ELMA TARISAI SIKALA (nee ZANAMWE)
versus
LICOS SIKALA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 29 December 2016

**FAMILY LAW COURT- TRIAL**

*H. Mukonoweshuro*, for the plaintiff
*G N Takawira*, for the defendant

CHITAKUNYE J. The plaintiff and the defendant entered into a customary law marriage in August 1993 when the defendant paid bride price (lobola/roora) for the plaintiff. Though the parties were not agreed as to when they started staying together, it was common cause that their first born child was born in January 1994.

At the time of payment of the bride price, the plaintiff was a 3rd year veterinary science student at the University of Zimbabwe (UZ). The defendant was employed as an assistant accountant.

The marriage was solemnised in terms of the African Marriages Act [*Chapter 238*], now [*Chapter 5:07*] on 21 May 1996. The marriage still subsists.

The marriage was blessed with 9 children of whom 7 are surviving. Six of the seven children are still minors.

On 8 May 2013 the plaintiff issued summons out of this court seeking, *inter alia*, a decree of divorce, custody of the minor children of the marriage, maintenance for the minor children and an order for the division, apportionment and distribution of the property owned by the parties.

The plaintiff alleged that the marriage relationship has irretrievably broken down to such an extent that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties in that:-

(a) The defendant has during the subsistence of the marriage subjected the plaintiff to frequent violent physical and verbal abuse sometimes in the presence of the parties' children. He is cruel and unpredictable.
(b) There has been no conjugal relationship between the parties for more than a year.
(c) The defendant has engaged in extra marital relationships thereby exposing the parties to the risk of contracting H.I.V.
(d) The defendant has indicated to the plaintiff that he is no longer interested in the relationship and has suggested that the parties divorce to which the plaintiff agrees.
(e) The defendant has refused or neglected to contribute to the needs of the children.

The plaintiff alleged that during the subsistence of the marriage the parties acquired both movable and immovable properties. The immovable properties comprised the following:-

(a) Stand 5 Welbeck Township of Foyle Estate registered in the defendant's name under Deed of Transfer No. 7161/2001 measuring 11.6248 hectares.
(b) Lot 6 Block M Hatfield Estate held by the defendant under Deed of Transfer No. 3810/94 (subdivided into 15 Stands).
(c) Business Stand in Mazoe leased under lease No. MAZ/UB/73/2011
(d) Mining claim Registration No. 40679.

The plaintiff provided a schedule of how she proposed the movable and immovable properties should be distributed. On the immovable property she suggested that she be awarded Stand 5 Welbeck Township of Foyle Estate Mazoe which is the matrimonial home(also referred to hereinafter as the Mazoe property) whilst the defendant is awarded one Stand out of the stands at Lot 6 Block M Hatfield Estate also known as no. 6 Fern Road Hatfield (Hatfield property). The rest of the immovable property was to be sold and the net proceeds shared in equal shares between the parties.

The defendant, in his plea, denied conducting himself in the manner alleged by the plaintiff. He denied that the manner proposed for the distribution of the assets of the spouse was fair. He contended that he was not neglecting his children's needs but was providing according to his ability.

The defendant filed a counter claim in which he conceded that the marriage has irretrievably broken down albeit not for the reasons advanced by the plaintiff but for the fact that the parties had lost love and affection for each other.

On the aspect of custody of the minor children, the defendant initially suggested that custody be awarded to the plaintiff (defendant-in-Reconvention) with the defendant retaining reasonable rights of access. He later amended that part of his pleadings to now seek joint custody of the minor children.

In his counter claim the defendant proposed the manner in which the property should be distributed. On immovable property he proposed that he be awarded the following:-

(a) Stand Number 5 Welbeck Township of Foyle Estate Mazoe; and

(b) The Mining claim registration no.70679.

The plaintiff (defendant –in- Reconvention) be awarded-

(a) One Stand at Lot 6 Block M, Hatfield Estate; and

(b) Business stand in Mazowe held under lease number MAZ/UB/73/2001.

On maintenance, he proposed that each party contributes equally to the needs of the children provided that the decision of the schools that the children should attend is made jointly by the parties. He, however, did not provide any monetary figures in this regard.

The counter claim was rejected by the plaintiff who insisted on her claim as per her declaration.

On 25 November 2014 a pre-trial conference was held in terms of r 182 of the High Court Rules, 1971, as amended. The following issues were referred for trial:-

1. What constitutes the matrimonial property and what is a fair and just distribution of the matrimonial property?
2. Whether or not joint custody in respect of the six minor children must be granted in the circumstances, if not, who between the parties must be granted custody of the minor children?
3. What is the quantum of maintenance payable for the minor children?

Prior to the commencement of the trial and during the trial parties continued to negotiate on some aspects of the case. The result of the further discussions was that parties agreed on the following:

(a) That the plaintiff be awarded one Hatfield Stand number 2348 Hatfield Township of Lot 6 Block M of Hatfield Estate as her sole and exclusive property. That stand was valued at USD30 000-00.

(b) That defendant retains the Mazoe Business Stand leased under MAZ/UB/73/2011 and the Mining Claim registration number 40679.

(c) That in the event of either of them being granted custody of the 6 minor children then access would be regulated on the basis that defendant would have access to the minor children for the 1st half of the school holiday while the plaintiff would have the children for the last half.

(d) That the non-custodian parent would have access on alternate weekends, public holidays and birthdays (where they do not fall on school days).

Besides the above, parties could not agree on any other aspect. On the issues outstanding both parties gave evidence and tendered bulky bundles of documents in support of their respective contentions.

From the evidence adduced the following are common cause: that the defendant paid the bride price for the plaintiff in 1993. Their first born child was born in January 1994. They registered their marriage on 21 May 1996 at a time the plaintiff was about to depart for Netherlands on a staff development scholarship.

The plaintiff completed her first degree in veterinary science in 1995 and was awarded a staff development scholarship to pursue a Master's degree in the Netherlands.

The scholarship paid her tuition fees and a stipend of 1500-00 Guilders per month.

In order to obtain a visa for both of them to go to the Netherlands a marriage certificate was required hence the registration of their marriage.

The parties left for the Netherlands with their child in September 1996.

The plaintiff completed her Masters degree in 1998 and she and the child came back to Zimbabwe while the defendant remained in the Netherlands to do his MBA degree in the period 1998-1999.

From 1996 to date the plaintiff has been in continuous gainful employment. She was firstly employed by the University of Zimbabwe from 1996 to 2007, and secondly, by the Food and Agricultural Organisation (FAO) from 2007 to date.

It is pertinent to point out that whilst plaintiff was doing her Master's degree the Visa that allowed the defendant to accompany her to the Netherlands did not allow him to seek

employment. Thus, if he at all sought employment, it was outside the conditions of the visa.

When the defendant remained in the Netherlands he duly completed his MBA degree and returned to Zimbabwe in the year 2000. He duly joined his family and they moved to stay in the Hatfield property. Later they moved to rented accommodation in the Mt Pleasant area.

It was common cause that as at the time of issuance of the summons 5 of the minor children were attending school. The total school fees per term for the 5 children was about US$12 000-00.

It was further agreed that the outstanding immovable properties were valued at the parties' instance. In that regard valuation reports were submitted. The parties agreed that from the valuation reports the average value of the Mazoe matrimonial property is about US$215 000-00. The stands at the Hatfield property were valued at US$30 000-00 for one stand.

The issues that remained for determination by this court were now couched as follows:-

(a) How to distribute the matrimonial home which is valued at US$215 000-00, which is the average of the two values submitted.
(b) Whether joint custody should be awarded or not? If not, who should be awarded custody?
(c) What should be the maintenance contribution from the non custodian parent?

**Immovable property**

On the matrimonial home the plaintiff claimed a 50% share whilst the defendant offered her a 30% share. The defendant's reason for offering the plaintiff the 30 per cent of the value of the matrimonial home was that he bought both the Hatfield and Mazowe properties on his own and the plaintiff did not make any direct financial contribution towards the purchase price as she was not being paid a meaningful salary at the University of Zimbabwe where she was employed. He further contended that when he bought the Hatfield property the plaintiff was still a student and thus unable to contribute financially towards its purchase.

The plaintiff's evidence on this aspect was to the effect that in 1993 when they married under customary law they had no immovable property. They then bought the

Hatfield property in 1994. As a student she was in receipt of a stipend part of which she saved. When they bought the Hatfield property she used those savings to contribute to the purchase price. It was her evidence that a deposit of Z$25000-00 was required of which she provided Z$11000-00 whilst defendant paid Z$14000-00. As she had no pay slip, on applying for a mortgage loan the property was put in the defendant's name as the purchaser. It was her evidence that they continued to pool their resources together in paying the loan instalments till 1996 when they left for the Netherlands. When they were in the Netherlands the property was rented out and rentals there from were used to service the loan. They would also send money from the Netherlands to augment rentals in servicing the loan. The plaintiff thus maintained that she contributed to the Hatfield property.

The plaintiff further stated that when the property was subdivided the defendant was not in employment and so it was her salary that was used to initiate the process of subdividing the property into 15 stands. Unfortunately when they fell out, the defendant proceeded to sell most of the stands and she did not derive any benefit from the sales. Out of the 15 stands about 3 were left at the time of the issuance of the summons. These are the stands she wished to get a share of.

It was also her evidence that from 2007 they operated a joint bank account. However she pulled out of this arrangement in 2011 when she contracted an STI infection and felt cheated by the defendant.

In furtherance of their interests in the stands the plaintiff requested the defendant to produce proof of the sale of the 15 stands as he had been contending. The defendant could only produce agreements of sale for 13 of the 15 stands. Thus as at the time of the trial there ought to have been at least two stands available from the three admitted by the defendant in his pleadings. The plaintiff asked for these two to be considered as matrimonial property. It is from these stands that parties agreed that the plaintiff can have one.

As regards the Mazoe property, the plaintiff's evidence was to the effect that this property was acquired in 2001. It was paid for partly in cash and the balance by mortgage finance. The defendant took out the mortgage bond in his name but the parties continued to pool their resources. Due to hyper inflation the property was paid off within a few years.

It was thus the plaintiff's evidence that as both parties contributed the property should be shared in equal shares despite the fact that she felt her contribution both directly and indirectly would easily entitle her to a greater share.

The plaintiff also suggested that she retains the Mazoe property whilst the defendant retains the three remaining stands at the Hatfield property. Another proposal was that the Mazoe property be subdivided into two portions with the plaintiff retaining the portion with the main house and defendant taking the other and an equal distribution of the 3 stands in Hatfield.

It is my view that as parties agreed on the plaintiff being awarded one stand from the Hatfield stands it follows that the real contentious issue pertains to the distribution of the Mazoe property.

The issue maybe paused as: Should this property be awarded to either of the parties, or be divided into two with each party getting an equal share or should each part just be granted a share in the property without an order for subdivision?

The defendant's evidence was to the effect that the plaintiff never contributed to the purchase of the Hatfield property. He bought it on his own before they had started staying together; he denied that the plaintiff had any savings from her student stipend to contribute towards the purchase of the Hatfield property.

On the Mazoe property the defendant testified that he bought that on his own without the plaintiff's contribution. He bought it through a mortgage bond. He categorically denied that they were pooling their resources for the repayment of the loan. The defendant contended that the plaintiff is not entitled to 50% of the Mazoe property. He instead offered her a 30% share. He stated that his reason for offering the 30% was that he looked after her when she was a student and as she did her education. Thereafter for the period the plaintiff worked for the University of Zimbabwe she was not earning much and so could not make meaningful contribution. It was only when she joined the Food and Agricultural Organisation that she started earning enough to contribute to the needs of the family. The defendant put the plaintiff's period of contribution as from 2007 to 2011. It is in these circumstances that the defendant offered the plaintiff only a 30% share in the Mazoe property.

The division, apportionment and distribution of property at the dissolution of registered marriage is governed by s 7 of the Matrimonial Causes Act [*chapter 5:13*]. Section 7 (1) thereof 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."

The assets to be considered are those of the spouses as at the time of the dissolution of the marriage. Such assets may have been acquired by either of the spouses in his or her name, or jointly. The assets may have been acquired before the marriage or during the subsistence of the marriage. Assets acquired whilst parties are on separation are also affected. One can thus not contend that any asset acquired before marriage or after separation should not be considered.

Subsection 7 (4) of the Act provides guidelines on the factors to be taken into account in determining a just and equitable division, apportionment or distribution of the assets in these terms:-

> "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 conditions 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 spouse 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 parties."

In *Takafuma* v *Takafuma* 1994(2) ZLR 103 (S) MCNALLY JA aptly noted that:-

> "The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion; it is a discretion which must be exercised judicially."

In *Gonye* v *Gonye* 2009 (1) ZLR 232(S)at p 236 H to 237 B MALABA JA had this to say on the discretion referred to above:-

> "It is important to note that a Court has an extremely wide discretion to exercise regarding the granting of an order for the division or apportionment or distribution of assets of the spouses in divorce proceedings."

In the exercise of the above noted wide discretion, court is enjoined to consider all the circumstances of each case. The weight to attach to any particular factor will obviously vary from case to case.

*In casu,* the marriage lasted for about 20 years to time of issuance of summons and 22 years as at the time of trial. It should be noted that for most of that period the plaintiff was in gainful employment.

The emphasis on direct financial contribution as portrayed by the defendant was misplaced. The circumstances of the case show that when the two got married in 1993 they had no immovable property. It was only in 1994 that they acquired the Hatfield property. In 1996 when the plaintiff was awarded a scholarship the couple opted to go to the Netherlands together. That scholarship as stated by the plaintiff included a stipend of 1500 Guilders per month. l am inclined to accept the plaintiff's evidence that the defendant rode on the back of the plaintiff as an accompanying spouse hence his visa did not allow him to engage in any employment work. His initial 3 months study permit would not have permitted him to remain in the Netherlands till the plaintiff had completed her Master's degree, more so as he had no other official source of income. So his being in Netherlands was on the adequacy of the plaintiff's stipend to cater for the basic needs of the couple and their child. I am of the firm view that for the time the couple was in the Netherlands the plaintiff was officially fending for the family.

The defendant's contention that whilst in the Netherlands he was employed and earning enough to rent an apartment for the family is without merit. Indeed, as conceded by the plaintiff, the defendant worked 'here' and 'there' but was not in regular employment such that his earnings could not sustain the family. Whatever the defendant may have earned was to augment what the plaintiff was providing from her stipend. The defendant's main role was to accompany the plaintiff and to look after their child as the plaintiff attended her lessons. This is also discernible from the fact that the defendant only embarked on his MBA degree after the plaintiff had completed her Master's degree.

The defendant's effort at demeaning the plaintiff's contribution to the family in this regard was clearly without merit. It may also be noted that whilst they were in the Netherlands the Hatfield property was rented out and so generating income to service part of the loan. The shortfall was then met from money the parties were sending from the Netherlands.

It was common cause that after the plaintiff completed her Master's degree program in 1998, she returned to Zimbabwe with their child whilst the defendant remained in the Netherlands doing his MBA degree. The plaintiff continued working for the UZ.

A further pointer to the fact that whilst in Netherlands the defendant was dependant on the plaintiff's earning is that when he remained doing his MBA degree program, he incurred a debt of 18600 Guilders in tuition fees. I did not hear the defendant to suggest that any of that debt was incurred when the plaintiff was in the Netherlands; clearly whatever the defendant was earning was not enough to meet his tuition and living expenses.

Another contribution by the plaintiff was that when the defendant remained in the Netherlands, she supported the family on her own. She stayed with her-in- laws so that the Hatfield property could continue generating income from rentals for servicing the loan.

When the defendant eventually returned he only worked for about 2 years and left employment. He made efforts at self employment without much success. The plaintiff on the other hand continued with her employment. She continued with her contributions to the needs of the family.

The defendant admitted that the plaintiff did contribute except he limited her contribution to the time the plaintiff joined FAO up to 2011 when she opened her own bank account. In the same vein he accepted that for that period they operated a joint account. As with any one desirous of belittling another's contribution, the defendant contended that the plaintiff's salary was not deposited into that account. He said that what were being deposited into the joint account were the plaintiff's field allowances which she would thereafter take for the field trips.

If the plaintiff was taking all her money from the joint account this contradicts the defendant's assertion that it is only in those 4 years that the defendant contributed to the needs of the family and so he would offer her a 30% share. That offer on its own shows recognition that the plaintiff was not taking all her money from the joint account.

It may also be noted that the evidence showed clearly that the plaintiff has been contributing more to the needs of the family including paying school fees for the children even to an extent of meeting shortfalls created by the defendant's failure to meet his own portion of the fees. The defendant has instead resorted to grumbling about the schools the children are attending and that he would rather they attended government schools where

fees are lower. The plaintiff has not conceded to the grumblings. She has asked the defendant to contribute even at those government rates with her meeting the balance, but the defendant has not been forthcoming.

Based on the evidence adduced, I am not persuaded to accept that the plaintiff did not make substantial contribution to the acquisition of the properties in question and to the needs of the family.

In Gladys *Chigunde* v *David Chigunde* HH121/15 at p 5 of the cyclostyled judgement, in commenting on the situation of a marriage that had subsisted for a long time, I stated that: -

> "It is impossible to quantify contributions by each spouse over 29 years of marriage. Surely unless one was keeping an accurate record such would not be an easy task. In any case, as was alluded to, there are some contributions to the welfare of the family that are not easy to quantify. Instead parties should look at other features such as the needs and expectations of the parties as they go out of the marriage. Their needs and expectations should carry more weight than direct financial contribution."

In that case, parties had been married for 29 years and the wife was awarded a 50% share.

Other cases where direct financial contribution did not carry the day include:

1. *Usayi* v *Usayi* 2003 (1) ZLR 684(S) where the Supreme Court upheld a High Court decision to award a 50% share to a house wife of 35 years who had not been in formal employment; and
2. *Matongo* v *Matongo* HH 14 /12 where court awarded a 35% share of the matrimonial home to a wife who had made no direct financial contribution but only indirect contribution as a wife over a period of about 25 years.

In this case, I am of the view that the plaintiff contributed both directly and indirectly. So her share, even on the basis of contribution would be higher than the 30% offered.

There were 9 children born to the parties of which the plaintiff had to nurse in their tender ages in addition to attending to her employment. I did not hear the defendant to complain that for that long period the plaintiff abdicated her responsibilities as wife and mother to the family. If anything, she appeared to have acquitted herself well in attending to her wifely duties, bearing 9 children and taking motherly care of 7 of them to the present stage.

Another aspect that needs to be considered is the financial needs and obligations of the spouses. The evidence showed that the defendant has been reluctant to meaningfully contribute towards the school needs of the children. His ability or inability to contribute could not be accessed well as he was not forthcoming with his income. The defendant seemed eager to portray himself f as someone with very limited source of income. He said that he realises about US$ 18 000-00 per year from his farming operations. He however betrayed himself when in the same breath he offered to buy the plaintiff a property worth about US$60 000-00 to US$80 000-00. He did not disclose how he would be able to raise such a sum. If it is through a mortgage loan one must still bear in mind that even in obtaining a loan one needs to prove that they have a reliable source of income to be able to service that loan. It was that source of income the defendant was not candid on.

The defendant was also not candid with court on the purpose of his Mt Pleasant offices. The assertion that he rents that office to use as administrative office for his farm operations does not make sense. It is difficult to understand how someone would rent an office for US$360-00 per month, translating to US$4320-00 per year, in Mt pleasant, away from the farm itself. It was not disputed that there are some outbuildings at the farm which, in such a situation, could easily be used for administration. It is more sensible to have offices at the place of operations than away unless those offices are to serve other purposes. Clearly in this regard the defendant was not being candid with court. Those other income generating activities he engages in and income there from ought to have been disclosed.

Whilst the plaintiff laid bare her bank statements showing her income and withdrawals, the defendant could not do the same despite such evidence being necessary to ascertain his financial position. The defendant's assertion that he was not aware of the need to avail proof of income is not worth believing. He has been legally represented since the commencement of the matter and he is a holder of qualification in the accounting field, surely it would not have escaped his attention or that of his legal practitioners that proof of income is necessary where parties are contesting over their respective abilities and inabilities to meet their obligations.

What this means is that the plaintiff, faced with such a husband, may have to carry the greater burden of ensuring that children's school fees are paid.

I am of the view that the circumstances of this case are such that only an equal share in the Mazoe property will meet the justice of the case. Both parties expressed their desire

to be awarded the Mazoe property. The defendant contended that he is into farming as his main means of income and so he needs the plot to be able to continue farming. The plaintiff, on the other, hand argued that she needed shelter. She also alluded to the fact that she had been doing a poultry project at the property only to be ordered to stop by the defendant. So she would also want the farm or part thereof to restart her poultry project to augment her income.

The plaintiff's suggestion that each be awarded a part of the farm with an order for the subdivision of the property, is however untenable. The subdivision of land has its attendant requirements which this court cannot impose on the relevant authorities. There are procedural requirements in terms of the Regional, Town and Country Planning Act, [*Chapter 29:12*], that have to be met. It would be unwise for this court to order the appropriate authorities on the issue of subdivision to subdivide the property in a particular way, as suggested by the plaintiff, when they have not been part to these proceedings and no one has approached them for their views on the efficacy or otherwise of the proposed subdivision.

What I deem most appropriate is to award each spouse a share and provide the manner in which each may realise their share.

In the circumstances a 50% share for each party will be awarded with the defendant being granted the first option to buy out the plaintiff within a stated period. Should he fail, the plaintiff can exercise the option to buy out the defendant's share within a given period as well. Should both fail to buy each other out then the property may have to be sold and the parties given their respective shares from the net proceeds.

There was virtually no evidence on how the movable property should be distributed. The only aspect the plaintiff was asked about was the Isuzu motor vehicle and she said the defendant can have it as it is his personal motor vehicle. Apart from lack of evidence on movables, there was also no issue highlighted in the pre-trial conference minute to show that there was any dispute.

Equally In their closing submissions counsel for both parties did not address the issue of the movable property. I thus take it that parties settled on how they will share the movable property. It is, however, important that whenever parties reach settlement on any issue, such must be recorded and reflected in the pre-trial minute and in the closing submissions so as to avoid any future misunderstanding between the parties. In the

absence of any details of a settlement the parties may have reached, I will take it that they are happy with this aspect not being part of the order to be granted by this court.

**Custody**

The next issue for consideration is that of custody. As already alluded to, initially the defendant had agreed to the plaintiff being awarded custody of the minor children with him being granted reasonable rights of access. This, however, changed when he amended his plea and counter claim to now seek joint custody. Whatever drove him to alter his earlier position was not made very clear. There were no new factors alleged that were not known to him at the time of filing his plea and counter claim which had now arisen. It would appear this was simply a change of mind on his part.

Subsections (1) and (2) (a) of s 10 of the Matrimonial Causes Act provide that:-

> "(1) Where there are any children of the marriage, the appropriate court, before granting any decree of divorce, judicial separation or nullity of marriage, may require evidence to be produced by either party for the purpose of determining whether or not proper provision has been made for the custody and maintenance of such children.
>
> (2) An appropriate court may, after hearing evidence referred to in subsection (1)—
> (a) commit the children into the custody of such of the parties or such other person as the court may think best fitted to have such custody."

The section clearly empowers court to grant custody to either of the parties or to any other person as court may think appropriate depending on the evidence adduced. Court may also grant the parties joint custody if the evidence adduced satisfies court that such will be in the best interests of the child.

In *Maarschalk* v *Maarschalk* 1994 (2) ZLR 110(H) SMITH J had occasion to interpret the provision section of subsection (2) of s 10 of the Matrimonial Causes Act as read with subsection 2 of s 8 of the Interpretation Act [*chapter 1:01*] at page 120B-E at p 120 F this is what he said:-

> "To my mind, that provision shows that it was the intention of the legislature that the powers of the court should not be narrowly construed. Under common law, during marriage, the custody of the children is shared by the parents so the concept of joint custody is accepted. For the reasons spelt out in the cases referred to above, on divorce custody is usually granted to only one party. It seems to me, however, that where the circumstances justify the award of joint custody, the court should not be precluded from making such an award. As I have tried to point out above, in my opinion section 10 (2) of the Matrimonial Causes Act 1985, permits a court to make such an award."

The efficacy of joint custody must be ascertained from what is expected of the parties. In Webster's Universal Dictionary and Thesaurus, the term custody is defined as –'guardianship' and a custodian 'as one who has the care of anything; a keeper; a caretaker'.

H R Hahlo in The *South African law of husband and wife* 5th edition at 394 attempted to define the term custody when he stated that:-

> "Custody is but one incident or sector of natural guardianship. Where, as happens in most cases, custody is awarded to the mother and no order is made as to guardianship, the father is left with guardianship minus custody. The mother, as the custodian parent, is entitled to have the child with her; to control its daily life; to decide all questions relating to its education, training and religious upbringing; and to determine what homes or houses the child may or may not enter and with whom it may or may not associate. In case of emergency she can supply the necessary consent to a surgical operation on the child."

Custody thus entails that the custodian parent has the right to attend to the day today needs of the child including decisions of which school the child should attend. In a situation where the parents consult each other on any issue pertaining to the child, the custodian parent will have the final say.

See *Berens* v *Berenis* 2009 (1) ZLR 1 *Makuni* v *Makuni* 2001(1) ZLR 189

If joint custody is to be awarded the parties must show that they are able to carry out such duties and responsibilities jointly and in harmony.

In *Beckford* v *Beckford* 2006 (2) ZLR 377(H) KUDYA J had occasion to deal with the requirements for joint custody. The conclusion reached by the learned judge after a careful analysis of the situation with joint custody in Zimbabwe was aptly summarised as follows:

> "The authority of the court to grant custody of children following divorce is based on the provisions of s 10 (1) and (2) (a) of the Matrimonial Causes Act [chapter 5:13]. Custody encompasses two aspects. These are of physical custody and legal custody. The former entails the control of the body, while the latter is concerned with the decision –making authority over that physical body on a day to day basis. On divorce custody is usually granted to only one party, but where the circumstances justify the award of joint custody, the court should not be precluded from making such an award, which would be permissible under s 10 (2) of the Act. The prerequisites for a joint custody order would be that: (a) both parents are fit; (b) both desire continuous involvement with their children; (c) both are seen by the children as their source of security and love; and (d) both are able to communicate and cooperate in promoting the children's interests. In addition, the court can look to such factors as-
>
> (a) The parties 'ability to deal with the issue in a sensible, mature, responsible and temperamentally stable manner;
> (b) Whether the relationship between the parties has been remarkably good despite the collapse of the marriage;
> (c) Whether they respected, trusted and remained fond of each other;
> (d) Whether they had shared the duties of parenthood amicably and constructively;

(e) Whether they had similar outlooks and values;
(f) Whether compromise rather than altercation had been their way of coping with differences;
(g) Whether they did not disparage each other in the eyes of the children but praised one another in the children's presence; and
(h) Whether they had willingly acted as joint custodians since their separation."

The above factors point to the fact that the paramount consideration is the best interests of the child. If the spouses are to be awarded joint custody it must be shown that such custody will be in the best interest of the children. For joint custody to be in the best interests of the child the relations between the spouses must be such that they are able to compromise and put the children's interests ahead of their own. Where the relations between the parties are such they are unable to relate well and emotional stress takes the better of them in their quarrels, joint custody may not be a good option. Where the parties are unable, due to personal ego, to settle on basic aspects such as the welfare and education of the child, clearly joint custody will not work. It will be inimical to the interests of children to grant custody to parties who, in their egocentric conduct, have little regard for the best interest of the children.

Article 3 (1) of the United Nations Convention on the Rights of the Child (UNCRC) states that-

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Article 4 of The African Charter on the Rights and Welfare of the children (ACRWC) reaffirms the importance of the principle of the best interest of the child when it states in sub-article (1) that:-

> "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration."

In furtherance of its obligations under the UNCRC and ACRWC, the government has put in place legislation emphasising the primacy of children's interests. For instance s 5 of the Customary Law and Local Courts Act [*Chapter 7:05*] states that:

> "In any case relating to the custody or guardianship of children, the interests of the children concerned shall be the paramount consideration, irrespective of which law or principle is applied."

The Constitution, as the supreme law, has provisions confirming the principle of the best interests of the child. In this regard s 19 (1) of the Constitution states that:-

> "The State must adopt policies and measures to ensure that in matters relating to children, the best interests of the children concerned are paramount."

Section 81 (2) thereof then states that:-

> "A child's best interests are paramount in every matter concerning the child."

In applications made in terms of the Guardianship of Minors Act [*Chapter 5:08*] this court has emphasised the need to consider the best interest of the child in deciding the question of custody and guardianship. For instance, in *Galante* v *Galante* (3) 2002 ( 2) ZLR 408 at p 418B-C SMITH J, in considering an application for custody in terms of s 5 of the Guardianship of Minors Act, opined that:-

> "In determining what is in the best interests of the child there are many factors which must be taken into account. In *MCCALL* v *MCCALL* 1994 (3) SA 201(C) at 204-205, KING J said as follows in relation to the criteria to be used:
>
> 'In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out here under, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance..."

It is pertinent to bear in mind that the party desiring joint custody must show that this is in the best interests of the children.

The plaintiff gave evidence indicating that joint custody would not be in the best interests of the children. She argued that she should be granted sole custody with the defendant being granted reasonable rights of access. She testified that the defendant did not relate well to the children. His attitude was such that some of the children were scared of him.

The plaintiff further testified that the defendant has been physically and verbally abusive to her in the presence of the children. This abuse reached a stage where one of the children encouraged her to seek a protection order. It was common cause that when she applied for the protection order, the magistrate interviewed the children after which the order was granted.

Another aspect the plaintiff alluded to was that the defendant had not been supportive of the children's welfare such that she bore the brunt of their educational needs with hardly any assistance from the defendant. The defendant's assistance seemed to come only after she had sued for divorce.

The defendant on the other hand insisted on joint custody. He however conceded that when the plaintiff applied for a protection order the children were interviewed by the

magistrate after which the protection order was granted. He accused the plaintiff of coaching the children on what to say in that interview. There is no doubt that what the children said about the goings on at home convinced the magistrate to grant the protection order. According to the defendant their eldest child narrated events from the time when he was about two years old. That in my view would only serve to show that there were some unsavoury occurrences in the home.

The plaintiff's counsel argued against joint custody. He, instead, submitted that the plaintiff be granted sole custody as the children are very young and need motherly care. The youngest, a boy, is about 4 years old having been born on the 21 January 2011. He gave the ages of the other children as 7 years (a girl), 9 years (a girl), 12 years (a boy), 14 years (a boy) and 16 years (a girl). Counsel argued that the older girls need the guidance of the plaintiff at their tender ages. He also alluded to aspects that would make joint custody unworkable in view of the abusive past in the marriage.

The defendant's counsel on the other hand contended that court should either grant joint custody or award custody to the defendant. He contended that the plaintiff will not always be available as she has a busy schedule at work. She virtually has to be away from home for two weeks a month; recently she was away for about three months. These work commitments militate against awarding sole custody to the plaintiff. His client on the other hand is readily available and able to take care of the children.

Upon a careful analysis of the evidence adduced and submissions made I was not satisfied that the parties can co-operate in the day to day decisions affecting the children. The defendant did not impress me as someone who is prepared to rationally consider the other party's view and compromise on decisions affecting the children. He would rather his decisions carried the day. Awarding joint custody in the circumstances would not be in the best interest of the children.

The circumstances leading to this divorce and the relation between the parties show clearly some tension between the parties. The allegations of physical and verbal abuse in the presence of children were not rebutted with any seriousness. Equally the circumstances that led to the granting of a protection order against the defendant were casually dealt with yet they were a serious indictment on the conduct of the defendant in the home.

Another aspect to note is the situation of their first born child. Though this child is now an adult the circumstances of his failing to pursue a university education show an impasse between the parties. The defendant initially gave the impression that the child just

did not want to further his education. As it later turned out, this was not true. The truth was that the child's choice of university was not liked by the defendant and so for that the child has had to go without university education.

The choice of schools for the minor children is another aspect the parties have failed to agree. The defendant appears reluctant to meaningfully contribute towards the school fees for the children because they are in expensive private schools when he would rather they were at government schools where he said he can meaningfully contribute. When asked how the issue of school will be handled in the case of joint custody, the defendant expressed the view that they will have to discuss. He also suggested that each parent will pay school fees during the time they will be having custody of the children. Such an arrangement will for certain bring an element of uncertainty in the children's education and choice of schools. These are some of the factors that militate against joint custody.

In deciding on the better parent to have custody I am inclined to award custody to the plaintiff. The plaintiff has shown much more commitment and unwavering support for the welfare of the children. She has taken it upon herself to meet the children's school fees and other needs without grumbling. The fact that the plaintiff at times is away from home on work assignments should not work against her. The plaintiff indicated that she has a maid who takes care of the children. This maid has been with the family for the past 18 years and so is a motherly figure to the children. I did not hear defendant to raise any complaint about the ability of this maid as portrayed by the plaintiff. In any case the plaintiff said she is away for about 5 days per month unless she has to attend job related training which for the past year took her to Kenya for two weeks. For the past 7 years she has been with FAO, the longest she was away from home was 3 months when she went for training. Before going away she would always make arrangements for the welfare of the children.

It may also be noted that, whilst in his closing submissions the defendant's counsel contended that if joint custody fails then custody be granted to the defendant, this was never in the defendant's pleadings even as amended. Equally in his evidence such was not strongly requested for.

**Maintenance**

The plaintiff's claim was for US$200-00 per month per child. The defendant contended that he cannot afford this sum. He instead said that in respect of maintenance the parties contribute equally towards the children's groceries and school fees provided that the

decision as to which schools that the children shall attend will be made jointly by both parties. At that stage he did not commit himself to any figures in terms of monetary contribution. In the amended counter claim defendant now sought that:-

> "In respect of maintenance for the minor children, it is fair, just and equitable that the parties contribute towards the children's groceries and upkeep during the period they have custody. It is also fair, just and equitable that the children be transferred to public schools where the defendant is able to contribute equally. In the event that the parties cannot agree to change schools, then the defendant should contribute 50% of the average school fees at a Government former group A school.
>
> Alternatively
> In the event of joint custody not being granted, the parties will contribute equally to the children's groceries, school uniforms and incidental needs. In the event that the children cannot be transferred to a public school at the plaintiff's insistence, the defendant should contribute equally towards school uniforms and at the level of Government former group A school fees level."

In his evidence the defendant was not forthcoming on the quantum of maintenance he was prepared to pay. He was as unhelpful on quantum as he had been unable to provide evidence on his income.

The plaintiff's evidence, on the other hand, was to the effect that the contribution defendant was offering was inadequate. She revealed that during the discussions the defendant had offered to pay US$50-00 per month per child, school fees at US$250-00 per child per term for the children attending High School and US$150-00 per child per term for the children at Primary School. These fees were deemed to be 50% schools fees paid at government schools. Though the plaintiff maintained that these amounts were not adequate she indicated a willingness to accept the amounts with a rider that the defendant must comply with his commitment.

In the circumstances the manner in which the defendant presented his case thus left me with no option but to accept the plaintiff's evidence on what she said the defendant had offered during discussions. This will be that the defendant will pay USD 50-00 per month per child; provide 50% of the school fees using the government schools level. According to the plaintiff, that translates to US$250-00 per child per term for the children in High School and U$150-00 per term per child for the children at Primary school.

Accordingly it is hereby ordered that:-

1. A decree of divorce be and is hereby granted.

2. Custody of the minor children of the marriage, namely Mongiwethu Sikala (born 04/7/1999), Duminkosi Joost Sikala (born 26/03/2001), Nkosana Sikala (born 07/07/2003), Mbali Sikala (born 25/01/2006),Naledi Sikala (born 17/04/2008) and Ely Sikala (born 21/01/2011), be and is hereby awarded to the plaintiff.
3. The defendant be and is hereby granted reasonable rights of access which he shall exercise as follows:
   (a) The 1st half (2weeks) of every school holiday whilst the plaintiff will have the children for the last half;
   (b) On alternate weekends, public holidays and birthdays (where they do not fall on school days)
4. Maintenance:
   The defendant shall contribute as follows for the maintenance of the minor children.
   (a) US$50-00 per month per child;
   (b) Provide 50% of the school fees using Government School fees level currently translating to US$250-00 per term for each child attending High school and US$150-00 per term for each child attending primary school.

   The maintenance shall be paid until each child attains the age of 18 years or becomes self supporting, whichever is earlier.
5. Immovable property:
   The plaintiff be and is hereby awarded the following immovable property:
   (a) Stand no. 2348 Hatfield Township of Lot 6 Block M of Hatfield Estate as her sole and exclusive property;
   (b) A 50% share in value in Stand number 5 Welbeck Township of Foyle Estate registered in the defendant's name under Deed of Transfer No. 7161/2001.
6. The defendant shall be awarded the following immovable property:
   (a) Business Stand in Mazoe leased under lease No. MAZ/UB/73/2011;
   (b) Mining claim Registration No. 40679.
   (c) The remaining unsold stands, if any, at Lot 6 Block M Hatfield Estates.
   (d) A 50% share in value in Stand number 5 Welbeck Township of Foyle Estate registered in defendant's name under Deed of Transfer No. 7161/2001.
7. The defendant is hereby granted the first option to buy out the plaintiff's share in Stand no.5 Welbeck Township, of Foyle Estate within six months from the date of this order or such longer time as the parties may agree.

Should the defendant fail to buy out the plaintiff's share within the stated or agreed period, the plaintiff shall be given the option to buy out the defendant's share within 6 months from the date or time of failure by the defendant or within such longer time as the parties may agree.

Should the plaintiff fail to buy out the defendant within the stated or agreed period, the property shall be sold to best advantage by an estate agent mutually agreed to by the parties or, failing such agreement, one appointed by the Registrar of the High Court and the net proceeds shall distributed equally between the parties; that is as per their respective shares in the property.

8. Each party shall bear their own costs of suit.

*H. Mukonoweshuro & Partners*, plaintiff's legal practitioners
*Takawira Law Chambers*, defendant's legal practitioners.