

RODGER SIBANDA

Versus

CASENEGE T. SIBANDA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 27-28 JANUARY; 30- 31 MARCH;
10 MAY; 16-17 JUNE; 29 JULY 2022 & 10 AUGUST 2023

Civil Trial

Ms B. Khuphe for the plaintiff
Miss V. Chikomo for the defendant

TAKUVA J: This is a contested divorce matter in which divorce was sought on the grounds of irretrievable breakdown of the marriage. At pre-trial-conference the following issues were agreed;

1. Whether or not it is in the best interests of the minor children that defendant be granted custody with plaintiff enjoying reasonable access.
2. Whether or not Mercedes Benz registration number AEA 9324 is part of the parties' assets therefore subject to sharing.
3. Whether or not it is just and equitable that defendant be awarded number 64 Buena Vista, Bulawayo.

The onus on issue (1) was placed on the plaintiff, while defendant had the onus to prove issues 2 and 3. Further the parties made the following concessions;

1. Parties agree the marriage has broken down i.e irretrievably beyond reconciliation;
2. Parties agree that the maintenance of the minor children shall be on equal basis with each party catering for the ends of each minor child, in particular Rivaldo Sibanda (M) born on the 23rd June 2015 to be catered for by the plaintiff and Rowanne Sibanda (F) born on the 21st October 2013 to be catered for by the defendant.

The matter was then referred to trial in terms of the above issues.

Factual background

The parties got married in terms of the Marriages Act (Chapter 5:11) on 23rd December 2011. Plaintiff was 42 years old while the defendant was 19 years old. While the wedding was in December 2011 the parties had customarily married in August 2011 and started living together. Plaintiff was employed by ZETDC as a Principal Human Resources officer. In that capacity he “arranged a job” for the plaintiff who eventually was employed by the same company as an Artisan Assistant in May 2011.

The marriage was blessed with two minor children namely;

1. Rowanne Rodger Sibanda born 21 October 2013 (female)
2. Rivaldo Rodger Sibanda born 23 June 2015 (male)

The parties acquired both movable and immovable property during the subsistence of the marriage. Eventually in 2017 the parties separated and plaintiff issued summons on 8 August 2017 claiming;

- (a) A decree of divorce;
- (b) Custody of the minor children.
- (c) Property sharing in terms of paragraphs 8, 9 and 10 of his declaration.
- (d) An order that defendant provides maintenance for the minor children in the sum of US\$100,00 per month per child until they reach the legal age of majority or become self-sufficient.

The defendant entered appearance to defend and entered a plea and a counter claim which was resolved at the pre-trial-conference.

Plaintiff’s case: Custody

In an effort to prove his case, plaintiff gave *viva voce* evidence. According to plaintiff, defendant is not a suitable person to be granted custody of the two children because when plaintiff is away on business, defendant would lock the children in a room and go to night clubs. At other times she would leave them with her grandmother. Children would go to bed alone and the boy would fall down and fail to return to the bed. Plaintiff claimed that at times he would photograph the children not covered with blankets while asleep. In 2017 he returned

from a business trip and discovered his 3 year old had an injury on the hand. He had not been treated. According to plaintiff there was an incident in which the defendant “ran over” the child with her motor vehicle. This incident occurred when the plaintiff was away and upon his return he took the child to hospital where instead of obtaining a medical report, he said he only was issued with a “card”.

Plaintiff produced the son’s photograph as Ex 1 on page 11 of plaintiff’s bundle of documents. The picture shows a bruise on the forehead. The boy was treated on 6 October 2017 and the officer who received the report at Hillside indicated in form 234 (a request for medical report) that “The victim is said to have been ill-treated by his mother”. Dr Binali observed the following injuries; “Bruise on the RT thumb – healing”.

It was plaintiff’s further evidence that sometime in August 2017 or 2018, he wanted to bath his daughter and she screamed and upon checking discovered that her hand “was broken”. He took her to United Bulawayo Hospitals where she was attended to by a Dr Malaba. He reported the matter to the police and defendant was arrested, taken to court where prosecutors said they would proceed by way of summons and the matter “disappeared” there.

Between the 25 -26 of November 2021 defendant phoned him asking for medical aid cards without saying why. Plaintiff was informed by the police that the child had been sexually abused by a neighbour at a flat in town where defendant was staying with the children. The children told him that they were alone when this happened. Defendant took the child to the police and later to hospital. Plaintiff said when defendant was at work, the children would remain in the care of their grandmother or a maid and he would collect them during school holidays.

Plaintiff considers himself as the best parent because defendant will be away from home “99%” of her time while he is “always” at home. He lives with his two daughters aged 18 and 19 years, who could remain with the children in his absence. According to the plaintiff the children will be unwilling to return to their mother’s house after visiting him. Plaintiff boasted that he has 7 children with different women. One lives in Nkayi while the other is in Mahatshula, and three live with him at home. Those three are 17, 19 and 20 years old.

Under cross-examination plaintiff conceded that he will be at work up to late hours but insisted that defendant was not a suitable parent to be awarded custody of the children because

she brings her boyfriends home and they do things in front of the children. He maintained that the defendant was not looking after the children properly. However plaintiff conceded that he was an ambitious man who indulges in many projects such that defendant would single handedly find herself running the home.

Movables

Mercedes Benz C180 motor vehicle

Plaintiff stated that this motor vehicle is not matrimonial property in that it was purchased in 2010 using funds the directors had earned from a money lending business in 2001. At the time the car was acquired, plaintiff and other directors wanted to register a clinic under the company called Lalapet (Pvt) Ltd. The vehicle was a pool car to be used by a doctor. They paid cash up front. Plaintiff admitted that the vehicle is registered in his name. Defendant was neither a director nor a shareholder in the money lending business or in Lalapet (Pvt) Ltd. Further defendant did not contribute money to the acquisition of this motor vehicle.

When asked under cross-examination how he financed the purchase of the Mercedes Benz and buses, plaintiff said he used funds raised between 2001 and 2005 when they were running a business under RMCC a money lending company.

Immovable property – No. 64 Buena Vista – Bulawayo

Plaintiff contended that this property was acquired before the marriage therefore it is not matrimonial property. He said when he met defendant in April 2011 he was married to one Belinda. The agreement of sale for this property was entered in October 2010 but the agreement was signed on 15 February 2011. It was his evidence that this property was registered on 24 June 2011 in his name as shown by the Title Deed marked exhibit 5. He said he customarily married defendant in August 2011. When asked about the price of the home he said it was around US\$45 000,00 plus US\$12 000,00 for the land. As regards the mode of payment, plaintiff said he paid US\$120 000, 00 for the land and bought material worth US\$35 000,000. He insisted that he made the final payment in February 2011 after selling his Nkulumane house and paid US\$45 000,00.

As regards improvements, plaintiff said defendant did not contribute at all from December 2011 to May or June 2017 when they separated.

Under cross-examination he denied that defendant contributed financially to the completion of the house which at purchase was just a mere stand with an incomplete structure. Further, plaintiff dismissed any suggestion that defendant assisted with the purchasing of building materials like doors and window frames by saying; “she did not do that, I did not build the house by myself; it’s Mpofu who did that.” However plaintiff admitted that the cottage was incomplete in that it had neither roof nor ceiling. According to him, there was no arrangement to extend the sitting room.

Plaintiff further denied that defendant assisted him to plaster the cottage walls, tiling of floors and putting up the ceiling, electricity rewiring of the sitting room, drilling and equipping a borehole and the installation of an electric geyser in their cottage. It is plaintiff’s evidence that it was a Mr Mpofu who drilled and equipped the borehole. He also installed the electric geyser. Plaintiff admitted that Mpofu ran away before completing the house but insisted Mpofu had paid for the plaster work.

Under re-examination, the following exchange occurred;

Q Were there any developments at number 64 Buena Vista, Bulawayo after you had taken occupation?

A Yes, property was incomplete.

Q Which developments?

A One bedroom was plastered. They installed doors in the sitting room. They were 2.

Q When you took effective occupation were you now married to the defendant?

A Moved in June 2011 ... We were not staying with defendant but with Belinda

Q When were these developments done?

A January 2012

Q How did you pay for the development?

A Mpofu paid

Q Did the purchase price include a completed house?

A Mpofu did not replace the building materials.

Q Any financial cost to the house after you occupied it?

A No. Mpofu is supposed to provide the tiles and trusses. The durawall is now going to be my responsibility

Q Why would the company insist on registering the Merc in your own name?

A Money lending business, my employer did not want us to engage in business.

Plaintiff called his cousin, one Clever Mahlangu whose testimony was to the effect that he was introduced to the defendant by the plaintiff in 2011. He confirmed that at that time plaintiff was married to Belinda and they had one child. The witness said the property in issue was purchased in “2008 up to 2010”. He was told by the plaintiff that negotiations took long culminating in the signing of the agreement in 2010. When plaintiff moved to live at the house (64 Buena Vista) he visited him and saw a house he described as follows;

“Cottage was completed, the main house had not yet been roofed. He said he bought it as a complete house but contractor had problems with his wife”.

As regards defendant’s contributions, the witness said he knew nothing about that.

Upon being asked if the house had changed from 2010 to the date he testified, he said nothing has changed on the main house but he saw some tiles at the servant’s quarters although he was not privy to who contributed what. As far as he knows plaintiff had three wives before he married defendant. Plaintiff has 6 or 7 children to his knowledge. At one time plaintiff told the witness that defendant had a boyfriend but defendant denied that.

Plaintiff next called Wilson Sibanda who works as a Revenue Assistant Clerk at ZESA. He described himself as plaintiff’s business partner since 1991. They started running a micro-finance business called Lalapet Investments. He claimed they used profits to purchase vehicles including the Mercedes Benz which was used as a “service” vehicle. When asked why the Mercedes Benz was registered in plaintiff’s name, he said they “sat down as a company and agreed that whatever vehicles were bought will be in plaintiff’s name because he was the secretary”. Further the witness said we passed a resolution on 11 September 2020.

According to this witness he first met defendant in July 2011 and in October 2011 plaintiff terminated his relationship or customary marriage with Belinda /maNcube. As regards

number 64 Buena Vista, he said it was purchased in 2008 and the seller was in terms of the agreement supposed to build the house to its completion. As a result, plaintiff did not pay the full amount at once that is why it prolonged to 2010. The purchase price was raised from the sale of other houses in 2010. When it was pointed out to him that in terms of the agreement of sale on page 14 the agreement to purchase number 64 Buena Vista was signed on 15th February 2011 he agreed that this does not sit well with his evidence that house was purchased in 2008.

Later, the witness said he was not privy to how the sale was financed. This was after it was put to him that the agreement showed that plaintiff was to secure a loan from CABS to pay for the house. The witness said when he visited the house after defendant was now staying there, he did not notice any improvements because the portion they were staying was a “complete house.”

In 2005 the witness said they were partners in Rodger Sibanda Music Co. Club or RMCC. They then changed the name to Lalapet (Pvt) Ltd. It was the witness’ testimony that at the formation of Lalapet, they put their money together but purchased vehicles and registered all of them in plaintiff’s name since his employer did not want any competition. He conceded that there are no vehicles or immovable property registered in Lalapet’s name. While the company has offices he could not say whether or not it has employees. Also he said the company is building a clinic at house number 13462 Cowdray Park, Bulawayo, a house belonging to Ricardo Sibanda, plaintiff’s son. He was surprised that according to papers filed by plaintiff, the house belongs to plaintiff and it should not be shared. The witness agreed that he was in the dark as regards company property. Finally, the witness said after realizing that defendant was claiming company property they did not join in to defend the company property as all the relevant papers were now with their lawyers.

After this witness plaintiff closed his case and defendant opened her case by testifying herself. She is currently resident at number 101 Derby house, 6th Avenue and Main Street, Bulawayo with her mother, children and a helper. The witness is employed by ZETDC at Bulawayo Power Station as an Artisan Assistant. She was employed on 7 May 2011. According to her she got to know of this employment opportunity through the plaintiff while in Botswana. At the time she was awaiting her ‘O’ level results intending to proceed to lower 6th.

She narrated how she met plaintiff in Harare while crossing a street until they later fell in love. Plaintiff suggested that she stops going to school and instead go to work so that they could assist each other financially. Sometime in April 2011 whilst in Botswana, plaintiff sent her bus fare to return to Zimbabwe as he had arranged an interview for a job at ZETDC. She started work in May 2011. At that time plaintiff was renting a house at number 1 Downline Road, Waterford until August 2011 when they moved to number 64 Buena Vista.

Immovable property

(a) No. 64 Buena Vista, Bulawayo

Defendant stated that she should be awarded this property because plaintiff stopped her from further studies with a promise that they should work and build a house. Plaintiff had financial problems resulting in an eviction order being granted by the court due to non-payment of rent. She denied that they moved to 64 Buena Vista in August or September 2011. Some of the plaintiff's financial obligations were the following;

- (a) he was paying school fees for 4 children
- (b) he was saving to buy a house
- (c) he was repaying a loan he had used to acquire the house.

It was defendant's evidence that while plaintiff was attending to the above obligations, she was taking care of all the expenses at home including buying food and paying the maid. Her description of the property is that when they moved in, it had not been fully developed in that it had no roof on one side and the cottage was also not fully developed. The cottage walls were not plastered, no ceiling and no floor tiles. Further, she said the walls to the main house were half-built.

Defendant bought floor tiles from Bathroom Boutique and hired a builder to work in the three (3) roomed cottage. She had one large room divided into a lounge and garage. Walls were plastered and defendant paid the builder and materials. The couple had their 1st child who passed on in January 2012. Plaintiff had refused to pay the builder alleging that he had done a shoddy job.

Defendant gave birth to a premature baby when plaintiff was not at home in July 2012. The house had no ceiling and it was very cold. The baby caught pneumonia and died after one

week. Both parties agreed to have a ceiling fitted and defendant bought ceiling boards. When asked what other financial role she played from 2011, defendant said she was buying food to feed 5 children and buy clothing, beds and linen, wardrobes, television, sofa, school needs and kitchen utensils while plaintiff was concentrating on his project of establishing a clinic at Cowdray Park.

Later, defendant had a borehole sunk and equipped through a loan in the region of US\$2 700,00. It was the plaintiff who looked for people to sink the borehole. Plaintiff hired another builder to finish the house. Defendant assisted financially as well as feeding the builder. The main house had one side's wall up to window level. That wall was demolished and a double wall constructed. Defendant did the electrical rewiring and installed a geyser after plaintiff had purchased the equipment required. She also bought a toilet seat and a tub at Bathroom Boutique in 2011 soon after the wedding.

(b) Cowdray Park property – stand 13452

According to the defendant's testimony when she met plaintiff he had acquired the Cowdray Park stand which he swapped with his house in Nkulumane. One Wilson then paid cash as a top-up. When plaintiff constructed the Cowdray Park house they were together and assisting each other in that while plaintiff was paying for the construction, defendant was taking care of the household expenses. Defendant's friend assisted in wiring the house after plaintiff and defendant secured materials in the form of plugs, distribution boards and cables amounting to US\$1 500,00 to US\$2 000,00 plus US\$600,00 for labour.

Plaintiff acquired another stand in Cowdray Park for the business. He was building another house but defendant did not assist directly but indirectly as they were no longer in good books. When asked who should be awarded the properties in Cowdray Park, defendant said they should be given to the plaintiff to enable him to further "his business".

The Mahatshula property – stand 992

Defendant stated that in 2013 she directly contributed to its construction and improvements through the following tasks;

- (a) wiring and plastering
- (b) tiling

- (c) purchase of metal for a double door gate
- (d) bought cables
- (e) paid labour charges in the sum of US\$300,00
- (f) paid approximately US\$400,00 for other materials
- (g) bought cement

Defendant is not claiming this house and suggested that it should be awarded to the plaintiff since he is the one who “bought it” and his son Ricardo stays there.

Mercedes Benz motor vehicle – registration No. AEA 9324

This vehicle forms part of the matrimonial property according to the defendant. It is her testimony that during the existence of their marriage, the parties acquired the following motor vehicles;

- (i) Mazda Tribute acquired in 2012
- (ii) Lucida registered in plaintiff’s son’s name Ricardo
- (iii) Three ambulances registered in plaintiff’s name
- (iv) Mercedes Benz registration No. AEA 9324, registered in plaintiff’s name

These motor vehicles were kept at the matrimonial home except the ambulances and Lucida. The parties were using the Mercedes Benz as a family car for purposes of driving to and from work. Plaintiff applied for a loan which he used to purchase three ambulances and a Mercedes Benz in question. Further, she confirmed that all the vehicles except the Lucida are registered in plaintiff’s name. Plaintiff has custody of all of them again apart from one in his son’s custody. It is defendant’s view that plaintiff can have the rest of the vehicles minus the Mercedes Benz which they were using as a married couple. Defendant contended that she indirectly contributed to the acquisition of the Mercedes Benz.

Custody of the minor children

Plaintiff wants to be granted custody of both children because she is the best parent to look after them considering what has been happening between plaintiff, herself and the children. Upon separation she took the children who were aged 2 and 3 years with her. She

paid school fees and all related expenses on her own as plaintiff refused to assist her until she approached her lawyers. It was agreed that plaintiff was to be responsible for the boy's welfare while defendant was to take care of the girl. However, plaintiff did not keep his word forcing defendant to apply for a loan to pay for the boy's fees at crèche. When confronted, plaintiff said he would only pay if the children attend boarding school.

Defendant who had financial difficulties had no option but to have both children enrolled at Usher Primary school. The boy was 6 years old and bed-wetting. He also had ulcers. As the only 6 year old, the other students would abuse him and steal his things. At one time a matron advised defendant to remove the children from such an environment. However, when she told plaintiff the challenges, his response was that they would adjust with time. When next she went to see the children, the matron told her that plaintiff had directed that she be denied access to see the children.

Defendant transferred the children to Riverside day school and asked plaintiff to pay. He refused arguing that they should be returned to Usher Primary School. Since plaintiff could not afford paying fees alone, she approached the Maintenance Court which granted her an order but plaintiff would not budge. Plaintiff filed an urgent chamber application in this court challenging the amount that was lower than that at Usher. Plaintiff continued to refuse to pay fees forcing defendant to transfer them to Tennyson Primary School. Plaintiff continued to ignore the children's problems, refused to pay school fees until 2022 when they came to court for this matter. Plaintiff boasted that even if he were to be arrested defendant will still not get the money.

As regards the rape incident defendant said she was shocked when plaintiff said the child was raped. She said upon arriving home she got a report from her daughter that a boy had touched her private parts. A nephew confirmed the incident and she asked her mother to examine the child after which she took the child to the police. On their way she phoned plaintiff who insulted her accusing her of having caused the injury to the child. The police referred them to United Bulawayo Hospitals where a doctor concluded that there was no penetration, but the child had an infection. Plaintiff came to hospital for HIV tests. The boy was a 16 year old neighbor while her daughter was 8 years old. They were referred to the Juvenile Court. Defendant said plaintiff followed up the case as he thought defendant was covering up the case. Defendant denied that she was at fault because the incident occurred while she was at work.

She said it was not true that there were a lot of drunkards where she lived. Her neighbours can do whatever they want to do but had no access to her house. In any event defendant has since moved from that place. She further denied that she had a life of partying. Regarding the allegation that she hit her son with her motor vehicle, defendant strongly denied that saying the son was never injured in a road traffic accident. It was defendant's evidence that plaintiff was not able to properly take care of the children in that he is never at home and even if he took them home, he will leave them with another child. On the other hand defendant claimed that she is always at home, if not, her mother or maid will be with the children. On one occasion the defendant asked plaintiff to remain with the children while she travelled to South Africa to visit her sick sister. Plaintiff agreed and he collected the children.

Defendant was convinced plaintiff wanted custody simply to fix her. She said plaintiff is never there for the children as he has so many projects to attend to. He has no maid. At times he leaves them with his girlfriend. Defendant also said plaintiff is not good at raising children in that all his children with other women were sent to boarding schools at his instance.

Under cross-examination defendant insisted that she first met plaintiff in December 2010. Upon her engagement in May 2011 her salary ranged between \$300 - \$400,00 per month until 2012 when her grade was raised and she received US\$600,00 per month. She estimated plaintiff's salary as US\$1 500,00 – US\$1 600,00 per month. When it was put to her that in fact plaintiff was earning US\$4 000,00 per month defendant professed ignorance insisting that plaintiff would show her a pay-slip with "minus". This did not bother her as she knew plaintiff was involved in projects for the benefit of the family and she would concentrate on feeding the family. Defendant disputed the suggestion that she withheld money in order to develop her mother's house. However, she admitted that both of them assisted by putting up gates that were paid for by plaintiff.

Further, defendant disputed that the house in dispute was purchased in February 2011. According to her the house was purchased in June 2011 when they went to view the house. Defendant was adamant that Belinda and plaintiff never lived together at number 64 Buena Vista, Bulawayo. When they started staying at the house they found bricks piled and she hired and paid a builder who finished the double wall. She strongly denied plaintiff's evidence that the agreement was for a full house and that plaintiff was "waiting for the seller to finish"

constructing the house. Defendant queried why plaintiff would wait for someone who had ran away deserting his work.

Defendant repeated how the Mercedes Benz was purchased in the following words; “Ambulances and Mercedes Benz were purchased in 2016. Plaintiff took a loan at Stanbic and the Mercedes Benz was imported from Japan ... I went with the plaintiff to negotiate the purchase as a family car to use at home.” It was her further evidence that plaintiff at times used an ambulance to ferry children.

Asked to comment on injuries on the medical report on page 9 of the bundle of documents, the defendant said it occurred whilst she was at work. The daughter was complaining about her hand saying she got injured whilst trying to climb up a tree. After getting the children, plaintiff made a report to the police claiming defendant had “sat on the child’s hand”. After four days defendant was called by the police but was not arrested as the police concluded that there was no case to answer. Defendant said plaintiff had made false reports in the past without success.

As regards the image on page 11 of a scan on the son’s forehead, defendant said she was at work when it happened and when she arrived home the maid made a report to her to the effect that the boy fell down headlong from a sofa at 64 Buena Vista. Plaintiff as usual took pictures to use against her. She denied that the scar was caused by her motor vehicle. However, she agreed that this occurred at the time the parties had their own problems. In answer to a question that she lied about her contributions to the property since she wanted to be unjustly enriched from the marriage which was her intention from the word go, defendant said, “I fell in love with him. I was a child and the intention was not to make money. He did not have any wealth at the time. I suggested that he should give me the Mahatshula house but he refused saying it belonged to his children. I opted for the Buena Vista to make things easier for him”.

Finally, defendant said plaintiff is a very jealous man who unjustifiably accuses her of doing bad things like excess intake of alcohol and partying.

The law

Section 26 (c) and (d) of the Constitution of Zimbabwe 2013 provides that the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution, whether through death or divorce, provision must be made for the necessary

protection of spouses – see also Article 16 (1) of the Universal Declaration of Human Rights (1948). The meaning of this is that there must be fair and equitable distribution of property at the dissolution of a marriage with a clear emphasis on gender equality – see *Mhora v Mhora* SC-3-20.

Section 7(1) of the Matrimonial Causes Act (Chapter 5:3) provides that in granting a decree of divorce, judicial separation or nullity of marriage a court may make an order dividing, apportioning or distributing the assets of the spouses. Section 7(4) provides as follows:

- “(4) On granting an order in terms of section (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 one 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, expected to be educated or trained;
 - (d) The age and physical condition of each spouse and child;
 - (e) The direct and indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and every other domestic duties;
 - (f) The value of either of the spouses or to any child of the defendant’ including a pension or gratuity which such spouse or child will use as a result of the dissolution of the marriage;
 - (g) The duration of the marriage;

And in so doing the court shall endeavor 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 the normal marriage relationship continued between the spouses.”

The court has broad discretion in making an order for the division, apportionment or distribution of the assets of the spouses including an order that any asset may be transferred

from one spouse to the other. See *Ncube v Ncube* 1993 (1) ZLR; *Gonye v Gonye* 2009 (1) ZLR 232 at 236N – 237B. In giving effect to the broad discretion bestowed on it by s7 (1) of the Act, the court must have regard to the factors set out in s7 (4) – *Shenje v Shenje* 2001 (1) ZLR 160 (H).

As regards direct and indirect contributions, the *dicta* by ZIYAMBE JA in *Usayi v Usayi* 2003 (1) ZLR 684 (S) at 688 is instructive. The learned judge said;

“The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, housekeeper, day and night nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? ...”

The point is when formulating a legal approach to the reallocation of property on divorce, the courts should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife.

In respect of the assessment of evidence constituting mutually exclusive versions it is settled law that;

“Where the onus rests on the plaintiff and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and the balance of probabilities of the case and if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case anymore than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is

true and that the defendant's version is false." See *National Employers General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 € at 4440E-G.

In *Stellenbosch Farmers Winery Group Ltd & Anor v Marvell Etote & Ors* 2003 (1) SA 11 (SCA), the court put the test as follows;

"The technique generally employed by courts in resolving factual disputes of this nature may be commonly summarised as follows;

"To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various, factual witnesses; (b) their reliability; and (c) the probabilities ... As to (c) this necessitates an analysis and evaluation of the probability or probabilities of each party's version on each of the disputed issues."

The parties' evidence must be looked at in its totality. In *Hees v Nel* 1974 PHF 11 (1) 32 MOHAMED J outlined a variety of factors that must be considered in assessing credibility as follows:

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

Application of the law to the facts

In casu the court must resolve the following disputed issues;

- (a) Whether or not it is in the best interest of the minor children that defendant be granted custody with plaintiff enjoying reasonable access?
- (b) Whether or not the Mercedes Benz vehicle registration number AEA 9324 is part of the parties' assets therefore subject to sharing;

- (c) Whether or not it is just and equitable that defendant be awarded number 64 Buena Vista, Bulawayo?

Custody

The onus is on the plaintiff. The dispute is centered on which parent should be granted custody of two minor children, namely;

- (i) Rowanne Rodger Sibanda born 21 October 2013 (female)
(ii) Rivaldo Rodger Sibanda born 23 June 2015 (male)

It was plaintiff's evidence that defendant is not a suitable parent to be granted custody of these infants because the defendant has been physically violent against the plaintiff and the children such that on a number of occasions plaintiff had to take the children to hospital for medical attention. Further plaintiff alleged that defendant has neglected her wifely and motherly duties, coming back home after midnight after the children have gone to bed and leaving early in the morning before they woke up. Plaintiff alleged that defendant was unsuitable in that she likes "partying and drinking beer to excess". Defendant was also accused of starving the children, bringing boyfriends home and exposing the girl child to some abuse.

On these grounds plaintiff contended that it would be in the best interest of justice if the custody of the minor children is awarded to him with the defendant enjoying reasonable access.

I move to examine the credibility of the plaintiff taking into account the factors outlined by MOHAMED J in the *Hees' case supra*. On that application of the test, I find plaintiff's evidence unclear, unreliable, and inconsistent with the objective facts. Also on the evidence, the probabilities do not favour the plaintiff's version in that it would be highly improbable that defendant would deliberately ignore her children in the manner described by plaintiff. I am fortified in this view by the level of exaggeration punctuating his entire evidence on defendant's unsuitability. While plaintiff produced photographs depicting injuries and medical reports, plaintiff relied on speculation and hearsay evidence as to how the injuries were inflicted. I find it absurd and incredible that defendant would hit her son with a car and the victim suffered only a minor bruise on the forehead. Equally incredible is the allegation that defendant "sat on her daughter's hand causing a green stick fracture. Also I find the plaintiff's

version that defendant had somehow connived with other people to have her daughter sexually abused untruthful.

On the other hand I believe defendant's version of events as outlined in her testimony. Firstly, she said the children sustained the injuries whilst she was at work during day time. In respect to the injury on Rivaldo's forehead, her explanation was that she was told by the maid that he had fallen from a sofa and injured himself. I find this version to be consistent with the objective facts. Unlike the plaintiff's undisclosed source of the road traffic accident, defendant disclosed her source as the maid – the person who was looking after the minor children.

Secondly, as regards the injury on Rowanne's hand, defendant's version originated from the victim herself and is that she fell down while attempting to climb a tree at home. This is consistent with the injury observed by an orthopedic surgeon who described it as "painful and tender right wrist with an obvious green stick fracture on X-rays". It must be noted that the daughter sustained this injury during the day when defendant was away at work.

Thirdly, as regards what plaintiff referred to as "rape" the defendant gave a candid explanation supported by independent objective facts in that it turned out that there was a 16 year old culprit who was arrested and taken to the juvenile court. Also, defendant not only informed plaintiff timeously but also promptly made a report to the police and a medical examination was carried out shortly thereafter. More unfortunately, the incident occurred while she was at work and what she was told namely that the boy had touched her private part turned out to be in line with the doctor's finding that there was no penetration.

It is apparent from the evidence that, from the time the parties separated, the plaintiff started to build his case for custody against the defendant by obtaining pictures and medical reports. Unfortunately, a major factor is missing namely the link between the defendant's conduct and the subsequent injuries observed on the children's bodies.

Taking the totality of the mutually destructive evidence from the parties into account, I find the defendant to be a suitable parent to be granted custody of her minor children. Their welfare will be adequately served in defendant's custody.

Mercedes Benz motor vehicle

Again the parties provided two mutually destructive versions in that plaintiff maintained that he can no longer remember when the motor vehicle was purchased using funds

from a money lending business that birthed Lalapet (Pvt) Ltd while defendant on the other hand said it was purchased in 2016 together with 3 ambulances through a bank loan. The question becomes which version is true. Defendant's version is supported by the registration certificate exhibit 3 that shows that the Mercedes Benz was registered in 2016. Further all three ambulances were registered in 2016. Could this just be a coincidence? I think not. It is improbable that a resolution is made in 2010 and implemented six years later. Why would plaintiff forget when four vehicles were purchased by the company? I find that plaintiff's magic year is 2010 before he married defendant in December 2011.

What is also baffling is that this must have been a big purchase for Lalapet (Pvt) Ltd to embark on but surprisingly there are no import documents or any other record showing how these cars were paid for. It was not revealed how much each director contributed. While the onus is on defendant, sight should not be lost of the fact that this information is in the exclusive knowledge and custody of the plaintiff and his partners or directors. I find plaintiff's evidence on when and how the Mercedes Benz was purchased unclear and unconvincing.

On the other hand the defendant said plaintiff personally applied for a loan that was approved and he used it to purchase the Mercedes Benz together with the three ambulances. In my view, this version is corroborated by the fact that all those four vehicles are registered in plaintiff's name, were being kept at plaintiff's workplace and at his residence. Plaintiff used the cars as he pleased. All this is common cause. I find the defendant's version more credible than that of the plaintiff on a balance of probabilities. I find that the vehicles were purchased in 2016 and were paid for by the plaintiff's personal funds acquired through a bank loan. On the credible evidence of the defendant, this loan was repaid through direct and indirect contributions from the two parties. Therefore the Mercedes Benz is matrimonial property subject to distribution in line with the court's discretion.

Assuming I am wrong there is another reason why the Mercedes Benz should be considered matrimonial property. While it is a trite principle of our law that a company duly incorporated has a distinct legal *persona* separate from its shareholders, the veil of incorporation of that company may be lifted where necessary in order to prove who determines or who is responsible for the company's actions. It is trite that there are no hard and fast rules on the circumstances that justify the lifting or piercing of the corporate veil, with each case generally having, to depend on its own facts and merits.

In *Mkombachoto v Commercial Bank of Zimbabwe* 2002 (1) ZLR (4) at p208C the court sounded the following warning;

“In my view the court has no general discretion to disregard the company’s separate legal personality whenever it considers it just to do so. The court may “lift the veil” only where otherwise as a result of its existence fraud would exist or manifest justice would be denied.”

In casu, while Form CR 14 (Exh 6) shows that there are 3 directors of Lalapet (Pvt) ltd there are in fact only two directors as plaintiff is listed twice. Also, while the CR 14 form is “certified” the same does not apply to the attached sheet of paper on which the list of directors is shown.

On the evidence no proof was produced to show that Lalapet (Pvt) ltd held any annual general meeting or a directors’ meeting. No evidence that the shareholders were ever paid dividends. On the other hand, the evidence shows that Lalapet was plaintiff’s project and he could do with it as he wished or liked. Lalapet was plaintiff’s project created to hide assets from the defendant. I come to this conclusion on the basis of the following credible evidence;

- (i) the plaintiff had all the motor vehicles registered in his own name;
- (ii) all these vehicles were kept in plaintiff’s custody either at his work place or at his private home;
- (iii) all these vehicles were at plaintiff’s disposal;
- (iv) the other shareholder did not take any action to protect his interest in the property, even though he was aware that the company was to be the subject of litigation in matrimonial proceedings;
- (v) Lalapet was actually trading as “Rodger Sibanda” the plaintiff, according to Wilson Ndlovu’s evidence;

In my view, such conduct amounts to an attempt by the plaintiff to deceive or defraud the defendant thereby justifying the piercing of the corporate veil. In *Cape Pacific Ltd v Lubrien Controlling Investments (Pvt) Ltd & Ors* 2002 (1) ZLR (4) at p268 C the court had this to say;

“When the corporation is the mere alter-ego or business conduit of a person, it may be disregarded. This rule has been adopted by the courts in those cases where the idea of the corporate entity has been used as a subterfuge and to observe it would work injustice.”

When the courts lift the corporate veil of separate legal persona they disregard the corporate entity and look to the relationships which lie behind the corporate form.

In the result, I therefore disregard the corporate entity of Lalapet (Pvt) Ltd and look behind its corporate form. Once this is done it becomes clear that Lalapet (Pvt) Ltd was actually an invention of the plaintiff created shortly before the marriage in order to defraud the defendant. Lalapet is plaintiff’s alter-ego.

On this ground, I find that the Mercedes Benz is matrimonial property. In accordance with the provisions of s7 (4) of the Matrimonial Causes Act awarding it to the defendant and leaving plaintiff with five vehicles is fair and just.

Number 64 Buena Vista, Bulawayo

To the extent that plaintiff denied that defendant contributed to the construction of this house, I find plaintiff’s credibility very poor. He contradicted himself as regards the state this house was in at the time it was purchased. In his evidence in chief he said he bought a complete house. However, he later said he paid \$12 000,00 for the land and bought building material to the tune of \$35 000,00. Under re-examination, plaintiff displayed shocking prevarication in that while admitting that the house was incomplete at occupation he denied that defendant contributed to the completion of the construction. This time the escape route was that one Mpofu paid for all the work. Plaintiff also said he was waiting for Mpofu to complete constructing the house.

Surprisingly, plaintiff later agreed that Mpofu ran away before finishing the job. How then would plaintiff wait for Mpofu? It became clear that plaintiff was avoiding answering questions directly. Plaintiff was profuse and very detailed on irrelevant issues.

On the other hand, I find that defendant’s evidence is clear, straight forward and reliable. Defendant’s evidence is corroborated by the agreement of sale that shows that plaintiff was to secure a personal bank loan to finance the deal. Plaintiff had falsely claimed that he paid “cash upfront”. Also plaintiff’s witness one Clever Mahlangu who is his cousin

corroborated the defendant's evidence that the house was incomplete when he visited them. I find that defendant was a credible witness whose evidence I accept whenever it conflicts with that of plaintiff. I reject plaintiff's evidence regarding defendant's contribution towards finishing this house.

In the result, I find that at the time of occupation of number 64 Buena Vista, the house was incomplete in that it was an incomplete house. I also find that the house was purchased in 2011 in line with the agreement of sale. It is my finding that the defendant contributed immensely to the construction of the house as outlined in her credible evidence supra. Finally, I find that this property is matrimonial property.

As regards defendant's contribution to the Cowdray Park house, defendant was candid with the court in that she admitted that the "stand" was purchased before she married the plaintiff and that she contributed indirectly to the construction of a house on that stand. She referred to this property as plaintiff's business project and consented that it be awarded to the plaintiff to enable him to run his "clinic".

In respect of the Mahatshula property, defendant in my view gave credible evidence of her contribution in terms of improvements. She agreed that this property be awarded to the plaintiff in light of the fact that the children live in it and he is the one who bought it.

In distributing the matrimonial assets the court is guided by s7 (1) (4) of the Matrimonial Causes Act and the court's discretion must be exercised in line with this section. Accordingly, I have considered the number of immovable properties acquired by the parties during their 6 year marriage. I have also considered the parties' responsibilities especially the plaintiff's responsibility to provide shelter for his children in a fair and just manner.

In the circumstances, it is ordered that;

1. A decree of divorce be and is hereby granted to the parties.
2. The custody of the minor children namely:
 - (i) Rowanne Rodger Sibanda born 21 October 2013 (female)
 - (ii) Rivaldo Rodger Sibanda born 23 June 2015 (male)

be awarded to the defendant with the plaintiff enjoying the rights of reasonable access as follows;

- (a) one week end every fortnight;
 - (b) two weeks every school holiday
 - (c) special family functions in consultation with defendant.
3. Stand number 64 Buena Vista, Bulawayo be and is hereby awarded to the defendant as her sole and exclusive property.
4. Mercedes Benz motor vehicle registration number AEA 9324 be and is hereby awarded to the defendant as her sole and exclusive property.
5. As per the parties' agreement, the maintenance of the minor children shall be on an equal basis with each party catering for the needs of each minor child in particular, Rivaldo Sibanda (M) born on the 23rd June 2015 to be catered for by the plaintiff and Rowanne Sibanda (F) born on the 21st October 2013 to be catered for by the defendant.
6. Each party to bear its own costs.

Messrs T. Hara & Partners plaintiff's legal practitioners
V. Chikomo Law Chambers, defendant's legal practitioners