

BENJAMIN CHIYANGWA  
versus  
VIRGINIA TAMBUDZAI CHIYANGWA (NEE CHINYANGA)

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 17, 18 and 19 May 2016 and 4 May 2017

**Divorce action**

*B. Machengete*, for the plaintiff  
*N P Goneso*, for the defendant

CHITAKUNYE J. The plaintiff and the defendant were joined in holy matrimony on 9 December 1995 at Chitungwiza, in terms of the Marriage Act, [*Chapter 5:11*]. The marriage still subsists.

A marriage that started blissfully lost its lustre much later after the blessings of three children and in the year 2009 the plaintiff deserted the matrimonial home.

On 4 March 2011, the plaintiff issued summons claiming a decree of divorce and other ancillary relief. The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there were no reasonable prospects of restoration of a normal marriage relationship in that:

1. The plaintiff has lost love and affection for the defendant
2. The parties have become incompatible with each other, and have been separated since 2009.

The plaintiff alleged that during the subsistence of the marriage the parties acquired property consisting of household goods and effects. He suggested that each party retains what is currently in their possession.

He alluded to the fact that issues of maintenance, custody and access be in terms of existing court orders.

The defendant, in her plea, conceded that the marriage had irretrievably broken down and so a decree of divorce should be granted. The defendant filed a counterclaim.

Various amendments were made to the pleadings, in particular, the plea and counter claim. What emerged from this was that some properties that had not been disclosed by the plaintiff were brought to the fore. Some of the properties revealed were available at the time the plaintiff issued summons but he had not disclosed them.

At the close of pleadings a pre-trial conference was held in terms of r 182 of the High Court Rules 1971. Some of the issues were resolved at the pre-trial conference. The resolved issues were reduced into writing as a 'consent paper'. That consent paper was duly signed by the parties on 2 December 2015 and, as per the parties' desire, that consent paper shall be made part of the court order.

The issues upon which the parties could not agree were referred to trial and these were couched as follows:

1. What constitutes the just and equitable distribution of the immovable assets of the spouses
2. Which cars are owned by the parties and how should the cars be shared
3. Whether or not the Defendant and the children of the marriage should continue residing at Number 129 Folyjon Crescent, Glen Lorne, Harare to the best advantage and best interests of the minor children. if not,
4. Whether or not the plaintiff should provide alternative comparative accommodation to the Defendant and the Children of the marriage
5. Whether or not the Plaintiff should provide three beds for the children of the marriage, a colour television set, DSTV decoder, three laptops, a lounge suite, deep freezer, a four plate stove and kitchen chairs for use by the minor children within six months of the grant of the divorce order by this court
6. Whether or not the Plaintiff should pay the costs of recovering Defendant's GCE Ordinary Certificate in his possession
7. Whether or not the Plaintiff upon exercise of his rights of access in terms of the access order in JC28/11, that the Plaintiff shall not impose unreasonable conditions such as withholding children's books, clothes, all bedding materials, school reports, school notifications, passport, birth certificates, drivers licence, school fees admissions and medical aid cards
8. Whether or not the Defendant is entitled to Post divorce maintenance and quantum thereof?

The plaintiff gave evidence after which the defendant testified. A number of documents were tendered into evidence by both parties.

From the evidence adduced certain facts were common cause. The parties confirmed their desire for the Consent paper they signed to be made part of an order of this court. That consent paper dealt with such issues as custody of the minor children, maintenance and access,

and the Unit J, Seke, immovable property that was donated to the children by the plaintiff. It is pertinent to note that that property had been the parties' matrimonial home before they moved to the current matrimonial home namely number 129 Folyjon Crescent, Glen Lorne.

The parties agreed that the marriage has irretrievably broken down and so a decree of divorce should issue. Where both parties concur that their marriage has irretrievably broken down as they no longer have any love and affection for each other court has no option but to grant a decree of divorce as prayed for by the parties.

It is common cause that at the time of marriage the parties had no immovable property of their own.

The marriage was blessed with three children of whom two are still minors. The eldest though a major is not self supporting as she is attending tertiary education.

The second born child is in boarding school and was doing form three whilst the last born was in grade three at G primary school as a day scholar. Prior to being enrolled at G that child was a border at W Primary School when he did his grades 1 and 2.

It was further common cause that since the plaintiff deserted the matrimonial home, the defendant has always had custody of the children and remained in the matrimonial home.

The plaintiff's evidence was to the effect that after marrying in 1995 he later acquired stand number 1037 Unit G, Seke, which property was later sold in about 2003. In 2002 he acquired stand number 7105 Unit J, Seke. This became the parties' matrimonial home from the time of purchase to 2006 when they moved to number 129 Folyjon Crescent, Glen Lorne. This property was purchased by his current employer, Unified Councils Pension Fund, for his use. It is this house that he deserted in 2009 to go and live with another woman.

After separation he acquired stand 5909 Warren Park, Harare in July 2011 after obtaining a loan from his employer and his banker. In August of the same year he acquired Stand 1597 Gletwyn, Chishawasha, Harare. See exhibit 5.

All the acquired immovable properties were registered in the plaintiff's names. The plaintiff stated that the defendant did not contribute anything towards the purchase of the immovable properties and so she should not be awarded any share in these properties. The plaintiff was quite categorical that he should be awarded a 100% of the immovable properties because, though they were acquired during the subsistence of the marriage, the defendant did not contribute anything either directly or indirectly towards their purchase. He further testified that, in any case, all the available immovable properties were acquired after separation and after he had issued summons for divorce.

On the motor vehicles the plaintiff testified that they did not buy any motor vehicle before separation. The Toyota Hiace Regius referred to in the pleadings was only acquired after separation and, as with the immovable properties, the defendant never contributed anything towards its purchase. He thus stated that this motor vehicle must be awarded to him whilst defendant retains a Mazda Capella he believed she acquired on her own.

On maintenance the plaintiff testified that he has been paying maintenance since 2010 when a maintenance order was granted against him at the maintenance court. A number of variations have been effected to the original sum ordered such that currently he is paying US\$150.00 per month for the defendant and US\$250.00 per month for each of the minor children. It was his evidence that maintenance for the defendant should be discharged as the defendant is still young, at middle age, and she should fend for herself.

On the defendant's claim for the replacement of some of the movable household furniture, the plaintiff testified that he is unable to replace the furniture and, in any case, the defendant should have used the maintenance money he was paying to maintain the property. I did not, however, hear the plaintiff to deny that the furniture in question is the furniture they brought with them when they moved from Unit J, Seke, to Glen Lorne in 2006. Despite being shown pictures of the furniture depicting the worn out state of the furniture, the plaintiff was adamant that he was unable to replace it and that the plaintiff and the minor children should live with that as he cannot afford to buy them new household goods and effects.

On the defendant's claim to be allowed to live in the current matrimonial home with the minor children till the youngest of them attains the age of majority, the plaintiff was categorical in stating that as this is his employer's house, given to him to occupy as a condition of his contract, that cannot be so. He needed to move in himself and, apparently, with his partner. He also discounted the alternative of securing alternative comparable accommodation for the defendant and the children and indicated that they should move to the Unit J house which he had donated to the Children. He also stated that he cannot afford to secure comparable accommodation for them due to limited financial resources.

On the issue of access, the plaintiff denied that he had imposed any unreasonable conditions. As far as he is concerned the conditions that the children do not move with their casual clothing from one parent to the other was agreed to by the two of them.

The plaintiff's stance can thus be summarised as follows:

1. The defendant should not be awarded any share in the immovable properties despite the duration of the marriage because she did not make any direct or indirect contribution towards their purchase instead she should be content with his offer that she should go and live with the children in the children's house, stand 7105 Unit J, Seke.
2. No motor vehicle should be awarded to defendant as he believed she had acquired a Mazda Capella Station wagon for herself, she must thus be content with that;
3. The obtaining maintenance regime for the children should continue less the maintenance for defendant as defendant should fend for herself post divorce;

The defendant's evidence on the other hand was to the effect that when they got married they had no immovable property of their own. The plaintiff was employed at Old Mutual whilst she was unemployed. She nevertheless engaged in informal trading. She would go to the farms and the mines to sell wares such as second hand clothes. She would also go to Mazoe to buy oranges and other fruits for resale. All this was in a bid to contribute towards their common household. Whenever she brought some money the plaintiff would invest it in shares with Old Mutual and the remaining portion would be used in the home.

It was her evidence that from the early years of their marriage the plaintiff was furthering his education such that she had to carry the greater burden of looking after the family as plaintiff concentrated on his work and studies. According to the defendant, if the plaintiff was not at school he would be at work. In his studies the plaintiff did Chartered Institute of Secretaries (CIS) which was very expensive hence she had to chip in with money for his books. After CIS, the plaintiff went on to do a Diploma in Insurance, thereafter a Diploma in IPZ. He also did a course in real estate, and then MBA Executive. Whilst doing his MBA the plaintiff was residing at the National University of Science and Technology (NUST) in Bulawayo. The plaintiff further obtained a Bachelor of Arts degree with UNISA and a Bachelor of Law degree.

When the plaintiff was pursuing these studies the defendant was the one fending for the family by providing clothing, food and other needs. It was also her evidence that the plaintiff's salary would also go towards the servicing of loans that he would obtain hence leaving the bulk of the family needs to the defendant.

The defendant further testified that during the subsistence of the marriage she also pursued studies and attained GCE at Ordinary level. She thereafter obtained a Diploma in Accounting and a Diploma in Theology.

It was also the defendant's evidence that in 2003 she secured employment with the Reserve Bank of Zimbabwe (RBZ). She was with the RBZ till 2013 when she lost employment through retrenchment. During the period of her employment she enrolled the plaintiff and the

children on her Medical Aid Scheme. She was also contributing to the needs of the family from her earnings.

It was thus the defendant's contention that she contributed both directly and indirectly to the acquisition of family assets and she deserved a share.

Whilst conceding that the Unit G property was sold during the subsistence of the marriage, the defendant testified that the plaintiff made her believe that the proceeds there from were invested as the plaintiff was in the investment industry. Those are the proceeds she believed were later used in the purchase of the Warren Park property after separation. The defendant stated that the fact that the plaintiff acquired a number of immovable properties within a few years after deserting the matrimonial home, pointed to the fact that he may have been making savings or investments such that when he left home he thought it was now time to buy the properties. In this regard she pointed to the fact that the Warren Park property and the Gletwyn property were acquired within two months of each other. The Warren Park property was acquired in July 2011 and the Gletwyn property in August 2011.

Besides these two properties, there is also another stand in Gweru that the plaintiff had not disclosed; this is Stand no. 1067 Senga Township Extension, Gweru, which was also acquired after separation.

It was thus the defendant's contention that she should be awarded a 40% share in the Warren Park property and another 40% share in the Gletwyn Stand. She also suggested that instead of being awarded 40% shares in the Warren Park and Gletwyn property, she can be awarded the Warren Park property as her sole and exclusive property and the defendant can retain the Gletwyn property and the Senga Extension Stand.

As regards number 129 Folyjon Crescent, Glen Lorne property, the defendant stated that the plaintiff told her that this property was to be plaintiff's property after 5 years from the date of purchase as part of his employment benefits. She thus believed such a condition was in the contract of employment. Though she had no evidence of her own she was of the view that the plaintiff was not being truthful in stating that there was no such a term in his contract of employment and that the property remained his employer's property even after the 5 years.

A perusal of a copy of the contract of employment that was tendered into evidence shows that there is no such a term or condition in the contract. The defendant's assertion in this regard had no concrete basis. The terms and conditions on remuneration included a housing allowance, access to personal loan and to mortgage loan. In fact in a letter dated 4<sup>th</sup> February 2015 to the Maintenance Court Officer, the plaintiff's employers stated, *inter alia*, that the

plaintiff was given the right to the use of company house at 129 Folyjon Crescent, Chisipite, Harare. Clearly therefore number 129 Folyjon Crescent belongs to the plaintiff's employer.

The defendant further testified that since the minor children had been used to living in the Glen Lorne area it would not be in the best interest of the children for them to relocate to the high density area of Unit J, Seke and so, if the plaintiff will not allow them to remain in that house, he must provide an alternative comparable accommodation in the same or similar area so that the children continue with the lifestyle they had been accustomed to since 2006.

The defendant's contention on this aspect could only be feasible if the plaintiff agreed as the house belonged to his employer and anyone in occupation had to be in terms of an agreement with the employer or at least the employee. In the absence of such consent it may not be tenable for court to order that the defendant occupies the house when the owner was not part of these proceedings. The claim in this aspect is in my view untenable.

The other request was that if plaintiff cannot consent to the defendant remaining in occupation of his employer provided house, then the plaintiff should secure a comparable house in a similar area for the defendant and the children. I am of the view that this is also untenable. It is pertinent to note that number 129 Folyjon Crescent was not secured because the plaintiff could afford its cost, but it is the employer that provided that house for its fund manager. The fact that the plaintiff has been provided a house in a plush suburb does not necessarily mean he can afford to acquire such property for himself or even that he can afford to lease such property. There was no evidence showing that the plaintiff has such funds as to be able to buy or even lease a similar property in a similar area.

I will thus not order plaintiff to provide comparable accommodation for the defendant and the minor children.

The other immovable property the defendant claimed a share of is the rural home. She indicated that they bought all the building material for the construction of a housing structure at the plaintiff's parents' communal area. The structure was later constructed and she would like a share of US\$3500.00 as she valued the building structure at US\$7000.00.

On the motor vehicles, the defendant was adamant that the Toyota Hiace Regius was acquired whilst they were staying together. She also denied that she owned a Mazda Capella motor vehicle. As far as she was concerned the motor vehicles were the Toyota Hiace Regius Reg. number ABO 1553 and the Toyota Ipsum Reg. number ABI 3958.

Besides the above two motor vehicles, the defendant testified that the plaintiff has two other motor vehicles courtesy of his employer. These are a Toyota Prado and a Toyota Hilux.

She indicated that the Toyota Hilux should by now be owned by plaintiff as he has had it for more than 10 years and the employment condition was such that he would be entitled to buy the motor vehicle after 5 years.

On the movable properties comprising mostly household furniture the defendant's evidence was to the effect that the property is worn out and the plaintiff should replace it for the sake of the minor children. The specific items she asked for comprised: a colour TV set, 3 Beds, DSTV Decoder, lounge suite, Deep freezer, 4 Plate Stove and Kitchen chairs.

On post-divorce spousal maintenance, the defendant gave evidence to the effect that she required US\$700.00 per month. Her justification was that she needed to maintain the same lifestyle she was used to as a wife of an executive Fund Manager. She outlined her expense as follows:- US\$50.00 for medical Aid; \$20.00 funeral cover; \$ 200.00 food and toiletries; \$ 100.00 clothing and blankets; \$100.00 for fuel to attend school consultation and hospital; \$100.00 for a Maid; US\$250.00 for retraining. She put her total monthly needs at US\$1050.00 of which the plaintiff must pay US\$700.00.

She also alluded to the fact that ever since she lost her employment in 2013, she has not been able to secure any employment. Her predicament was compounded by the fact that when the plaintiff left the matrimonial home in 2009 he took with him her GCE Ordinary level certificate and so she has not been able to seek employment without the certificate. It was in this regard that she claimed for a sum of US\$300.00 to enable her retrieve or obtain another certificate. It was also her evidence that once she recovered her certificate she would need retraining so that she secures employment hence the US\$250.00 per month retraining sum in her maintenance claim.

A summation of the defendant's stance maybe captured as follows:

1. That all the assets were acquired during the subsistence of the marriage and so should be considered in the distribution of assets of the spouses.
2. From the inception of the marriage she contributed towards the needs of the family through her informal trade. Later she was in formal employment from 2003 to 2013.
3. The income earning capacity of the plaintiff was enhanced through the studies he undertook when the parties were staying together. During the formative years of the marriage whilst plaintiff concentrated on his work and studies, the defendant fended for the family. She also participated by providing an enabling environment for the plaintiff to concentrate on his studies in the full knowledge that the needs of the family were being taken care of by the defendant.

4. Having participated in sowing the seed that led to plaintiff attaining higher qualifications, the plaintiff now wished to deny the defendant the fruits of that seed sown in the formative years of the marriage.
5. That ever since the plaintiff deserted the matrimonial home she has been responsible for the needs of the family. The plaintiff's contribution has been through maintenance orders which she had to approach court for.
6. She needs post divorce maintenance to maintain the same standard of living she enjoyed during the marriage and also to enable her to re-establish herself.

The division, apportionment and distribution of properties and issue of maintenance at the dissolution of a marriage are governed by the Matrimonial Causes Act, [*Chapter 7:01*]. ("the Act").

Section 7 (1) of the Act, states that:

"Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—

- (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;
- (b) the payment of maintenance, whether by way of lump sum or by way of periodical payments, in favour of one or other of the spouses or any child of the marriage."

The subsection thus empowers an appropriate court to apportion or distribute assets of the spouses as at the time of the dissolution of the marriage. It also empowers the court to transfer any asset from one spouse to the other. The only asset that may not be so transferred or tampered with are those provided for in subsection (3); that is inherited assets.

The assets that are to be considered are assets owned by either or both spouses as at the time of the dissolution of the marriage. Such assets include assets acquired before or during the marriage or whilst on separation. A spouse need not have contributed towards the purchase of the asset either directly or indirectly to be awarded a share thereof. (*Gonye v Gonye* 2009 (2) ZLR 232 (S))

In *Siphiwe Joyce Moffat v Phoese Moffat* HH 804/16 at p 5, I reiterated the position as follows:

"The use of the term matrimonial property tends to give the impression that only assets acquired during the subsistence of the Marriage when parties are still living together should be considered. This is clearly wrong. All assets owned by either of the spouses or jointly owned by the spouses at the time of the dissolution of the marriage must be put on the table for consideration."

In *casu*, all the assets that the spouses own must be considered irrespective of whether such assets were acquired before the plaintiff deserted the matrimonial home or after the desertion.

In arriving at a just and equitable distribution of the assets, court is guided by the provisions of s 7(4) of the Act. That subsection provides that:

“In making an order in terms of subsection (1) an appropriate court shall 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;

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.”

The task is not an enviable one especially when either or both spouses are not candid with court. It is nevertheless a task court must do in order to do justice between the spouses who, in some instances, are bent on getting the most out of each other. In making its determination Court enjoys wide discretion on how best to distribute the assets of the spouses such that each gets what is due to them from having been married to each other for the duration of such marriage. *Gonye v Gonye (supra)* at pp 236 H-237 B.

In *casu*, the evidence adduced showed that the following immovable properties should be considered in the distribution:- stand 5909 Warren Park, Harare; Stand number 1597 Gletwyn Township, Harare; Stand 1067 Senga Township Extension, Gweru; and the improvements to the Rural home

The other properties namely stand Unit G and Stand 7105 Unit J, were no longer available. The Unit G stand was disposed of during the subsistence of the marriage whilst the Unit J property was unilaterally donated to the children of the spouses in July 2010 by the

plaintiff. The defendant has since conceded that by virtue of the donation this property is not available.

As regards number 129 Folyjon Crescent, Glen Lorne, no adequate evidence was led to show that it is an asset of the spouses. The contract of employment, which the defendant sought to rely on as the basis for stating that the property was to be acquired by the plaintiff after 5 years from the date of its purchase, has no such clause. If at all such a term was part of the contract of employment the defendant ought to have tendered such proof. As things stand this is a property for the plaintiff's employer. In a letter dated 4 February 2015 to the Maintenance court, Harare, the employer through its principal officer indicated that the plaintiff is given the right to the use of company house at 129 Folyjon Crescent. This thus confirmed the status of that house.

In considering how to distribute and apportion the assets available, it is important to disabuse the plaintiff's argument that the defendant should not be awarded anything because she did not contribute to the purchase of the assets. As noted above, s 7 (4) of the Act clearly enjoins court to consider all the circumstances of the case and not just direct contributions. The issue of contributions is just one of the several factors to consider and is not necessarily the key factor. In instances where a marriage has endured for long the issue of direct contribution has been overshadowed by indirect contribution over a long time and the needs of the spouses.

In *Usayi v Usayi* 2003 (1) ZLR 684 (S) court considered the duration of the marriage and the needs of the spouse and confirmed a 50% share in the matrimonial home awarded to the wife when she had not directly contributed towards its purchase. In confirming the sharing ratio the court considered as valuable the wife's role as custodian of children, being in charge of the family and enabling the husband to engage in academic pursuits which placed him in a position to improve the family's standard of living, her contribution on the domestic front which enabled her husband to work and pursue studies.

Later in *Tangirayi v Tangirayi* HH 65/13 at p 9 GUVAVA J (as she then was) opined that:-

“Although the defendant was unemployed she contributed considerably as a wife, mother, counsellor, housekeeper and day and night nurse for the family. In the ten years she was married to the plaintiff she had four children which is not an easy task. She was a wife and mother and ensured that plaintiff had her support to get his degree.”

The wife in the said matter was awarded a fifty percent share in the property due to her indirect contributions.

It is apparent from the above that a spouse's supportive role in enabling the other to

attain higher academic or professional qualification that then enables the family to attain a higher standard of living cannot be ignored.

In *casu*, the defendant was not just seated at home but from inception she engaged in income generating activities to the benefit of the family. From 2003 to 2013 she was in formal employment earning income that was utilised for the benefit of the family. Thus even if she may not have made a direct contribution towards the purchase price of the assets acquired when the parties were staying together and those acquired after separation, her indirect contributions cannot be overlooked. I did not hear the plaintiff to deny that when he deserted the family to go and live with another woman the defendant remained taking care of the day to day needs of the family.

The duration of the marriage and the needs of the spouse must thus be considered. In this case the marriage lasted for about 16 years. The defendant having been married to the plaintiff since 1995 to date and having observed the plaintiff amass wealth through her participation in the ways already alluded to would surely be expecting to have shelter of her own. Indeed had the marriage continued she would have been entitled to live at number 129 Folyjon Crescent, Glen Lorne, and to enjoy the benefits that come with living in such a property. Now that the marriage relationship has come to an end she will lose this.

The plaintiff, on the other hand, will continue living in the house as part of his conditions of employment which employment he secured by virtue of the higher qualifications he attained during the marriage and when the defendant provided him the enabling environment by taking care of the family as he went about his studies.

Another aspect to note is that whilst the defendant does not have the capacity to secure such a property for herself or earning an income close to that of the plaintiff, the plaintiff has a good income earning capacity and capability of acquiring various properties and maintaining his current standard of living. Any share the defendant gets should take into account what she stands to lose as a consequence of the dissolution of the marriage brought upon her by the plaintiff's desertion of the matrimonial home.

Further, the plaintiff's donation of the Unit J property to the children' whilst appearing noble, may have been out of a desire to deny the defendant any immovable asset on the premise that she did not make any contribution. Unfortunately, the unavailability of the Unit J property does not mean that the defendant cannot get any share in the remaining assets. She is entitled to a share in the assets that remain available for distribution.

I am of the view that in as far as no current values of the available immovable properties were provided, the most appropriate order would be to award each spouse a share in the two immovable properties -- Stand 5909 Warren Park and 1597 Gletwyn, Chishawasha. The plaintiff will retain the Senga Extension stand as the defendant laid no claim to a share thereof.

I am of the further view that a fair and just share for the defendant would be about 35% of the value of each of the two immovable properties. Depending on the value of each property, the parties can swop the defendant's 35% share in the Gletwyn property with the plaintiff's 65% share in the Warren Park property and pay each other any adjustment to ensure that what the defendant gets in value terms is 35% of the value of each of the two properties. This would enable the defendant to own the Warren Park property. The plaintiff will retain a 65% share in each of the two properties and the Senga Extension stand.

On the motor vehicles, I am inclined to agree with the defendant that the Toyota Hiace Regius and the Toyota Ipsum belong to the plaintiff and these were available at the time the plaintiff instituted divorce action. The fact that the Toyota Ipsum is in another persons' name was in my view a ruse by the plaintiff to distance the vehicle from possible distribution. The registration books of the motor vehicles confirm the same address for the owner as 129 Folyjon Crescent, Glen Lorne. The plaintiff did not deny that besides these two vehicles he also has use of two other vehicles from his employer. Thus as far as vehicular mobility is concerned the plaintiff is not short of this. The defendant on the other hand has none. The plaintiff could not prove that the defendant owned a Mazda Capella vehicle. His evidence on this was sheer speculation with no concrete evidence to show for it.

In the circumstances the defendant will be awarded the Toyota Hiace Regius Registration number ABO 1553 Motor vehicle as her sole and exclusive property. The plaintiff will retain the other vehicles.

The next issue pertains to the defendant's quest for the replacement of the old movable household furniture with new ones. In the distribution of assets court is enjoined to deal with those assets that are available at the time of dissolution of the marriage. The issue of replacement of old assets with new assets is not an easy one especially where, as in this case, no values of the new items were provided. The defendant should have come up with a monetary replacement value of the items so that if she succeeded she will buy the items herself. An order that the plaintiff replaces the items with new ones has the potential for a never ending conflict.

For instance the value, quality and other facets of such assets may create endless quarrels. This is an aspect that was not handled well and is thus untenable to grant.

The next issue pertains to the defendant's claim for a share in the house structure at the rural home. The defendant claimed a sum of US\$3500.00 in lieu of her share in the structure she claimed the couple erected at the plaintiff's parents rural home. It was upon the defendant to prove the value of the structure. Unfortunately, no proper valuation was done for the structure. The value of US\$7000.00 was the defendant's guess and not a well informed figure as she could not state the basis for that value. It is my view that the defendant's claim cannot succeed on this item. Clearly not enough evidence was led on the value of this structure to sustain the claim.

The next issue for consideration is Post-divorce spousal maintenance for the defendant.

In terms of s 7 (1) (b) of the Act court is empowered to make an order for post divorce maintenance in favour of one or other of the spouses. A spouse seeking post divorce maintenance must, however, satisfy court that she is unable to maintain herself and therefore needs assistance from the other spouse. That assistance must be quantified and its duration justified. In *Chiomba v Chiomba* 1992 (2) ZLR 197 the Supreme Court stated the position as follows:

“Marriage can no longer be seen as providing women a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.”

In *Kangai v Kangai* HH 51/2007 GOWORA J (as she then was) reiterated the position at p 5 of the cyclostyled judgement in these explicit terms:

“A woman who has been divorced is no longer entitled as of right to be maintained by her former husband until her remarriage or death. Where the woman is young and had worked before marriage, and is thus in a position to support herself, where there are no minor children, she will not be awarded maintenance. If she had given up her job to look after the family she will be awarded maintenance for a short period to allow her time to get back on her feet. Where the divorced woman is middle aged she will be given maintenance for a period long enough to allow her to be trained or retrained. On the other hand elderly women who cannot be trained or remarried are entitled to permanent maintenance.”

In *casu* the defendant is middle aged and had been employed from 2003 to 2013. She has educational qualifications to enable her seek employment. Her challenge thus far has been the economic situation in the country and the fact that the plaintiff is alleged to have taken her educational certificates. Thus, even if she sought employment, for as long as she is deprived of her certificates she may not secure any. The issue of her certificates must thus be resolved to

enable her seek employment. Prior to being in formal employment the defendant had been engaged in informal trading and so that is another source of income she can revert to. I am thus of the view that as a middle aged woman she may need maintenance for a limited period whilst she picks herself up.

Currently the defendant has been in receipt of maintenance in the sum of US\$150.00 per month pending divorce. That is the figure she asked to be increased to US\$700.00 per month till she dies or remarries. I am of the view that the fact that currently she is in receipt of maintenance may be an acceptance and recognition that she is incapable of sustaining herself till such time she picks herself up. She has not been able to do so due to the handicap stated above. In my view she may not be able to sustain herself soon after the grant of the decree of divorce as she needs time to retrain and seek new employment. She cannot be deprived of maintenance without the opportunity to adjust her life to the new reality.

The plaintiff's argument that the defendant should have adjusted her life during the period of separation is untenable in the circumstances of this case. It is accepted that the defendant and the children have been living in a company house of which they will need to move out and adjust to life in a different environment. That change of environment has its own peculiar needs which necessitate a continuation of maintenance. In any case the maintenance needs pre-divorce may not necessarily be the same as post divorce. If defendant is able to satisfy court of her necessary expenses post divorce then she will be entitled to maintenance post divorce for a limited period.

The defendant's claim was for a sum of US\$700.00 per month until she dies or remarries. She outlined the expenses involved. The outlined expenses came to a total sum of US\$1050.00 of which she asked for a contribution of US\$700.00 from the plaintiff. The plaintiff on the other hand said he cannot afford to pay any post divorce maintenance to defendant.

In ascertaining the quantum of maintenance to grant the needs and expenses of the spouses must be considered. Such needs and expenses must be reasonable and befitting the standard of living of the family.

The ability of the plaintiff to pay must also be considered. In this light the plaintiff's payslip showed that he earned a gross salary of US\$9684.84 and allowances and benefits amounting to about US\$2928 per month. Mandatory deductions amount to US\$ 5012.97 leaving him with disposable income of US\$7599.87. It is from this disposable income that the

plaintiff obtained loans from the employer and bankers resulting in a net income of about US\$2396.00.

A careful analysis of the plaintiff's evidence shows that he has the ability to pay maintenance for the children as already agreed to and for the defendant in a reasonable sum. The current figure of US\$150.00 maintenance for defendant took into account the fact that the defendant was occupying the matrimonial home where some of the needs were met by plaintiff's employer. When she moves out of the house she will be expected to meet those needs on her own. It is in that regard that an increase from the current sum is justified. The figures that the defendant proffered are not outrageous except that she has to accept that she has to start contributing meaningfully to her own sustenance. In this regard she will have to cut down on some of her expenses.

I am of the view that a maintenance figure of about US\$250 per month will suffice. This sum will be paid over a period of 5 years whilst the defendant adjusts to her new life and seeks income generating engagements or employment. I believe a period of 5 years is sufficient for the defendant to be retrained and secure a means of sustaining herself.

The other aspect to this is the issue of the defendant's certificate. From the manner in which the issue on this aspect was coined, it is apparent that the plaintiff had something to do with the disappearance of those certificates. It is only proper that if he cannot hand back the certificates to the defendant, he be ordered to pay the amount that is required for the defendant to secure copies of the certificates from the relevant examination bodies. It was the defendant's evidence that from her inquiry she was advised that she required about US\$300.00 to secure copies of the certificates. I did not hear the plaintiff to proffer a lesser amount. In the circumstances an order will be granted in favour of the defendant.

The other issue for trial pertained to the allegation that the plaintiff imposed certain conditions during the exercise of his rights of access. The plaintiff denied that he was imposing any conditions. However as he testified it became clear that he was indeed imposing such conditions as that the children should not move with their cloths from one parent to the other. It is my view that whatever condition(s) the plaintiff may have been imposing is not in line with the rights of the children. If the plaintiff has issues with the defendant those should not translate into putting restrictions on the children. The children should move with any clothes they require. Equally no restriction should be placed on all school and other items the children may wish to carry from one parent to the other.

The defendant as the custodian parent has various rights *vis-a-vis* the children which

she must exercise. See *Berens v Berens* 2009 (1) ZLR 1 and *Makuni v Makuni* 2001 (1) ZLR 189 (H).

I thus conclude that an order that in the exercise of his rights of access, the plaintiff shall not impose any unreasonable conditions such as withholding the children's books, clothes, bedding, school reports, school notifications, passports, birth certificates, driver's licences, school fees admissions and medical Aid cards will be appropriate.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. The defendant is hereby awarded custody of the two minor children of the marriage namely, T (born 16 February 2000) and N (born 29 August 2007)
3. The consent paper signed by the parties on the 30<sup>th</sup> November 2015 and filed with this court on the 2<sup>nd</sup> December 2015 shall govern issue of—(i) maintenance for the children; (ii) access; (iii) aspects of the immovable property No 7105 Unit J, Chitungwiza stated therein; (iv) contribution to costs ; and (v) any other issues stated therein.
4. In the exercise of his rights of access the plaintiff shall not impose any unreasonable conditions such as restricting or withholding items the minor children should move with from one parent to the other, including school books, school reports. Medical aid cards and any other item the defendant as the custodian parent may require.
5. The defendant is awarded as her sole and exclusive property all the household goods and effects in her possession.
6. The defendant is awarded the Toyota Hiace Regius Registration No. ABO 1553 as her sole and exclusive property.
7. The defendant is awarded a 35 percent share in the following immovable properties:
  - a) Stand number 5909 Warren Park, Harare and
  - b) Stand number 1597 Gletwyn Township, Harare,whilst the plaintiff retains a 65 percent share in each of the aforesaid immovable properties
8. The above two immovable properties shall be valued by a valuer agreed to by both parties within 30 days from the date of this order. Should the parties fail to agree on a valuer, one shall be appointed for them by the Registrar from his list of independent valuers.
9. The plaintiff shall be given the option to buy out defendant's share in the two properties within a period of 120 days from the date of receipt of the valuation report.

10. Should the plaintiff fail to buy out defendant within the period stated above, or such longer time as the parties may agree, the properties shall be sold to best advantage by an estate agent mutually agreed to by the parties failing of which one shall be appointed by the registrar from his list of estate agents and the net proceeds shared in the ratio 65:35
11. The plaintiff be and is hereby directed to sign and attend to all necessary papers to facilitate the sale and transfer of the aforesaid properties failing which the Sheriff or his lawful deputy is hereby directed to act in his stead.
12. The plaintiff shall pay the costs of valuation.
13. The plaintiff is hereby awarded Stand number 1067 Senga Extension, Gweru as his sole and exclusive property.
14. The plaintiff shall pay to the defendant maintenance in the sum of US\$250.00 per month for a period of 5 years with effect from 31<sup>st</sup> May 2017.
15. The plaintiff shall pay US\$300.00 to the defendant as costs for the recovery of defendant's GCE Certificate within 30 days of this order unless he surrenders the aforesaid certificate in good state to the defendant.
16. Each party shall pay their own costs of suit subject to clause 10 of the consent paper.

*Rubaya & Chatambudza*, plaintiff's legal practitioners  
*Goneso and Associates*, defendant's legal practitioners