JOEL MADZIVANYIKA
versus
TAPIWA MADZIVANYIKA (nee SIMENDE)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 1 September 2016

Divorce Action

F.G. Gijima for plaintiff
F. Chimwamurombe for defendant

CHITAKUNYE J. The plaintiff and defendant were married in terms of the Marriages Act, [*Chapter 5:11*] on 13 August 1993 at Harare.

Their marriage was blessed with three children, two of whom are now adults. The third child is still a minor and attending school.

On 24 January 2005 the plaintiff issued summons out of this court against defendant seeking a decree of divorce, an award of custody of the minor children to defendant with him enjoying reasonable rights of access and that he be ordered to pay maintenance in respect of the children in addition to paying the children's school fees and other needs. At that time all the children were still minors. He also sought a distribution of assets of the spouses in terms of appendix A to his declaration.

The defendant duly filed her plea on 4 April 2005. Her plea was basically a denial of the manner suggested for the distribution of the assets of the spouses. As a self actor she did not seem to appreciate the need to adequately respond to each and every allegation by plaintiff. The plaintiff thereafter filed his replication on 4 May 2005.

The matter apparently remained dormant for reasons the parties were not in agreement over until 2012 when, upon engaging a firm of legal practitioners, defendant resuscitated the matter by filing an amendment to her plea.

At the time the matter was resuscitated only the last born of their children was still a minor as the other two had attained majority status.

In her amended plea defendant admitted that the marriage had irretrievably broken down and that a decree of divorce should thus issue. She however denied responsibility for such breakdown. She placed the blame on plaintiff's conduct. The defendant, without laying a proper counter claim, asked for maintenance for the remaining minor child in the sum of $500-00 per month in addition to school requirements and clothing. She also asked for maintenance for herself in the sum of $300.00 per month until she dies or remarries whichever occurs first.

On the assets of the spouses, defendant indicated that a fair and equitable distribution of the assets would be in terms of Annexure 'X' to her amended plea and not plaintiff' Appendix 'A'.

In his replication to the amended plea plaintiff denied that defendant was entitled to be maintained as she is gainfully employed and earning enough to maintain herself.

At a pre-trial conference held on 5 June 2012 the following were agreed:-

1. That the marriage had irretrievably broken down with no prospect of restoration to a normal marriage relationship;
2. That the defendant shall have custody of the minor child with plaintiff enjoying reasonable rights of access;
3. That the plaintiff shall maintain the minor child at the rate of $200 per month until the minor child attains eighteen[18] years or becomes self supporting whichever occurs earlier;
4. That each party shall keep the moveable property in his or her custody.

The issues the parties could not agree on and were thus referred to trial were as follows;

1. Whether defendant is entitled to maintenance and if so how much?; and
2. The number of immovable properties owned by the parties and what would be a just and equitable distribution thereof.

The plaintiff gave evidence after which defendant also gave evidence. Both parties confirmed that their marriage has irretrievably broken down with no prospects of restoration to a normal marriage relationship. It is trite that where both or either of the parties on the trial date maintains that the marriage has irretrievably broken down and they do not wish to continue with the marriage, court cannot force them to continue in the marriage. Where, as in this case, both parties have lost love and affection towards each other a decree of divorce should be granted.

1. **Whether defendant is entitled to maintenance and, if so how much?**

In his summons the plaintiff did not offer any maintenance for the defendant. In her initial plea defendant did not ask for maintenance for herself. It was only in her amended plea when she was now legally represented that defendant brought in the issue of maintenance for herself in the sum of $300-00 per month until she dies or remarries whichever occurs first. This was not a counter claim but a plea in response to plaintiff's claim. The manner in which this 'claim' for maintenance was smuggled in leaves a lot to be desired especially that defendant was now legally represented and ideally a proper counter claim laying the basis for the claim ought to have been made.

Be that as it may the parties seem to have accepted that the issue of maintenance should be considered and an appropriate decision made.

In this regard it is important to note that s 7(1) (b) of the Matrimonial Causes Act, [*Chapter 5:13*] provides that:-

> "Subject to this section, in granting a decree of divorce…….or at any time thereafter, an appropriate court may make an order with regard to-
> (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 any child of the marriage."

In making an order in terms of subsection (1) court is enjoined to consider all the circumstances of the case in an endeavour to ensure the spouses maintain the lifestyle they lived during the subsistence of the marriage. The factors to consider include factors provided for in s 7(4) of the Act.

With the advent of women's emancipation the wife is no longer assured of post divorce maintenance just on the asking. Whilst in the past a wife could be assured of post divorce maintenance for life, the modern trend has been to require the wife to justify the need for post divorce maintenance, its duration and quantum thereof. It is no longer just for the asking. A spouse seeking post divorce maintenance must justify the need for such maintenance. The party must also justify the duration of the post divorce maintenance. This is in addition to the obvious need to justify the quantum of the maintenance.

In *Chiomba* v *Chiomba* 1992 (2) ZLR 197 (S) at p 197 D- 198 B the trend of the law on post divorce maintenance was summarised as follows:-

> "When a woman applies for maintenance at the time of divorce in terms of s 7(1) (b) of the matrimonial causes Act 1985 the criteria to be applied are set out in s 7(3)[now s 7(4)] of the Act. It used to be thought that where an "innocent" woman divorced her husband on the

ground of his misconduct she was entitled to maintenance until her death or re-marriage, whether or not she was able to work and support herself. This is not the position today. The changed attitude of the court has been brought about by the emergence of the working wife and "woman's liberation".

When deciding upon the issue of maintenance for women who are able to work these general guidelines, enunciated by Professor *Hahlo* concerning South African law, may be used in Zimbabwe as they are in accordance with the intention underlying the provisions relating to maintenance in the Matrimonial Causes Act:-

- Marriage can no longer be seen as providing woman a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.
- Young women who worked before marriage and are able to work and support themselves after divorce will not be awarded maintenance if they have no young children. If a young woman has given up work she will be awarded short term maintenance to tide her over until she finds a new job.
- Middle-aged women who have devoted themselves for years to the management of the household and care of the children should be given "rehabilitative" maintenance for a period long enough to enable them to be trained or retrained for a job or a profession.
- Elderly women who have been married for a long time and are too old to now go and earn a living and are unlikely to re-marry will require permanent maintenance.

In the present case the court held that the wife was not entitled to be maintained because there was an even balance between the parties regarding their responsibilities, prospects, youth and income after the payment of maintenance."

The above change in courts' attitude has been followed and is in tune with worldwide trends. see *Rabvukwa* v *Rabvukwa* 2004 (1) ZLR 530 (H).

In *casu*, the onus was on the defendant to show that she is entitled to maintenance, its duration and quantum thereof.

The plaintiff's evidence on the above issue was to the effect that defendant was not entitled to post divorce maintenance as she is capable of looking after herself.

The plaintiff alleged that defendant has a Diploma in Agriculture and has been employed by the Ministry of Agriculture. He also alleged that she has been doing cross border trading and earning adequately to sustain herself. When asked about defendant's educational qualification plaintiff confessed that he had not seen any document confirming the Diploma in Agriculture and neither was he sure of which Agricultural College defendant attended. I am of the view that had defendant attended any notable Agricultural College and obtained a Diploma plaintiff, as husband, would have been the first to know such college. The fact that he did not know tends to confirm defendant's contention that she holds no such qualification.

When asked about the cross border trading he alleged defendant was engaged in as a business, plaintiff was not clear as to the period defendant had engaged in such trade. He equally was unable to say if any income was derived from such trade.

The above uncertainties do not augur well for plaintiff taking into account that the couple was married in 1993 and have been together for this long.

The defendant's contention on cross border trading was that on the few occasions she went outside the country it was on the sponsorship of the plaintiff. It was to buy grocery items for the family and not that she was into cross border trading as a business. This was during the economic hardships the country went through and food items were hard to come by.

The plaintiff also argued that they separated a year before 2005 when he issued summons and since then defendant had not applied for maintenance *pendent lite*. According to plaintiff such failure confirms that defendant is able to look after herself.

The defendant on the other hand contended that after the issuance of the summons in 2005, the parties reconciled and resumed living together with plaintiff providing for the family. According to defendant this explains why the matter was dormant from 2005 to 2012. It was only in 2012 when she realised plaintiff had gone back to his incompatible conduct that she resuscitated the matter.

Though parties were not agreed on this aspect, plaintiff admitted that he was providing for his family. He was asked whether during the period from 2005 he had been contributing towards defendant's personal upkeep. His response was to the effect that 'no not towards her personal upkeep. I made sure I provided for the children. One is now married the other one is at university and the last born is in grade 7.' He confirmed he provided a rented house for them in which defendant lived with the children. If therefore he was providing all the children's needs including shelter for defendant and the children there may not have been need for defendant to seek maintenance *pendent lite*. It was apparent that plaintiff was finding it difficult to just admit that he was in fact providing for his family including the defendant.

I thus conclude that defendant is entitled to financial support to enable her secure shelter and other basic necessities that she was used to during the marriage.

As defendant is aged about 44 years, she is in the middle age category. This is a category that should be encouraged to find ways of sustaining themselves and not expect to be totally dependent on the other spouse. I did not hear defendant to contend that she suffers

from any mental or physical incapacity so as to be unable to fend for herself. What she requires is adequate time within which to adjust. Counsel for the defendant suggested a 10 year period. This, in my view, is too long. What is required is a period long enough for defendant to engage in some training or retraining, where she desires such, or to set herself up in any income generating venture. A period of about four years should be adequate. The defendant herself did not indicate how long she would need to be able to set herself up.

The next question is on the quantum of the maintenance. This is not an easy question due to obvious inadequacies in the evidence by both parties. In the assessment of maintenance court is enjoined to consider the basic needs of the parties that would enable them to continue with the lifestyle they were used to during the subsistence of the marriage. In that regard a list of the needs of the spouses is necessary. Such needs would have to be considered in light of the other spouse's income and necessary expenditure.

In *casu*, defendant did not provide a detailed list of her basic needs. When asked in evidence in chief why she needed $300-00 per month defendant's response was to the effect that-

> 'I want $300-00 I am sure it will be enough to sustain the type of life I was used to, to also do my hair like other women. It is not only hair I also need to be presentable, buy good clothes. My parents are aged and I need to visit them.'

Under cross examination she was just as general. One was left wondering how she arrived at the figure of $300-00 in the absence of individual figures for each of her current and intended expenses.

In the same vein plaintiff did not disclose his income and necessary expenditure. If anything it was an aspect not given the attention it deserved. He however did not seriously deny that he earns at least $4000-00 per month, part of which is from rentals of a building with a number of partitions.

Despite the deficiencies alluded to above in the defendant's case I am of the view she deserves some minimal sum to cushion her during the transition period. For instance she would need money for shelter for herself and the minor child, food, clothing, payment of utility bills, medical expenses and other basic needs for a functional home. I am of the view that a sum of $150-00 per month for 4 years from the date of this order should suffice.

2. **<u>The number of immovable properties owned by the parties and what would be a fair and equitable distribution thereof</u>**

In his summons and declaration plaintiff only disclosed three immovable assets as being available for distribution, namely; Stand 2610 Mshumavale, Kadoma; un-serviced 825 square metres, lot 4 Stand and a 310 square metres Stand in Unit G, Seke.

The defendant in her plea revealed the existence of other immovable properties. The defendant's list included-

Stand 2610 Mshumavale, Kadoma; Plot 7103 Mshumavale, Kadoma; Lot 14, Stand 6882 Tynwald; un-serviced 825 square metres Stand lot 4; a rural home in Buhera; shop 7119 Kadoma Township; Stand No. 21943 Unit G, Chitungwiza; Stand No. 6363 Mornington, Kadoma; Stand No. 882 Roan street, Mshumavale, Kadoma and Stand no. 7044 Rimuka Township, Kadoma.

In his replication to the plea plaintiff explained the position with each of the properties identified by the defendant as follows:-

1. Stand 2610 Mshumavale, Kadoma was sold in 2005. Defendant is aware of this.
2. Plot 7103 Mshumavale, Kadoma, this was acquired in 2007 and is being developed under Build, Operate and Transfer. The contractors build and use the property up to February 2013 and thereafter transfer it into plaintiff's name.
3. Lot 14 Tynwald, Harare was an offer made by the government which was then not paid for and was therefore lost.
4. Un-serviced 825 square metres lot 4. This property does not exist.
5. No rural home in Buhera but built a hut among other huts built by Plaintiff's parents at the parents' homestead.
6. Shop 7119 Kadoma Township. This shop is owned by May Ventures (Pvt) Ltd, a company registered in 2009 when the parities had already separated. The Directors of the company are Plaintiff and Mairesi Kondohwe. Plaintiff holds 50% shares in the company.
7. Stand No. 21943 Unit G, Chitungwiza which he said defendant can have.
8. Stand No.6363 Mornington, Kadoma which he said does not belong to the parties but to Mandy Vori and Tadiwanashe Madzivanyika. The property was acquired in 2007 when parties had been on separation for three years.
9. Stand No. 882 Roan Drive, Mshumavale, Kadoma. He said this is not matrimonial property but was acquired by Mairesi Kondohwe and the title is still in the name of the seller Karimazondo.

10. Stand No.7044 Rimuka, Kadoma. This was given to Plaintiff by City of Kadoma as payment for salaries which could not be paid in 2007; three years after the parties had separated.

From his replication he suggested that only three immovable properties were available for distribution. He suggested that he be awarded Stand No. 7044 Rimuka, Kadoma and Plot 7103 Mshumavale, Kadoma whilst defendant is awarded Stand 21943 Unit G, Chitungwiza.
The distribution and division of assets of the spouses at the dissolution of a marriage is governed by s 7 of the Matrimonial Causes Act, [*Chapter 5:13*] hereinafter referred to as the Act. Section 7 (1) (a) of the Act, states that:-

> "Subject to this section, in granting a decree of divorce, …….., 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."

In the exercise of its power in this regard Court is enjoined to consider all the circumstances of each case. Some of the factors to be considered are well enumerated in s 7(4) (a)-(g) of the Act.

In the exercise of its wide discretion court endeavours as far as is reasonable and practical to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the parties.
In *Gonye* v *Gonye* 2009 (1) ZLR 232 @ 236H-237 B MALABA JA had this to say on the nature of the discretion and the approach to be adopted:-

> "It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section7 (1) of the Act provides that the court may make an order with regard to the division, apportionment or distribution of 'assets of the spouses' including an order that any asset be transferred from one spouse to the other. The rights claimed by the spouses' under section 7(1) of the Act are dependent upon the exercise by the court of broad discretion. ..
> The terms used are the assets of the spouses and not matrimonial property. It is important to bear in mind the concept used, because the adoption of the concept 'matrimonial property' often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept 'assets of the spouses' is clearly intended to have assets owned by the spouses individually(his or hers) or jointly(theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regards to the division, apportionment or distribution of such assets."

In as far as the parties are not agreed on what constitutes the assets to be considered it is important to firstly ascertain the assets of the spouses.

In his closing submissions counsel for the plaintiff brought in another dimension to the case. He now argued that only properties registered in the spouse(s) names at the deeds registry should be considered as owned by the spouses. He further argued that only properties owned in terms of registration in the Deeds Registries Act [*Chapter20:05*] should be considered in the distribution of assets of the spouses. The submissions were clearly not in tandem with plaintiff's plea and evidence as will be shown below.

Stand 2610 Mshumavale, Kadoma.

Plaintiff argued that this property was sold before the divorce proceedings were commenced and so it is not available for distribution as an asset of the spouses. If, as plaintiff states, this property was sold in 2004 before the issuance of summons in 2005, it is not clear as to why plaintiff included it in his summons and declarations as property available for distribution. In his declaration he had proposed that this property be awarded to him. It was only in 2012 that, in response to defendant's amended plea, plaintiff revealed that this property had in fact been sold to defendant's knowledge in 2004. If at all this property was sold then this must have been after the issuance of the summons.

In view of the documents tendered, that included court papers, defendant could not refute that this property was indeed sold. Her only issue was that she did not benefit from the sale. Clearly this property may not be available for distribution as it appears to have been sold during the subsistence of the marriage.

Plot 7103 Mshumavale Kadoma.

In his replication to defendant's plea plaintiff stated that he acquired this property in 2007 and the property is being developed under the build, operate and transfer arrangement. Under this arrangement the contractors build and use the property up to February 2013 and thereafter transfer it into plaintiff's name. As this is now past February 2013 it follows that by now the property ought to have been transferred into plaintiff's name. In his viva voce evidence the plaintiff confirmed this was his property in that he acquired it in 2007. He further stated that the property was given to him by Kadoma City Council in lieu of his salary arrears. Instead of selling the stand he decided to keep it and produce vegetables on it. This was however contrary to a memorandum of agreement he tendered showing that he purchased the stand from the City of Kadoma for $120.000 000.00 in December 2009 (p 43 plaintiff's bundle of documents).

The plaintiff argued that defendant was not supposed to lay claim to a share of it because they had separated at the time he acquired it. Clearly plaintiff was under the belief that a property acquired when spouses are on separation should not be considered. This stance is different from the closing submissions which seem to suggest that the property is still owned by the council and so cannot be subject of distribution.

I am of the view that this property has to be considered in the division, apportionment and distribution of assets of the spouses. The plaintiff confirmed it was given to him by Council and so it is his. There is no question of payment of purchase price as suggested by Counsel for the plaintiff as this was given in lieu of salary arrears. The fact that the title deeds are not yet in his name would not in my view bar court from considering it as plaintiff's asset.

Lot 14 Tynwald Harare and 825 square metres lot 4.

In appendix 'A' to the particulars of claim plaintiff indicated that this property was available for distribution and had proposed that it be awarded to him. He had described it as un-serviced 825 square metres, Lot 4. In his replication to defendant's amended plea plaintiff now stated that the un-serviced 825 square metres lot 4 did not exist. He however did not explain why he had included it in his list in the summons.

The evidence led seemed to confirm that such a property did exist except that its description is Stand 6882 Tynwald Lot 14.

The plaintiff argued that this Stand was repossessed by the government in 2012 after he had failed to pay for it. As far as he is concerned this Stand is no longer available for consideration in the distribution of assets of the spouses. In this regard he tendered exhibit 3, which is a letter from the Ministry of Local Government, Public Works and National Housing to the Zimbabwe Republic Police, Commercial Crime Unit. The letter confirmed the fact that the Stand was repossessed from plaintiff and reallocated to one John Njodzi due to none payment of servicing fees by plaintiff.

The defendant, whilst contending that this property should be availed and that plaintiff could have manipulated the processes, had nothing concrete to rebut the plaintiff's evidence on this aspect. This court cannot find that the Stand is still available purely on defendant's suspicion. If the Stand was indeed repossessed and reallocated to someone else it follows that it is not available for redistribution.

Rural home in Buhera

It appeared common cause that the parties built a hut at plaintiff's rural home. Plaintiff's evidence was to the effect that he built that hut for his parents though they used to use it whenever they went to the rural home. The defendant laid no claim to it serve to say it must be acknowledged as a hut they built together. The improvements will thus be considered. Plaintiff can retain the improvements thereon.

Stand 7119 Kadoma.

The plaintiff alleged this property is owned by a private company namely May Jay Ventures (Pvt) Ltd. This company was incorporated in 2006. The plaintiff holds 50% in the company and the other 50% is held by Mairesi Kondohwe. These two are also the directors of the company. It is thus their company. Plaintiff argued that defendant should not claim anything from this property as it was acquired after their separation by the aforementioned company. In support of this assertion plaintiff tendered some documents showing that it is May Jay Ventures (Pvt) Ltd that applied for and was allocated the Stand by Kadoma Town Council.

The defendant's contention was to the effect that the corporate veil be pierced as plaintiff is the real owner of the property he has just used a company he formed with his girlfriend to distance the property from distribution. Defendant tendered a letter from Kadoma City Council dated 12 April 2012. In the letter an official of the council wrote that:

> "This letter serves to confirm that Stand 7044 Rimuka, Stand 7119 Kadoma Township and plot 7103 Mshumavale Kadoma Township are registered in the name of Joel Madzivanyika."

This buttresses defendant's contention for the piercing of the corporate veil.

In *Sibanda* v *Sibanda* 2005 (1) ZLR 97(S) the husband had registered most of the couples' properties, including the matrimonial home, in the names of one or other of his companies or nominees. His parents and his girlfriend were the directors of the companies. The husband argued that the properties in the names of the company should not be awarded to the wife as the company is a separate legal entity. Court aptly held that:-

> "The veil of incorporation maybe lifted where necessary in order to prove who determines or who is responsible for the activities, decisions and control of a company. On the evidence, it was clear that the husband controlled the company and so the house could be considered part of the matrimonial property."

A similar scenario obtained in *Mangwendeza* v *Mangwendeza* 2007 (1) ZLR 216 and court had no hesitation in lifting the veil of incorporation so as to unmask the machinations of a husband intent on depriving a wife of a share of the matrimonial estate.

In casu, evidence adduced shows clearly that May Jay Ventures (Pvt) Ltd was a company owned by plaintiff and his girlfriend and the property in question had been acquired by plaintiff from Kadoma City Council as noted in the Council's letter dated 12th April 2012 cited above. The property was thereafter conveniently registered under the company name. I did not hear plaintiff to argue that his girlfriend paid anything in the formation of the company or towards the purchase of the property. The inclusion of the girlfriend's name was for plaintiff's convenience and not that she had any financial input. This is a case were the veil of incorporation must be lifted to unmask the true owner of the property in question.
This property must be considered in the distribution of assets of the spouses as it was acquired by plaintiff.

Stand 21943 Chitungwiza.

The plaintiff in his pleadings offered this property to defendant of which defendant accepted. Defendant's only reservation was that it is an undeveloped Stand and so not of much value as compared to the other properties plaintiff wished to retain for himself. The parties themselves having agreed that this property be awarded to defendant it was disturbing to hear plaintiff's Counsel submitting that this property was not available for distribution as it was still owned by the Chitungwiza Municipality. The parties themselves acknowledged they were holders of rights and interests in the Stand which should be transferred to defendant and so on whose brief was Counsel arguing? Counsel's submissions in this regard were clearly misplaced. This is property plaintiff had readily offered to defendant.

Stand 6363 Mornington, Kadoma.

In his replication to defendant's amended plea, plaintiff alleged that this Stand was acquired by Mandy Vori and Tadiwanashe Madzivanyika, a minor child. The property was acquired in 2007 after the parties had separated. In his *viva voce* evidence he maintained the same.

The defendant's contention was to the effect that plaintiff used another of his girlfriends and the minor child to disguise his property. To confirm that plaintiff is the actual owner of the property she referred to the plaintiff's application form for a business Stand in

Kadoma, exhibit 6. In clause 14 of that application form plaintiff indicated that he owned other properties in Kadoma. When asked for the details of those properties he listed Stand 882 Mshumavale and Stand 6363 Mornington Kadoma as his properties. The plaintiff did not deny completing that form with those details. He, however, argued that he was merely stating where he was resident. But surely that is a lame excuse. Clause 14 states as follows:-

(A) Do you own any other land in Kadoma?' and he answered 'YES'

(B) 'If yes give details' and he stated the details as '882 Mshumavale, 6363 Mornington'.

The last question on that clause was:-

(C) 'Are the Stands developed? To which he replied 'yes'.

The plaintiff could not have been giving his residential address as that is not what was being inquired of him. In any case in clause 4 of that same application form he had already given his physical residential address as 41 Roan Drive, Mshumavale Kadoma, which is another residential property.

The defendant tendered a letter from Council addressed to her legal practitioners and dated 13 April 2012. In that letter the then acting Director of Housing and Community Services stated that:-

> "In reference to your letter dated 5 April 2012 please note that ownership of the properties you inquired is as follows:-
> Stand 6363 Mornington Kadoma – Joel Madzivanyika
> Stand 882 Roan Drive Mshumavale – Joel Madzivanyika and Mairesi Kondohwe
> Stand 2610 Mshumavale – Clara Ndoro who acquired the Stand through cession from Joel Madzivanyika."

Though on the 24 May 2012, the same officer wrote another letter indicating that he had erroneously indicated that Stand 6363 Mornington is registered in the name of Joel Madzivanyika (Senior) yet in actual fact it is registered in the name of Tadiwa Joel Madzivanyika (Junior) represented by his biological mother Maureen M. Vori. The officer did not explain how such an error came about when he ought to have verified with Council records before responding to the inquiry.

I am of the view that defendant's contention in this regard has some credence. Clearly plaintiff seemed to be desirous of distancing properties he was acquiring from being considered in the distribution of assets of the spouse. It must be acknowledged that defendant was and is still the only lawful spouse of plaintiff. Any other woman would not have the same rights or entitlement to assets or investments made by plaintiff as defendant. This

property should be considered as acquired by plaintiff and thus subject to consideration in the distribution of assets of the spouses.

Stand 882 Roan Drive, Kadoma.

The circumstances of this property bring to the fore the plaintiff's machinations in a bid to deny defendant her dues. It is pertinent to note that in his replication to defendant's plea, plaintiff alleged that this property is not matrimonial property. His reasons were that it was acquired by Mairesi Kondohwe in 2006 from one Karimazondo. The property is still in the name of the seller. In his evidence in court plaintiff was heard to say that Stand 882 Roan Drive belongs to him and Mairesi Kondohwe. This is the property at which he is residing. He went on to say that in his summons he had suggested this property be awarded to him whilst defendant is awarded the Chitungwiza property. Implicitly plaintiff is admitting that this property is available for distribution apportionment and division hence he originally apportioned it to himself in lieu of the defendant taking the Chitungwiza Stand.

The plaintiff tendered a memorandum of the agreement of sale between Tapera Karimazondo as Seller and Mairesi Kondohwe and himself as purchasers. The documents he tendered did not however explain why in the first place he had categorically stated that the property belonged to Mairesi Kondohwe when he knew that it also belonged to him. It may also be noted that in his application form for Stand 7044, plaintiff had indicated that he owned Stand 882 Mshumavale, Kadoma. When it was put to him that defendant was asking for his 50% share in the property plaintiff conceded that he can pay her from where he made monetary contribution? If he was a co-buyer of this property his share should be considered in the distribution of the assets of the spouses.

Stand 7044 Rimuka , Kadoma.

Any doubts about the defendant's suspicion that plaintiff was simply intent on concealing assets of the spouses from being considered should be put to rest by the evidence on this property. In his replication the plaintiff alleged that this Stand was given to him by City of Kadoma as payment for salaries which could not be paid in 2007. He thus proposed that it be awarded to him. In his viva voce evidence he maintained the same stance save to add that upon being given the Stand, as it is an industrial Stand, and as he had no money to develop it, he entered into a partnership with other people. There are three people who have

built some shells on the Stand. It was his evidence that he has filed documents with the Deeds Office for the subdivision of the Stand to cater for three partners.

In a bid to distance the property from distribution, plaintiff tendered a Memorandum of Agreement between the City of Kadoma as seller and plaintiff and Maureen Vori as purchasers. The plaintiff sought to now say that the property is under a purchase agreement. This is clearly contrary to plaintiff's replication to defendant's plea. The Memorandum of Agreement that plaintiff sought to rely on to buttress his latest stance was countered by exhibit 6 tendered by defendant. That exhibit 6 shows plaintiff as the only purchaser. The name of Maureen Vori appears to have been added onto the copy submitted by plaintiff as an afterthought. Unfortunately the addition was done after defendant had already obtained a copy of the Memorandum of Agreement from the Council.

Further, a Partnership Agreement on development of Stand 7044 he tendered as exh. 4 shows plaintiff as owner of the Stand and the other two persons as financiers, Maureen Vori is not mentioned at all either as co-owner or as having interest in that Stand.

This tends to confirm defendant's fears that plaintiff having been a Director of Housing in the Municipality may have doctored some documents to distance properties from the table of distribution. I am of the view that from plaintiff's replication it is clear that this is his property without any other person as co-purchaser. His belated attempt to include his girlfriend Maureen Vori as co-purchaser is clearly a fabrication and is contrary to his assertion in his replication on how he acquired that Stand.

It may also be noted that letters tendered by defendant as part of exhibit 5 dated 12 April 2012 and 16th February 2015 from the City of Kadoma state that Stand 7044 is registered in the names of the plaintiff. Clearly therefore this property is subject for consideration in the distribution of assets of the spouses.

It may be opportune to point out that plaintiff appeared to labour under a mistaken belief that assets acquired whilst on separation should not be considered. As ably noted by MALABA JA in *Gonye* v *Gonye (supra*) properties that are acquired whilst on separation are subject to consideration. The consideration is for all properties owned individually or jointly by the spouses at the time of dissolution of the marriage irrespective of when they were acquired

What emerges from the above analysis of the various immovable properties is that plaintiff has not been candid with court. He was intent on concealing properties he acquired during the

subsistence of the marriage. The various machinations he employed to conceal or distance the properties from distribution under the guise of being owned by his girlfriends in whole or in part and by a company he formed with this girlfriend confirms his mala fide. It must be borne in mind that the discretion enjoyed by court in the distribution of assets of the spouses requires that spouses be candid with court. It is only when the truth has been told regarding the properties and the circumstances of their acquisition that court is better placed to do a fair and equitable distribution of the assets. Where a spouse deliberately chooses not to be truthful, then they should not cry foul when a distribution not to their liking is done.

In the circumstances of this case I am of the view that taking into account all the circumstances including the duration of the marriage, the needs and expectations of the parties, a just and equitable distribution of the assets acquired during the subsistence of the marriage would be as follows:-

The plaintiff gets as his sole and exclusive property Stand 7103, Stand number 6363 and improvements at the rural home whilst the defendant gets Stand 21943 Chitungwiza as her sole and exclusive property.

The other properties will have to be shared in the ratio 65:35 in favour of plaintiff. The plaintiff will be given the option to buy out defendant in all the properties if he wishes to secure the interests if any of those girlfriends and company whose names he had conveniently registered the properties as co-owners to safe guard his selfish interests. The plaintiff shall be granted adequate time within which to buy out defendant. I believe a period of about 12 months should be adequate unless the parties agree on a longer period.

Should the plaintiff fail to exercise this option within the above stated period, unless the defendant offers to buy out plaintiff in respect of any of the properties within 6 months from such failure, the properties shall be sold to beast advantage and the net proceeds shared in terms of the sharing ratio.

In respect of the property awarded to defendant in full plaintiff shall sign all such papers as are necessary to effect transfer or cession into defendant's names within 30 days from the date of this order. Should plaintiff fail to do so, the registrar shall be directed to sign such papers to effect transfer or cession as the case maybe. The cost shall be paid by plaintiff.

Accordingly it is ordered that-

1. A decree of divorce be and is hereby granted

2. The defendant is hereby awarded custody of the minor child namely Rumbidzai Madzivanyika[born 23 March 2003]
3. The plaintiff shall pay maintenance in respect of the minor child in the sum of USD200-00 per month till the child attains the age of 18 years or becomes self supporting whichever is earlier.
4. Plaintiff shall pay spousal maintenance to defendant in the sum of USD150-00 per month for 4 years from the date of this order or till she dies or remarries whichever is earlier.
5. Movable property: - Each party shall keep the movable properties in his/her custody.
6. Immovable:- The plaintiff be and is hereby awarded the following properties:
   i) Stand 7103 Mshumavale, Kadoma;
   ii) Stand 6363 Mornington,Kadoma;
   iv) a 65% share in Stand 7119 Kadoma Township,Kadoma;
   v) a 65% share in Stand 7044 Rimuka Township,Kadoma;
   vi) a 65% share in Stand 882 Roan Street,Mshumavale, Kadoma; and
   vi) Improvements at the rural home in Buhera.
7. The defendant be and is hereby awarded the following as her sole and exclusive property:
   i) Stand 21943 Unit G, Chitungwiza;
   ii) a 35% share in Stand 7119 Kadoma Township, Kadoma;
   iii) a 35% share in Stand 7044 Rimuka Township. Kadoma;
   iv) a 35% share in Stand 882 Roan Street, Mshumavale , kadoma.
8. The plaintiff is hereby granted the option to buy out defendant's shares in respect of all the immovable properties to be shared.
9. The parties shall within 30 days of this order agree on an agent to evaluate the properties failing such agreement the Registrar shall appoint one from his list of evaluators.
10. The plaintiff be and is hereby granted a period of 12 months within which to buy out defendant's shares in all the properties from the date of receipt of the evaluation report.
11. Should the plaintiff fail to pay out defendant's share within the period stated or any other longer period as the parties may agree, unless the defendant offers to buy out

plaintiff within 6 months thereof, the properties shall be sold to best advantage by an estate agent appointed by the Registrar from his list of such Agents. The net proceeds shall be distributed according to the above mentioned sharing ratio.

12. The plaintiff is hereby directed to sign all necessary papers to effect transfer or cession of Stand 21943 Unit G Chitungwiza to defendant's name within 30 days of this order. Should he fail to do so, the registrar is hereby directed to sign all such documents as are necessary to effect the transfer or cession.
13. Plaintiff shall bear the costs of the transfer or cession as the case may be.
14. Each party shall bear their own costs of suit.

F.G. Gijima, plaintiff's legal practitioners
Danziger & Partners, defendant's legal practitioners.