greenside house was that it be awarded to her because of her contribution to the business which provided the funds or financial resources for the acquisition of all the properties including this house. Furthermore, that the defendant had already benefited from some of the properties which the parties had bought and developed together in that he had disposed of Stands nos 1362 and 1927 from which disposals she had derived no benefit. The defendant was also benefitting from the vehicles acquired through the company during the subsistence of their marriage. She

mentioned the following vehicles, a Mazda 626, a Mazda T35, a Toyota Hilux one of which was a 4 x 4, a Toyota Hilux Raider.

The plaintiff also said that she had since learnt from her legal practitioner that the defendant had since sold some of these vehicles. She was not consulted about the sale of the vehicles neither did she receive any money from the sale of the vehicles.

She has abandoned any claim she may have had to any of the vehicles. However she said that the court should take into account the fact that she had not received or gained any benefit and was not getting any benefit from these vehicles when deciding on the equitable distribution of the immovable properties.

The plaintiff also said that the defendant continues to this day to benefit from rentals which he is receiving for the immovable property, Stand 2367 which is registered in her name. He has not accounted to her for any of the moneys he is receiving from that property.

It was also the plaintiff's evidence that during the subsistence of the marriage and whilst she was away at a church conference for a period of three weeks, the defendant without her knowledge or consent unilaterally withdrew from their joint account money that she had received as her retrenchment package used it to build a rural homestead in Honde Valley. When she queried the way the company was being run and why she was being restricted from full participation therein, the defendant would say to her that everything including the cars and the money belonged to him. When she reminded him of her various and numerous contributions, he gave her a cheque in the amount of \$67 000 telling her that it was the money which she had contributed to the building of the Honde Valley homestead and the deposit which she had paid for Stand 1362 Chikanga.

Regarding movable assets the plaintiff said that her request was that she be allowed to take pots, pans, other cooking utensils, the dining table and cabinet as well as a kitchen cabinet which is at the Honde Valley rural homestead. She said that she believed the defendant was agreeable to this.

Plaintiff said that she believed she was entitled to the Greenside house as well as the movable assets which she referred to because all this property was purchased during the subsistence of their marriage and she had also made a considerable contribution towards/to the company which was the vehicle for all their financial resources. However, by the time she left for the United Kingdom, the defendant totally excluded her from financial matters to the extent of unilaterally removing her as one of the company's bank account's signatories.

The plaintiff explained that the family never stayed at the properties at Stands 1927 and 2367 Chikanga. Stand 1362 Chikanga was the first family home from which they moved out after purchasing the Greenside house. She said that although she was a director of the company from its inception and was supposed to know about all investments made by the company, all her efforts to access financial matters with the defendant (as the other director) eventually became futile, particularly when she was in the United Kingdom as he would hang up the telephone on her. She said that she had left her full time employment with the Standard Chartered Bank so that she could devote herself to taking care of the twins who had complex difficulties and health needs and to contributing to the company.

The plaintiff produced as evidence reports of assessments which were done on the twins at St Giles Rehabilitation Centre in Harare on 7 January 2002. The assessments were done by educational psychologists and speech therapists and also by an occupational therapist in Mutare. She took the reports with her to the United Kingdom where the children were again assessed by educational psychologists and speech therapists. The twins were further assessed by the Ealing Council Special Educational Needs section. The Ealing Council requested her to give them a detailed report of the children's difficulties from the time they were born to the time they were twelve years old. She also produced in evidence the document which she prepared. Thereafter, Ealing Council made a statement of the special educational needs for each of the twins who were found to be eligible to be placed at a special school for children with profound & severe educational needs.

She said that the outcome of the assessments on the twins was that they had global developmental delay and were functioning at a very low cognitive ability with added speech and language difficulties. It meant that they needed extraordinary supervision and they also needed a person who understood whatever they were trying to say as they have difficulty expressing themselves. These learning difficulties also mean that they are socially immature regardless of their age. They function at a very low chronological age as compared to their real age. They need a higher level of input from an adult. It is also very difficult for them to learn things as they have a very impaired short term memory. They are very vulnerable children.

Regarding the beginning of the twins' health problems, she said that from the time when the twins were about ten (10) months old, they began to suffer from fits or seizures. Their bodies would jerk and during such periods there would be the risk or danger of choking on their own tongues or banging their heads and sustaining head injuries. They thus needed

close supervision so that as soon as they started feeling unwell, which would usually be when the temperatures rise, they would receive the appropriate attention. The plaintiff looked after the children and would make doctor's appointments for the twins. When they started going to school she would arrange for the extra lessons which they needed. The children are currently living with her in the United Kingdom since September 2003. Their special needs, which the plaintiff had to attend to from a very early age, also meant that she could not contribute to the company as much as she might have wanted to.

The plaintiff denied the suggestion that their marital problems worsened because she relocated to the United Kingdom. She maintained that their problems started in March 1999, a few weeks after the birth of their youngest daughter and that she went to the United Kingdom because of the problems. The situation had become so bad that it was unbearable for her as she was abused physically and emotionally and was humiliated. She was stripped of everything and had no say on any matters including financial matters, in the home. She had eventually given up all attempts to gain access to the company offices.

The defendant sent the plaintiff some money in 2001 when she was still a student nurse in the United Kingdom. She is now a qualified nurse. She took the children with her to the United Kingdom at the defendant's request as he said he was failing to cope with their appointments and follow up visits to St Giles as well as their extra lessons. He suggested that the twins might receive help from specialist in England. The defendant only made an application for a visa to a visit the plaintiff and the children in the United Kingdom in December 2003. His application was turned down as his bank statement showed that he was heavily overdrawn. Since then the plaintiff is not aware of any other attempt by the defendant to visit the children.

She said that the twins' speech has improved. They can now communicate to the best of their level but their vocabulary and cognitive ability is still affected. The plaintiff said that her understanding is that their condition will not go away or disappear. In fact is a disability.

In total, the defendant has sent money to the plaintiff and the children on more than four or five occasions whilst they have been staying in the United Kingdom.

Whilst the plaintiff was being cross examined by Mr *Mukome* it was suggested to her that the court could be asked to impose a suspensive clause in its judgment to the effect that the Greenside house would not be transferred to anyone until the youngest child attains 18 years of age. Furthermore, that upon the youngest child's attainment of the age of 18, the property would be transferred into the names of the children in equal and undivided shares.

It was put to her that whilst the defendant was willing to give his half share in the Greenside house to the children, he needs the house for the time being as he would like to pledge it as security for his obligations in the business.

The plaintiff's response was that there is no assurance that the house will be safe and still available to be transferred into the children's names if it should be left in his name between now and the time when the youngster child attains the age of 18. She also said that pledging the house as security could not take precedence over the children's need for shelter. She suggested that the defendant can find other sources of sustaining the business.

It was also proposed to the plaintiff in the alternative that the house be awarded to the children but that the defendant be granted a usufruct allowing him use the house. The plaintiff's response was that she would be agreeable to him living in house as long as the house was transferred into the children's names. That way the house would be safe from disposal.

Plaintiff made it clear during cross examination that when she initially filed for divorce, she was not aware that Stand 1927 and 1362 Chikanga Township had been sold. She said that that explained why she listed them amongst the properties which they had. She said that her initial claim as to how the property ought to be distributed was based on her understanding or belief that these properties were still available for distribution. However, her attitude changed when she learnt of the sales of these properties. Thus although she had initially claimed the Greenside house for herself, her reconsidered stance was that it be registered in the names of the children but that the defendant could continue to live therein until he found another property to move into.

The plaintiff emphasised that she had shares in Njanike Construction Company and also mentioned the various motor vehicles none of which she is laying claim to, merely for the purpose of the court having a full picture or view of the extent of the defendant's benefit from the matrimonial estate even before the distribution by the court has been done. She confirmed that Stand 2362 still registered in her name to her knowledge.

Regarding her efforts to salvage the marriage and her subsequent conclusion that the marriage had irretrievably broken down, it was the plaintiff's evidence that whilst she was a student nurse in the United Kingdom she made efforts to come back home every two of the three holidays per year that she had. She would not come for the December holidays only because the tickets during the festive season were very expensive and she would also be preparing to write examinations in January. However, whenever, she came home the

defendant would always have a reason to go away. On one occasion she intended to come home on holiday and bring the youngest child with her. She bought a ticket for the child as well but the child had to remain behind at Heathrow airport as the defendant refused to sign a document that was required for the child's travel. He had even asked her why she was coming home at all. When she arrived alone, he again packed his bags and went away. That is when she realised that the marriage had completely broken down.

The defendant also testified. Regarding the immovable properties said that he sold two immovable properties in 2004 and in 2005 due to financial constraints that he was facing due to the country's hyperinflationary economic situation. He sold the two properties while the plaintiff was away in the United Kingdom but did not consult her about the sales due to the distance between them as well as the breakdown in their communication. Furthermore, he had expected that the plaintiff who had by then completed her nurse's training course would have come to his rescue as he is diabetic, by sending him appropriate equipment and medication. The plaintiff, he said did not do as he expected in this regard.

Defendant said that he placed the value of his contribution towards the purchase of the immovable properties at 90% against the plaintiff's 10%. He disagreed with the plaintiff's suggestion that the Greenside house be registered in the names of the children. He said that the plaintiff was not at all involved in the day to day operations of the company and that she was merely a dormant shareholder and director whose name he had included when he was advised that there needed to be two directors for the company (Njanike Construction Company) to be registered.

Defendant said that when the plaintiff told her that she had applied for a nursing course in the United Kingdom, he co-operated in every manner and decided not to argue with her. He raised the money for her ticket and accompanied her to the airport in Harare. She came back after her interview. When she was advised that she had been successful, he raised money for payment of all requirements including accommodation as well as the plaintiff's sustenance. He remained behind with their daughters, the youngest of whom was only 2 years old then.

In 2003 the plaintiff came home and took the children back with her on the understanding that they were going on holiday. He made attempts to follow and join them in December of the same year but was unsuccessful. During the same month he bought clothes for the plaintiff and the children and sent them over by courier DHL.

The defendant also stated that when he sold the house, it was in an effort to raise money for the children's sustenance in the United Kingdom. He would make arrangements with some of his relatives in the United Kingdom who wanted to have Zimbabwe currency back home and he would then make payments in the currency of the United Kingdom to the plaintiff. Thereafter, and in 2005 due to hyperinflation in the country's economy, he sold another house as he was failing to get jobs to keep the company running and earn an income. He said that he used the proceeds in the same way that he did the proceeds of the sale of the first house. He also used the proceeds for his daily food and maintenance of the other houses.

The defendant accepted that he did not consult with the plaintiff when he disposed of the properties. He said that this was due to the distance between them as well as the fact that their relationship was no longer cordial. Furthermore, he was not receiving any assistance from the plaintiff. He denied the suggestion that he disposed of the two houses out of malice.

The defendant said that he loves all his daughters including the twins who have a speech disability. He also said that it was him who paid for the stands 1927 and 2367 when they were allocated to them in 1993. For the purchase price for stand 1362 Chikanga Township, they used part of the plaintiff's retrenchment package from the Standard Chartered Bank as well as a mortgage loan that he obtained. To pay off the mortgage bond, he used money that he received as payment when he won a contract to build houses in Chimanimani in 1996. He said that stands 1927 and 2367 were developed with payments that he received when he won another contract with the Chimanimani Rural District Council. He supplied all the material that was used to build the houses by a builder from STS Easton Construction Company whom he engaged to do the construction. He also had a fence erected around each of the two houses.

It was also the defendant's evidence that in 1992 he "registered a company with the National Employment Council for the Construction Industry" under the name "One way Building Contractors". While operating this company he carried out some construction jobs for Plan International, Dairiboard and FITC. In December 1993 he got married to the plaintiff. In 1994 he did some work for ZESA. In May 1995 he registered Njanike Construction Company which is the name by which the company is now known. In his own description, One Way Building Contractor gave birth to Njanike Construction Company.

The defendant testified that he bought the Greenside house 1999. When he advised the plaintiff about his desire to purchase the property she showed no interest. He proceeded to apply for a loan from Beverley Building Society who approved of it within a week and the

property was purchased. Because of the already sour relationship between them the plaintiff would not even pack the family property for the purposes of moving to the new house. The defendant attended to this with the help of the maid and other male workers in the plaintiff's absence. He said that she showed no joy or interest in the new house where he had to off load and do the packing without her involvement. He stayed with her in the Greenside house in 2000 and in part of 2001 before she left for the United Kingdom. He was asked whether the Greenside house was purchased by the company, the plaintiff, himself or both the plaintiff and himself. His answer was that he had bought it himself.

The defendant said that in assessing the plaintiff's contribution at 10% he was also taking into account the role that she played as his wife and as a mother to their children as well as the money that she had provided and which they used to pay the deposit for the third Chikanga house. He also considered her contribution to the construction of the rural home even though she later demanded her money back. He denied that the plaintiff contributed anything or did any work for the company. He denied that she was the brains behind the administration of the company. He said that she was a "dormant shareholder and director" of the company and that she was a holder of one-third of the shares at his option or pleasure.

The defendant said that an equitable distribution of the matrimonial immovable assets would be for the house in Greenside to be awarded to him and Stand 2367 Chikanga to be awarded to the plaintiff.

It is common cause that when the parties married each other, none of them owned any immovable property. It is common cause that the first born twin children had serious health challenges that required the plaintiff to leave her formal employment at the Standard Chartered Bank in order to be able to attend to their needs. It is common cause that the parties approached the plaintiff's father to allow them to use the title deeds to his house as security for a loan which was needed to finance the Chimanimani project. Furthermore, that the earnings from the Chimanimani project were used to develop the two Stands 1927 and 2367 in Chikanga. It is also common cause that about \$35000 of the plaintiff's retrenchment package was used to pay the deposit for Stand 1362 Chikanga. Part of the retrenchment package was also used to construct the Honde Valley rural home. It is also common cause that income from the construction company was used to pay the purchase prices for Stands 1362 and the Greenside properties. It is undisputed that from the time that the development of Stand 1927 was completed and it was leased out, the defendant had been collecting the rentals until the time when he sold it. He is also still collecting rentals for Stand 2367. He has

also been collecting the rentals for the cottage at the Greenside property. The Defendant agreed under cross-examination that he never accounted to the plaintiff for any of the monies that he collected from these properties. He also agreed that he sold Stand 1927 Chikanga without informing or agreeing with the plaintiff.

The defendant also sold Stand 1362 Chikanga without informing or agreeing with the plaintiff. He did not account to the plaintiff on how he spent or disposed of the proceeds of these sales.

Each respective party sought to create the impression of great, if not greater contribution to the acquisition of the matrimonial estate than the other. What emerges from the evidence however, is that this was a young family that started off with both spouses having the desire to uplift or improve their circumstances and build a home together. They both put in their equal contribution but in their different ways. I am not persuaded that one made a greater contribution than the other. I find it highly improbable and not worthy of belief that the plaintiff's contribution to the marriage can only be assessed at 10% with that of the defendant at 90%. Notably the plaintiff did not attempt to play down the defendant's contribution to the extent that the defendant played hers down. Rather, the plaintiff's greatest contention was that the defendant has already benefited more from the matrimonial assets and that it is only fair that she be awarded as her sole and exclusive property Stand 2367 Chikanga Township, Phase Two and that Stand No. 3267 Greenside be registered in the names of the children. Notably this is a departure from the distribution claimed in the plaintiff's declaration.

In the Plaintiff's Declaration, she contended that a fair, just and equitable distribution of the immovable property would be for her to be awarded as her sole and exclusive property Stand 2367 Chikanga Township Phase Two and for the defendant to be awarded as his sole and exclusive property Stand No. 1927 Chikanga Township Phase Two as well as the Honde Valley rural home. She also contended therein that Stand 1362, Chikanga Township be sold and the net proceeds thereof be equally distributed between the parties. Furthermore, that Stand 3267 Umtali Township be transferred to the three minor children in equal and undivided shares, share and share alike. The change in her proposal was occasioned by the fact that she only became aware at a very late stage of the disposal of the two immovable properties sold by the defendant during her absence.

In his claim in reconvention the defendant contended that a just and equitable distribution of the immovable property would be for the plaintiff to be awarded as her sole

and exclusive property Stand 2367 Chikanga Township Phase Two. The defendant would then be awarded as his sole and exclusive property Stand 3267 A Umtali Township, also known as 62 Chaminuka Way, Greenside, Mutare as well as the rural home in Honde Valley.

It appears therefore that there is no dispute between the parties regarding the distribution of Stand 2367 Chikanga Township Phase Two and the Honde Valley rural home. They differ only with regard to the fate of the Greenside property.

In arriving at an appropriate distribution of matrimonial assets the court is enjoined by s 7 of the Matrimonial Causes Act, [Cap 5:13] to take not only the parties' levels of contribution but several other factors listed therein. I have already found that the parties contributed equally to the matrimonial estate. One of the other 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. *In casu*, the plaintiff is gainfully employed in the United Kingdom while the defendant manages the construction company which, it would appear for the greater part of the duration of the marriage, was the main source of income for the family. There is no evidence before this court that this present situation is likely to change in the foreseeable future. The three minor children of the marriage are unlikely to acquire any income earning capacity in the foreseeable future. With the twin children, because of their well documented disability, there is a real possibility that they may not ever, or at least in the foreseeable future be in a position to earn any income in their own right.

The other factor to be considered is the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future. It is in my view without doubt that the minor children's basic needs include accommodation, food, clothing, education, medical, and for the twins, psychological attention as and when necessary. The children have been and will remain in the plaintiff's custody who must take care of their daily needs in all spheres of their lives. In the same vein the court is also enjoined to consider the age and physical condition of each spouse and child. It was the defendant's undisputed evidence that he is a diabetic. However, there was no indication or evidence that he is in such a condition as to be incapacitated. If anything, life has carried on as usual for him. The minor children, particularly the twins are children with special needs who also suffer "moderate/severe" learning difficulties. It is highly probable, if not certain, that for the foreseeable future they will need extra care and attention.

The indirect contribution made by each spouse to the family, including contribution made by looking after the home and caring for the family and any other domestic duties, is another factor to be considered by the court. In addition to what I have already commented earlier in this judgment, *in casu*, I have no hesitation in agreeing with the plaintiff's legal practitioner when he states in closing submissions:

"In *casu* there is no doubt that the plaintiff suppressed her own income making capacity by leaving her gainful employment in a bank in favour of home making where she was to pay special attention to the disabled children of the marriage. The husband consequently was relieved to accumulate capital which he now claims to be his alone".

Although the court in *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H) was dealing with the division of assets in an unregistered customarily union, the comments made therein are apposite regarding the proper place of a wife in distribution of matrimonial assets:

"If a wife has contributed, either through financial contributions or by suppressing her income-earning capacity in favour of home making and relieving her husband to accumulate capital, she incurs personal impoverishment in the event of divorce. Therefore, where she has made a contribution that impoverishes her and will leave the husband enriched at her expense, an unjust enrichment should be extended to her"

The parties have been married for about seventeen years. In *Jengwa v Jengwa* 1992 (2) ZLR (2) (H) at 133-4 the following was stated:

"Normally the appellant with a marriage of such long standing should be reasonably confident of achieving a substantial apportionment. The birth and upbringing of children, the home making, the income producing endeavours would entitle her to expect something close to parity with the husband.....".

That the parties pooled their resources together for the benefit of their common household cannot be disputed in my view. I find persuasive the plaintiff's legal practitioner's submission that it "does not matter who was on the ground doing the actual work for Njanike Construction. It does not matter who was at home with the children. It does not matter who paid for what. What matters is that they were both contributing to the common household. While the plaintiff was taking care of the other amenities of life, the defendant was carrying out construction projects".

I have found that the parties contributed equally to the matrimonial estate. I also find that the defendant has already benefitted from the estate to a considerable extent from the proceeds of the sales of the immovable properties which he disposed of without consulting or agreeing to do so with the plaintiff. The fact that he may have sent some clothes and some

money from the said proceeds cannot be equated with accounting for the same as he sought to urge the court to do. He will be awarded the Honde Valley rural home for the reasons already discussed above. Similarly the plaintiff will be awarded Stand 2367 Chikanga Township Phase Two. With regard to Stand 3267 A Untali Township also known as 62 Chaminuka Way, Greenside, Mutare the parties will each be awarded a 50% share therein. Although in effect this would appear to unduly favour the defendant, particularly in view of the persuasive submission or contention by the plaintiff that the said property be transferred into the names of the minor children, sight cannot be lost of the fact that it is also the court's duty in its endeavour to arrive at a fair and just or equitable distribution, to ensure that it places the parties as much as it may be possible to do so, in a position in which they would have been had the marriage relationship continued.

For the above reasons it is therefore ordered as follows:

1. That a decree of divorce shall issue.
2. That custody of the three minor children of the marriage namely C.K.... born 1 April 1994, C.T... born 1 April 1994 and R.C ...born February 1999 be and is hereby awarded to the plaintiff.
3. That the defendant shall be entitled to reasonable access to the said minor children by visiting the children in the United Kingdom at least once every year upon reasonable notice to the plaintiff.
4. That the defendant shall contribute to the maintenance of the said minor children by paying to the plaintiff US\$66-00 per month per child for all three minor children, with effect from the end of November 2009.
 - (a) Maintenance for the minor children C.K. and C.T. shall be paid for as long as they require such maintenance; and
 - (b) Maintenance for R.C. shall be paid until she attains the age of 18 or becomes self supporting whichever occurs sooner.
5. That the plaintiff be and is hereby awarded as her sole and exclusive property Stand 2367 Chikanga Township Phase Two.
6. That the defendant, be and is hereby awarded as his sole and exclusive property the Honde Valley rural home.
7. That the plaintiff and the defendant are each awarded a 50% share in Stand 3267 A Umtali Township also known as 62 Chaminuka Way, Greenside, Mutare.

- (a) If the parties cannot, within 30 days of the date of this order, agree on a valuator, the Registrar shall appoint a valuator.
 - (b) The valuator shall as soon as possible, value the property and if there are any outstanding obligations shall indicate the net value thereof.
 - (c) The costs of valuation shall be paid by both parties in equal shares.
 - (d) The defendant shall pay to the plaintiff within six (6) months of the date of this order, 50% of the net value of the property.
 - (e) If the defendant fails to comply with subpara (d) above, then the plaintiff is given the option to pay the defendant 50% of the net value of the property within six (6) months thereafter.
 - (f) In the event that neither party is able to pay out the other in terms of subparas (d) and (c) above, then the property shall be sold by an independent estate agent appointed by the Registrar from the Registrar's Panel of Estate Agents and the net proceeds shared equally between the parties.
8. Each party shall pay its own costs.

Mbidzo Muchadeham & Makoni, plaintiff's legal practitioners
Mugadza, Mazengero & Dhliwayo, defendant's legal practitioners