

LEONARD MASHANDA
versus
OATH MASHANDA (NEE MOYO)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 16, 22, & 24 June 2022, 18 July 2022
and 13 April 2023

CIVIL TRIAL

M T Rujuwa, for plaintiff
B T Mudhara, for defendant

MAXWELL J:

BACKGROUND

On 13 October 2018, the parties contracted their marriage in terms of the Marriage Act [*Chapter 5:11*]. The marriage was blessed with two children, Kabelo Lenny Mashanda born on 21 July 2016 and Khanyiso Kelton Mashanda born on 25 November 2019. On 13 July 2020, the plaintiff issued summons for the dissolution of the marriage claiming a decree of divorce and a division of the matrimonial assets. In his declaration he stated that the parties were in the process of acquiring a 300m² residential stand through the City of Harare, that he had paid an initial deposit and made a commitment to pay off the balance of USD2 100.00 over twelve months. He further stated that the parties acquired various moveable properties which the defendant took with her upon deserting the matrimonial home. The moveable properties included a Jeep Grand Cherokee motor vehicle with registration number AAM 3950, lounge suite, bedroom suit, spare bedroom suite for children, 2 fridges, 4 plate electric stove, 4 plate gas stove, kitchen unit, microwave and kitchen chairs. The plaintiff proposed that the defendant be awarded all the moveable property she went away with as well as the residential stand for which he promised to pay off the balance. He further proposed that custody of the minor children be awarded to defendant with him having reasonable access every alternate weekend and school holidays as

well as at any time the parties discuss and agree. He proposed to pay ZWL\$2 000.00 per month as child maintenance till each child attains the age of 18 years or becomes self- supporting whichever occurs earlier. He promised to pay the children's fees from Early Childhood Development till attainment of their first degrees. He proposed that each party bears its own cost.

Defendant filed her plea and counter-claim. In her plea she disputed that the stand was 300m² and submitted that it was 821m² and that the balance, according to the developer, was more than USD2100.00. She submitted that the parties have a matrimonial home registered in the Plaintiff's name being a certain piece of land situate in the District of Salisbury called Stand 2699 Fountainbleau Township of Fountainbleau Estate also known as Stand 2699-56 Crescent Kuwadzana 4, Harare. She proposed that this property be distributed as part of the matrimonial property. She further submitted that the parties also, through joint efforts and contributions in cash and kind, built a thirteen roomed house, tobacco barns, cattle pens, spray dip and commercial fowl run at Plot No.2 Berry Farm, Chinhoyi which is a plot leased by plaintiff in terms of the Land Resettlement Scheme. Further that there is a sub-stand the parties acquired adjacent to the plot which has a 4 roomed servants' quarters built through joint efforts of the parties. She proposed that all this be part of the matrimonial estate. She disputed that she deserted the matrimonial home and submitted that she was forced out by plaintiff who came with a gun to chase her away. She also submitted that during the subsistence of their marriage, the parties acquired six vehicles, Chrysler Voyager Registration number ABY 4453, Chrysler PT Cruiser Registration number ACS 3652, Grant Cherokee Jeep registration number AAM 3950, Grant Cherokee Jeep registration number AAV 3729, Isuzu KB 250 registration number ABK 6411 and a tractor, 35 cattle, 40 goats, plough marker and trailer which should be shared equally between the parties. She proposed that plaintiff should pay USD200.00 per child as maintenance until each child turns 18 or becomes self-supporting whichever happens later. She agreed that Plaintiff pays for school fees until the first degree qualification.

In her counter claim she proposed that plaintiff be awarded the stand in Chiedza Housing Cooperative and the house at Plot 2 Berry Farm, Chinhoyi with all other developments whilst she is awarded the matrimonial home. She also proposed that plaintiff be awarded four vehicles, Chrysler Voyager ABY 4453, Jeep Grand Cherokee AAM 3950, Isuzu KB 250 ABK 6411, a tractor and 50% of the livestock at the farm whilst she gets the household property in her

possession, the Grand Cherokee Jeep AAV 3729 and Chrysler PT Cruiser ACS 3652. She submitted that during the subsistence of the marriage she did work for Brep Auto Centre (Private) Limited and that plaintiff would take money from home to improve the business therefore it is just and equitable that she be awarded 20% shareholding in Brep Auto Centre (Private) Limited. She agreed that she has custody of the children on the terms proposed by plaintiff but with maintenance of USD200.00 or equivalent in local currency per month per child and plaintiff meeting educational costs.

In his replication plaintiff pointed out that the stand was 300m² as he had no capacity to pay for the 821m² that he initially paid a deposit for. He submitted that the house number 2699-56 Crescent Kuwadzana solely belongs to him as it was awarded to him in a previous divorce under case number HC 1125/17. He disputed owning a gun and submitted that defendant moved out on her own and hired a truck in which she loaded all the moveable property. He further submitted that Plot 2 was allocated to his parents in 2003 and was only put in his name after the death of his father in place of his mother who is of advanced age. He also submitted that the improvements on the Plot were effected by his parents and the sub-stand does not belong to them as they were only allowed to build temporary servants' quarters thereon. On the motor vehicles, he submitted that only three belong to the parties, two Jeep Cherokees and the Isuzu KB 250 which is a non-runner, and that the Jeeps are registered in each of the parties' names. He submitted that defendant moved out with her vehicle and it developed a fault whilst she was using it almost a month after moving out. He disputed the acquisition of 35 cattle and 40 goats and stated that there were 14 cattle remaining in Gokwe belonging to his parents that were sold and the proceeds of the sale were used to purchase 15 cattle in Makonde. He submitted that he bought 8 cattle but two died and defendant did not contribute anything, and that he had to use one cow to compensate his mother for defendant's actions leaving only 5.

In his plea to the defendant's counter claim, plaintiff stated that defendant deserted the matrimonial home and took every household property item. He stated that he pad a deposit for a stand but due to the pressing economic situation, he opted to reduce its size as he is unable to pay the balance for the bigger stand. He pointed out that the beneficiaries of the land reform programme are his late father and his mother. His mother is of advanced age and she granted a waiver so that his name appears on the offer letter instead of hers. He submitted that the

improvements at the plot were made by his parents way back in 2003, before defendant came into the picture. In 2016 he sold his property in Gletwin and built a house on the plot from the proceeds. Plaintiff submitted that without pleading any contribution, defendant cannot be awarded the Kuwadzana property simply because the parties stayed there. He proposed that he retains the Jeep AAM 3950 whilst defendant retains the Jeep AAV 3729 and the Isuzu KB 250 ABK 6411, non-runner. He submitted that the tractor and its components belong to his parents having been bought by himself and his sister for them. He disputed that defendant is entitled to any livestock and pointed out that he has no household goods to retain as defendant emptied the house. He submitted that Brep Auto Centre (Private) Limited was opened in 2013 and does servicing of vehicles on rented premises. He disputed that any funds were taken from home to fund the business. He pointed out that there is an extant order of court on maintenance. He prayed for the dismissal of the counter claim.

JOINT PRE-TRIAL CONFERENCE MINUTE

On 26 January 2022 the parties signed a Joint Pre-Trial Conference minute. The parties agreed that the following issues were not in dispute;

1. The marriage had irretrievably broken down.
2. Plaintiff admitted and accepted the obligation of paying school fees and all school related expenses for the parties' minor children.
3. Plaintiff acceded to the defendant's request to retain all household property in her possession.
4. Defendant abandoned her claim for the payment of her legal costs.

The following were agreed to be issues for trial;

1. What is the fair and equitable distribution of the parties' movable and immovable assets?
2. Whether or not defendant should be awarded 20% of Brep Auto (Private) Limited.
3. Whether or not Plot No. 2 Urume situate in Chinhoyi is distributable.
4. What is the fair and reasonable amount of maintenance Plaintiff should pay for the minor children and the manner of payment.

DISTRIBUTION OF ASSETS

The law relating to the sharing of the assets of the spouses is set out in section 7 of the Matrimonial Causes Act [*Chapter 5:13*] (the Act). The assets subject to distribution are those that were acquired by the parties during the subsistence of the marriage which they consider to be belonging to the family. The Court's power to distribute the family assets however does not extend

“to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage—

- (a) by way of an inheritance; or
- (b) in terms of any custom and which, in accordance with such custom, are intended to be held by the spouse personally; or
- (c) in any manner and which have particular sentimental value to the spouse concerned.”

See s 7 (3) of the Act. In subsection 4 of the same section, the Court is enjoined to have regard to all the circumstances of the case, including the following—

- “(a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
- (d) the age and physical and mental condition of each spouse and child;
- (e) 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;
- (f) 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;
- (g) the duration of the marriage;...”

The Act further directs that in distributing the assets, the court shall endeavor as far as is reasonable and practicable and, having regard to the conduct of the parties, where it is just to do so, place the spouses and child in the position they would have been in had a normal marriage relationship continued between the spouses. The distribution of the assets of the spouses will therefore be considered in the light of the above.

MOVABLE ASSETS

HOUSEHOLD GOODS AND EFFECTS

There is no dispute insofar as household goods are concerned. The household goods and effects will therefore be awarded to the defendant as agreed.

MOTOR VEHICLES

Plaintiff offered the defendant the Jeep Cherokee AAM 3950 he claimed to have bought for her during the course of their marriage. Defendant claimed four vehicles, Chrysler Voyager ABY 4453, Jeep Grand Cherokee AAM 3950, Isuzu KB 250 ABK 6411 and a tractor. The parties are agreed that the Jeep Cherokee AAM 3950 be awarded to the Defendant. It will accordingly be.

a) Chrysler Voyager ABY 4453

According to defendant, plaintiff has had this vehicle throughout their married life and should therefore be considered his. Plaintiff's testimony was that this vehicle belongs to Mr Mzwimbi and that he kept it as he was looking for a buyer for it. Under cross examination he was referred to his previous divorce with one Beatrice Jeranyama on the issue of cars. It was pointed out to him that item number 4 on the deed of settlement referred to ABY 4453. In response he stated that he was keeping the car on behalf of Mr Mzwimbi and that if it was his he would have registered it in his name. The registration book for this vehicle was produced. It confirmed that the vehicle's registered owner is Jeffrey Mzwimbi. Registration of a vehicle raises the presumption of ownership of the vehicle. It is trite that he who makes a positive assertion bears the onus of proving the facts so asserted. See *Nyahondo v Hokonya* 1997 (2) ZLR 457. Defendant did not discharge the onus. Faced with the evidence regarding ownership of the vehicle, the defendant ought to have given details regarding the purchase of the vehicle, when the vehicle was bought and from who. She could have produced proof of payment or agreements of sale of the vehicle if available. She failed to show that plaintiff purchased the vehicle and that the vehicle is matrimonial property. The Deed of Settlement that was referred to in cross-examination was not placed before the court. What was included in Defendant's Bundle of Documents is the Divorce Order in HC 11215/17 which did not mention the vehicle in question. Accordingly, the vehicle is not susceptible to distribution.

b) Isuzu KB 250 ABK 6411

Defendant mentioned this vehicle in her counter claim and proposed that it be awarded to the plaintiff. She said nothing further in relation to it in her evidence. Plaintiff testified that this vehicle is a non-runner having broken down three years ago. Neither of the parties proposed how

it should be distributed in their closing submissions. Since defendant, who had mentioned the vehicle in her counter claim did not pursue its distribution, I find that the vehicle is not subject to distribution.

LIVESTOCK

In her counter claim, defendant prayed that she be awarded 50% of the livestock at the farm. In her plea to the Summons and Declaration, she had stated that the parties acquired 35 cattle and 40 goats. This was denied by the plaintiff who stated in his replication that there were 14 cattle remaining in Gokwe belonging to his parents and that the cattle had been sold and the proceeds were used to purchase 15 heifers in Makonde. He further stated that he only purchased 8 beasts in 2018 of which 2 died. Of the remaining 6, he stated that one was used to compensate his mother after defendant had slaughtered his mother's 9 goats. He disputed that the parties owned 40 goats. defendant produced a copy of a stock card in plaintiff's name for the years 2017 to 2019 which had totals ranging from 29 to 36. She also produced two Z.R. Police Livestock Clearance Certificates from Kensamba Police Station. The first one was Livestock Clearance Register Number 397 dated 26 August 2017 for the movement of fifteen (15) heifers to Bheri Farm. The second one was Livestock Clearance Register Number 365 dated 29 July 2017 for the movement of seventeen (17) goats to Bheri Farm. Both certificates show that the livestock were purchased by the defendant. Under cross examination plaintiff stated that the clearance certificates were in defendant's name because he had asked her to clear the livestock for him. He stated that at that time she was still his girlfriend. This was disputed by defendant who indicated that by that time they were married and that she had bought the livestock from proceeds of sales. Defendant also produced two Carswell Meats Kwekwe Abattoir invoices in plaintiff's name. Document number 5002430 was for the sale of 4 beasts and 5002431 was for the sale of 8 beasts. Both invoices are dated 29 March 2017.

At the end of the evidence of both parties, the Court was left with two irreconcilable versions. In *Stellenbosch Farmers' Winery Group Limited v Martel et Cie*, 2003 (1) SA 11@ 14-15 the technique generally employed by courts in resolving factual disputes is stated as follows:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court

must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

In assessing the credibility of witnesses the court generally is guided by several factors.

In *Nicoz Diamond Insurance Ltd v Clovgate Elevator Co (Pvt) Ltd: Clovgate Elevator Co (Pvt) Ltd v Nicoz Diamond Insurance Ltd* 2018 (1) ZLR 50 @ 55 reference is made to the case of *Hees v Nel* 1994 PH F11 in which MAHOMED J, had this to say on the subject of assessment of credibility:

"Included in the factors which a court would look at in examining the credibility or veracity of any witnesses, are matters such as the general quality of his testimony which often is a relative condition to be compared with the quality of the evidence of the conflicting witness. His consistency both within the context and structure of his own evidence and with the objective facts, his integrity, his candour, his age, his capacities and opportunities to be able to depose to the events he claims to have knowledge of. His personal interest in the outcome of the litigation, his temperament and personality, his intellect, his objectivity, his ability to effectively communicate what he intends to say and the weight to be attached and the relevance of his version against the background of the pleadings."

Defendant produced documents to buttress her case. She demonstrated that plaintiff had 36 cattle to his name in 2019. She also demonstrated that she bought 15 heifers and 17 goats in 2017. Plaintiff did not produce any document to support his case. He did not produce any evidence to rebut the presumption that the cattle in the stock card in his name belong to him. Despite undertaking to produce the original stock book, he did not do so. The original stock book would have shed light on when the livestock was registered and what it consisted of. It would

show the additions and subtractions and when they happened. In his summary of evidence he had promised to call his mother as a witness but did not do so. It is stated in *Mugari v Machiri* 1987 (1) ZLR 164 @ 166 B-C, that:

“the court will not allow itself to be drawn into making inferences when it is apparent that evidence could have been led on the very point on which the court is being invited to make the inference. The reason is obvious. The court will not reach out in the dark when the plaintiff has his hand on the light switch. It will ask itself why the plaintiff does not switch on the light. Is it because the light will reveal facts which inferential reasoning would not have revealed? See *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621.”

Plaintiff clearly did not want the court to know the factual position regarding livestock at the farm. Section 7 (4) of the Act lists some of the circumstances that a court should have regard to in the distribution of property upon divorce in the following terms; -

“...and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.”
(underlining for emphasis)

In *Mhora v Mhora* SC 89/20, it is stated that the conduct envisaged in s 7 (4) of the Act is that which seeks to hinder or frustrate a proper consideration of what consequential orders can be made upon divorce, and that the repercussions of such conduct are aptly illustrated in the case of *Shenje v Shenje* 2001 (1) ZLR 160 at 163A – C where GILLESPIE J had this to say:

“The task of assessing a fair division of property can be difficult enough when appropriate evidence is led of the wealth, assets and means of the parties. It is potentially much more difficult when a party seeks to conceal his circumstances. The various suggested approaches to a division (“a one-third rule” or a “his, hers, theirs” approach) are rendered useless where one does not have any clear idea of what is available for distribution.” (my emphasis)

Plaintiff’s testimony had some inconsistencies. Firstly, in his evidence in chief, he indicated that during the course of marriage the parties managed to buy eight (8) cows. In his closing submissions he stated that the farm, livestock, buildings were there long before the parties got married. In the replication, on p 16 of the record, he indicated that he was left with 5 cattle. In his evidence in chief he stated that 4 cows remained. In re-examination he indicated that when defendant cleared the livestock reflected in the certificates produced in evidence, she was still his girlfriend. As stated above, the clearance certificates are dated July and August

2017. Under cross examination plaintiff stated that he had married defendant traditionally in May 2016. It therefore follows that plaintiff was not telling the truth when he indicated that defendant was still his girlfriend in 2017 when the livestock were cleared. The inconsistencies, the failure to call his mother as a witness and the failure to produce the original stock book can only be the result of a deliberate attempt to prevent the truth from being established. I find the defendant's version more credible than that of the plaintiff. In her closing submissions, she stated that livestock was bought during the currency of the marriage, and that prior to that plaintiff had no stock book. The plaintiff's conduct can only be explained as a bid to frustrate a proper distribution of the livestock, which conduct the Act requires to be taken into consideration. Such conduct must be held against the perpetrator in the distribution of property. Consequently, I find that defendant is entitled to her claim of 50% of the livestock at the farm.

BREP AUTO (PRIVATE) LIMITED

Defendant is claiming 20% of the shareholding in this company. Plaintiff disputed defendant's entitlement to 20% and testified that this company was formed before he knew her and that she contributed nothing to its formation and running. Defendant testified that she contributed immensely to the company's operations. She pointed out that the company was at its infancy when the parties married and plaintiff was employed by Zimoco. She testified that they worked together to make it a success.

ZIYAMBI JA in *Usayi v Usayi* 2003 (1) ZLR 684 (S), stated at 688A-D, that:

“The Act speaks of direct and indirect contributions how can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night nurse **for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and therein an atmosphere from which both husband and children can function to the best of their ability? In the light of these many and various duties how can one say as is often remarked: “throughout the marriage she was a housewife. She never worked? In my judgment, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of 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. A fair approach is that set out by Professor Ncube in his book *Family Law in Zimbabwe*. At p 178 he said: -**

‘Our courts, when formulating a legal approach to the re-allocation of property on divorce, should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife.’” (my emphasis)

The Honourable Judge went on to state that indirect contributions encompasses much more than the performance of domestic duties and encompasses all aspects of a spouse's role in the life of the other spouse and their children in the day to day running of a family. Such contribution to the family cannot be disregarded. See *Muzongondi v Muzongondi* SC 66/17. Defendant narrated her indirect contribution in the form of taking care of her children, plaintiff's other children, nieces, nephews, siblings and the extended family, donation of appliances and furniture, catering for end of year parties, using her vehicle to ferry employees and allowing her vehicle to be given to customers who would have brought vehicles for repairs. She also stated that proceeds from sale of farm produce were also used in making the company viable. I did not hear the plaintiff saying that the company was viable before the parties married. Defendant was not shaken under cross examination and affirmed her indirect contributions. Such indirect contribution, in my view, entitles her to the share she is claiming. Accordingly, defendant is awarded a 20% share in Brep Auto (Private) Limited

IMMOVABLE ASSETS

KUWADZANA HOUSE

In her counter claim, defendant submitted that it would be just and equitable if she is awarded the matrimonial home, being on a certain piece of land situate in the district of Salisbury, called Stand 2699 Fountainbleau Township of Fountainbleau Estate held under Deed of Transfer No. 3031/2012, also known as Stand 2699 56 Crescent, Kuwadzana 4, Harare (the Kuwadzana house). In response plaintiff submitted that the house was acquired well before the parties were married therefore defendant's claim is misplaced. Plaintiff produced the deed of transfer in his name which confirmed that the house was transferred to him in 2012 and the parties subsequently married in 2018. The house was awarded to him when a tacit universal partnership between him and one Prettygirl Moyo was dissolved in HC 423/16. Subsequently, the house was awarded to him when a decree of divorce was granted in case number HC 11215/17 involving him and one Beatrice Jeranyama. In his closing submissions he urged the court to consider the duration of the marriage as directed in section 4 (g) of the Act. Defendant does not dispute that the house was acquired before her marriage to the plaintiff. Her claim was on the basis that the parties stayed at this house as the matrimonial home and she contributed to

the improvements thereto. She however did not put a monetary value to the contributions she made. Paragraph 19 of defendant's closing submissions opens with the following statement:

“19. It is not denied that Defendant contributed to the improvements on the matrimonial home by tiling it and paying rates (See Exhibit 10, 11,12,13,14 and 15).”

After reading that, one would assume that the mentioned exhibits relate to the tiling and payment of rates. Surprisingly that is not so. Exhibit 10 is a copy of defendant's payslip for February 2019 showing a loan deduction. In her evidence-in-chief defendant said she got the loan to top up money required for the construction of the house at the farm. Exhibit 11 is a letter from City of Harare confirming that defendant is a member of Harare Municipal Medical Aid Society with effect from 2/11/2009. The dependants are listed as her children, her spouse, her mother and her mother-in-law. The defendant's contribution to the medical aid society is not stated. Exhibit 12 are receipts described in the index to Defendant's Bundle of Documents as Zimre Instalments Receipts. Exhibit 13 is a picture of what is described as a farm house in the index to the Defendant's Bundle of Documents. Exhibit 14 is a list of building materials with a title “Building Berry house.” Exhibit 15 is a ZR Police Livestock Clearance Certificate dated 25 August 2017. No document was produced proving the contribution to the improvements to the matrimonial home. I find that defendant has failed to make a case for the award of the house to her for the following reasons; -

- the marriage lasted for only 5 years,
- the house was acquired before the marriage,
- the house was awarded to the plaintiff in the dissolution of a tacit universal partnership
- the house was awarded to the plaintiff in a previous divorce, and
- the contribution to the improvements is not quantified.

In any event defendant had deserted the matrimonial home by the time summons were issued. The Kuwadzana house will accordingly be awarded to the plaintiff.

RESIDENTIAL STAND

The defendant submitted that the parties acquired a stand measuring 821 square metres through Chiedza Housing Cooperative. She proposed that the stand be awarded to the plaintiff. The parties were in agreement that the stand has not been fully paid for. Plaintiff submitted that due to financial constrains he opted to downsize the stand to 300 square metres. He offered to

pay the balance for the 300 square metres and proposed that the stand be awarded to the defendant. There was no evidence produced to confirm the size of the stand. I understand that defendant's proposal that the stand be awarded to plaintiff was made on the basis that she gets the matrimonial home. As stated above, the matrimonial home will be awarded to the plaintiff. As plaintiff has offered to pay the balance for a 300m² stand and proposed that it be awarded to the defendant, it will be so awarded.

PLOT NUMBER 2, URUME, CHINHOYI

One of the issues for determination stated in the Joint Pre-Trial Conference Minute was whether or not Plot No. 2 Urume, situate in Chinhoyi, is distributable. Plaintiff testified that the farm was acquired by his late father in 2003 during the land reform program. At the demise of his father, his mother offered it to Absalom who subsequently passed on and now plaintiff is managing it on behalf of his elderly mother. In his closing submissions he stated that the farm cannot form part of the parties matrimonial estate as neither of them has real rights to it. Defendant seemed to have conceded that the plot is not part of the matrimonial estate. In her submissions and evidence she concentrated on the improvements made on the plot. In paragraph 3.4 of her plea she mentioned that; -

“The parties also built a thirteen roomed house, tobacco barns, cattle pens, spray dip and commercial fowl run at Plot No.2 Berry Farm, Chinhoyi which is a plot leased by Plaintiff in terms of the Land resettlement scheme. The above property was built through the joint efforts of both parties contributing in both cash and kind during the subsistence of the marriage. It is only fair and reasonable that it be part of the matrimonial estate.” (underlining for emphasis)

In her closing submissions she stated in para 20; -

“Defendant contributed immensely to the construction of the 13 roomed dwelling at the farm. She even got a loan to assist with buying the materials and used income from her business to build the dwelling. Over and above that she actually contributed in kind by overseeing the building project. Unfortunately, that property cannot be distributed by virtue of the tenure under which the land is held. Be that as it may Plaintiff will reap the fruits of the Defendant's toil in building that dwelling.” (underlining for emphasis)

In her plea defendant proposed that the improvements on the farm be part of the matrimonial estate but in her closing submissions she said the property cannot be distributed. In paragraph 22 of the closing submissions she turned around and suggested that plaintiff can be awarded the Chinhoyi Farm dwelling since he is the holder of the offer letter. It is a celebrated principle of our law that a person cannot approbate and reprobate a position taken in proceedings. See *S v Marutsi* 1990 (2) ZLR 370; *Archipelago (Pvt) Ltd v Local Authorities*

Pension Fund and Another S-30-13. I noted that the question of whether or not Defendant is entitled to compensation for her contribution towards the improvements on the farm was not made an issue for determination in this matter. I find that Plot number 2, Urume, Chinhoyi, is not distributable.

POST-DIVORCE MAINTENANCE

The last issue referred to trial is on the question of what is the fair and reasonable amount of maintenance Plaintiff should pay for the minor children and the manner of payment.

Section 7 (1) (b) of the Act empowers the court

“in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter,[to] make an order with regard to—

(a)

(b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”

It is trite that maintenance is not one-sided. Both parents must contribute each according to their means. The plaintiff offered to pay school fees and all school related expenses for the minor children. In addition he has offered to pay the equivalent of US\$100 per month for both minor children. He pointed out that this is the same amount he is paying for his other minor children as evidenced by the Court Order attached by defendant in her bundle of documents. The said court refers to two minor children, however, plaintiff produced birth certificates confirming that he sired nine children of whom seven are still minors. Plaintiff also testified that he still takes care of his elderly mother and that he earns US\$500 per month from the company and US\$1000.00 from farming activities which does not come on a regular basis. Defendant claimed the amount of US\$200.00 per month. She stated that plaintiff is a person of means with earnings from Brep Auto Company and farming activities. She stated that the best interests of the minor children require that he pays the amount as claimed.

In assessing the level of maintenance a number of factors are considered. These include the standard of living of the family, the basic needs for the child and the ability of the responsible

person to pay for the identified needs. It is imperative that the means and abilities of both parents be laid bare. In *Taneka v Taneka* 1993(2) ZLR 9(H) it is stated that:-

“in a case involving a dispute about the level of maintenance payable, the applicant and the respondent must deal with the Court with candour and utmost good faith and must disclose all material facts, whether for or against him or her, which will enable the Court to make a fair and just assessment.

Where the respondent fails to disclose all material facts and attempts ‘to pull the wool over the Court’s eyes’, the Court is entitled to use its own experience in addition to the information furnished by the parties when exercising its judicial discretion to decide the appropriate level of maintenance payable by the respondent.”

It was incumbent upon the parties to be candid with the court and disclose their respective incomes and expenditure upon which the court was to determine the level of award to make. Unfortunately this was not the case. Defendant did not disclose her current earnings. What is on record is her average earnings from business and employment from the time the parties married to when she moved out of the matrimonial home in June 2020. She stated that she earned between US\$1200.00 and US\$1500.00 per month. She did not provide information on her current expenses which would have assisted in assessing the amount of contribution to the children’s expenses she is able to make. She was content to provide a list of expenses including groceries without outlining the expenditure in relation to each child despite the fact that one is not of school going age. Neither did she specify her contribution to the children’s welfare apart from providing accommodation. In *Gwachiwa v Gwachiwa* S-134-86, one of the steps outlined when assessing the level of maintenance to be paid is to ascertain and add together the total net income of the parties that would be available per month. Thereafter what is considered are the claims that are on that income leading to an assessment of how much should be paid by the father to the mother as maintenance in order to ensure that the best interest of the children is achieved. It therefore follows that it is imperative that evidence be furnished on the pertinent aspects. At the end of the trial I was not able to say what the total income of the parties per month was. No compelling reasons were given for an order that plaintiff should pay more than he offers.

DISPOSITION

1. A decree of divorce be and is hereby granted.
1. Custody of the minor children Kabelo Lenny Mashanda (born on 21 July 2016) and Khanyiso Kelton Mashanda (born on 25 November 2019) be and is hereby awarded to the defendant with the defendant with the plaintiff being granted reasonable access on alternate weekends, public holidays, school holidays and at any times the parties may discuss and agree.
2. Plaintiff be and is hereby ordered to pay maintenance in the sum of US\$100.00 per month or the equivalent at the prevailing interbank rate on the date of payment till each child attains 18 years or becomes self-supporting whichever occurs first.
3. Plaintiff is ordered to pay the children's school fees and all school related expenses from Early Childhood Development till attainment of their first degrees.
4. Plaintiff and defendant be and are hereby ordered to share the matrimonial property as follows:

PLAINTIFF

- (a) The matrimonial home, on a certain piece of land situate in the district of Salisbury, called Stand 2699 Fountainbleau Township of Fountainbleau Estate held under Deed of Transfer No. 3031/2012, also known as Stand 2699 56 Crescent, Kuwadzana 4, Harare.
- (b) 50% of the livestock at Plot No.2 Urume, Chinhoyi.
- (c) A 80% share in Brep Auto (Private) Limited

DEFENDANT

- a) All household goods and effects.
- b) Jeep Cherokee AAM 3950.
- c) 50% of the livestock at Plot No.2 Urume, Chinhoyi.
- d) A 20% share in Brep Auto (Private) Limited
- e) A 300m² Residential Stand acquired through Chiedza Housing Cooperative.
5. Plaintiff is to pay the balance of the purchase price of the 300m² Residential Stand acquired through Chiedza Housing Cooperative.
6. Each party bears its own costs.

Rungwandi & M.Rujuwa, plaintiff's legal practitioners
Munda & Mudhara, defendant's legal practitioners