

MATIRASA KATSVAIRO  
versus  
TAWAINGA ARNOLD KATSVAIRO  
and  
SYLVIA MUPOMBWA

HIGH COURT OF ZIMBABWE  
MUCHAWA J  
HARARE, 22, 23 & 24 June, 6 & 7 July, 14 September, 4  
& 17 October 2022, 16 November and 2 June 2023

**Civil Trial – Divorce and ancillary relief**

*Ms M.I Mutero*, for plaintiff  
*F Mubangwa*, for first defendant  
*S Chirorwe*, for second defendant

**MUCHAWA J:** The plaintiff and first defendant were married on 25 December 1965 at Mrewa in terms of the Marriage Act [*Chapter 37*] as per the then operational laws of Southern Rhodesia. This marriage was monogamous by nature. Despite the nature of the marriage between the plaintiff and first defendant, the first defendant went on to enter an unregistered customary law union with the second defendant in or about 1979 or 1980. On 8 November 1989, the first defendant registered his marriage to the second defendant in terms of the African Marriages Act [*Chapter 238*] and misrepresented his status as someone who was married in terms of the African Marriages Act, to his first wife. The defendants' marriage was nullified by this court on 8 September 2020 at the instance of the plaintiff on account of its bigamous nature.

Ten children were born to the plaintiff and first defendant. One of them passed on and all the remaining nine are now majors. On the other hand, the first and second defendants have five children together. The plaintiff instituted these proceedings for divorce and ancillary relief against the first defendant only on the grounds of irretrievable breakdown of the marriage on account of the first defendant's involvement in an adulterous and bigamous marriage to second defendant. There are allegations of cruelty by the first respondent towards the plaintiff and that the parties

have lost love and affection for each other and have not lived as husband and wife for a period of more than twelve months preceding the institution of summons.

When the plaintiff instituted the divorce proceedings, the second defendant sought to be joined to the proceedings and her application was granted. The joint pre-trial conference minute before this court reflects that two issues were referred to trial as follows:

1. Whether or not the second defendant is entitled to a share of the matrimonial property, and if so, to what extent?
2. What is the just, equitable and proper distribution of the assets of the marriage?

The question of the marriage having irretrievably broken down was common cause. All the children of the marriage are now majors and no issues arose. Considering that the matter involved three parties and relates to a marriage of 58 years, the trial took a record 8 days. Below I set out the claims of the three parties.

The immovable properties in issue comprise of the following.

- i. Certain piece of land situate in the District of Salisbury called stand 8067 Salisbury Township lands measuring 506 square meters. (Hereinafter called the Southerton Property)
- ii. Certain piece of land situate in the District of Mutoko measuring 82,0895 hectares, called Budgja 18. (Hereinafter called the farm)
- iii. Certain piece of land known as stand No. 2173 Chinzanga Township, Mutoko measuring 300 square meters. (Hereinafter called the Chinzanga Property)
- iv. Developed Kaunye Homestead in Mutoko.

The plaintiff's claim is for:

1. 70% of the farm
2. 50% of the Southerton Property
3. 70% of the Chinzanga property
4. 50% ownership of the Kaunye homestead.

The first defendant's counterclaim, as amended, is for the immovable property to be distributed as follows;

1. That he be awarded 75% share in the Southerton property with plaintiff and second defendant sharing the remainder and all parties contributing proportionately towards costs of subdivision and transfer.

2. That he be awarded 75% share in the farm with plaintiff and second defendant sharing the remainder and all parties contributing proportionately towards the costs of subdivision and transfer.
3. That he be awarded 75% share in the Chinzanga property with plaintiff and second defendant sharing the remainder and all the parties contributing towards costs of the subdivision and transfer.
4. That he be awarded the Kaunye homestead in Mutoko.

The above was an upward review from his earlier claim that he be awarded 50% in the first three properties and plaintiff and second defendant share the remainder.

On her part, the second defendant is claiming the following:

1. 30% shares in the Southerton property.
2. 33% shares in the farm.
3. 30% shares in the Chinzanga property.
4. Exclusive use of the six roomed house at the Kaunye homestead whilst the rest of the buildings and improvements thereat are shared between the plaintiff and the first defendant.

Below I deal with each of the issues before me at trial.

**Whether or not the second defendant is entitled to a share of the matrimonial property, and if so, to what extent?**

The second defendant testified that she first met the first defendant in February 1978 when she was deployed to Musanhi Primary School as a temporary teacher, and he was the headmaster there. She said that because she was urgently deployed without her personal effects, she was housed by the plaintiff and first respondent in their house for a week and provided with food and blankets. She was in the company of her young child who was barely two years old then. Further evidence was that she was at Musanhi Primary School until September 1979 and her affair with the first respondent started end of 1978 after she took her child to her parents in Mutare in April 1978. It was in September 1979 that the second respondent says she visited the first defendant's home overnight and was introduced to his mother, brother, and sister as someone he intended to marry. She is not sure if the plaintiff became aware of the relationship after the introductions.

The payment of lobola was allegedly done in Mutare, her home by two representatives of the first defendant, Billiat Ndemera and Luka Mutanga on the 10<sup>th</sup> of October 1979 whilst the first

defendant stayed back in Harare. Under cross examination, it was put to the second defendant that the reason none of the first defendant's siblings went to marry her was that they were all opposed to this marriage which they all knew was unlawful considering first defendant's civil marriage. She believes that the plaintiff was advised of the marriage after payment of lobola as she then went to the Kaunye homestead and she was using the same kitchen as the plaintiff, addressing her as "maiguru" whilst she called her "mainini." This arrangement is said to have continued from October to December 1979 because it was ceasefire period and schools had been ordered to shut down for that period. Thereafter she claims to have been redeployed to other schools as a temporary teacher till 1985 when she went to college for teacher training.

According to the second defendant's evidence, she had no idea of the existence of the civil marriage between plaintiff and first defendant and for this she pointed to the marriage certificate between them when they solemnized their marriage in November 1989 and first defendant stated that the second defendant was his second wife in terms of the African Marriages Act. He is alleged to have professed that he was married to plaintiff in terms of customary law. On the strength of the marriage certificate, the second defendant changed her surname and status at work in 1990. In her evidence -in chief, the second defendant stated that she only realized that the plaintiff had a civil marriage with first defendant when summons was served in 2019. Under cross examination she then recanted and said that she had learnt of this in 2005 when her husband had a court case with his siblings, and this was mentioned in passing but she never saw the marriage certificate. Reference to the magistrates' court record however revealed that the second defendant was in fact the applicant in the matter and the respondents attached the marriage certificate of the plaintiff and first defendant and specifically pleaded that the first defendant had no capacity to marry the second defendant as he was legally married to the plaintiff.

The second defendant averred that the living arrangement of the parties from the time of resumption of work in 1980 was that the plaintiff and first defendant lived together at Musanhi Primary School whilst the second defendant taught as a temporary teacher at different schools almost each year. She then went to college from 1985 until 1988. After graduation she was deployed to Kaunye Secondary and lived at the Kaunye homestead from 1989 to 2005 where she stayed with and looked after the first defendant's mother till her demise in 2004. She would see

the first defendant during weekends and holidays and during some of these times he would be in the company of the plaintiff.

In her testimony, the second defendant painted a picture of harmony, love, and acceptance by the plaintiff and that they shared responsibilities in taking care of the children who lived together in Harare. She claimed that the plaintiff never confronted her about the affair she had with her husband and happily embraced her into the family. Under cross examination she was questioned about why her children did not remain with the plaintiff when she went to college, and she said that she had refused thus casting doubt on the alleged reciprocal love relationship between them.

The first defendant testified that he first had a customary marriage with the plaintiff in 1964 and then had the civil one in 1965. He said that he had shown the second defendant his customary law marriage certificate, though none was produced before the court. He wanted to downplay the monogamous nature of his civil marriage by pointing out that many people he knows do not abide to this. He, however, confirmed, under cross-examination that he had committed bigamy. When asked about when he married the second defendant, he was not particular and only said that it was towards end of year in 1979. He was quizzed about why none of his blood brothers went to marry the second defendant and that it was done secretly, and his explanation was that culturally one does not go and marry in the company of his blood relatives but with a friend.

According to the first defendant, the plaintiff never protested the marriage of the second defendant. He said that his two wives and him were happy and they even wanted a third sister wife, one Julia Gambe. He was hoping that things would go back to normal, the happy days which he painted.

Regarding the second defendant, the plaintiff said that the first time she met her was when she was deployed to Musanhi Primary School as temporary teacher in 1978 and she housed her and her baby as she had not come with any provisions to set up home upon initial deployment. She claims to have stayed with her for three weeks. The affair between first and second defendant is said to have started after the second defendant had moved into her own house in 1978 and upon confrontation on this, the second defendant must have reported to the first defendant resulting in an assault on the plaintiff by the first defendant.

It is the plaintiff's position that the second defendant was aware of the civil marriage between plaintiff and first defendant as their marriage certificate and wedding photographs were displayed on the walls in their house where she stayed for about three weeks. The marriage certificate was tendered as an exhibit, but the photographs are alleged to have been lost over time. She also said that the parties went to the same church and the second defendant was aware that the plaintiff wore a uniform only allowed to be worn by women married in terms of civil marriages. Over time, the plaintiff says she would be assaulted by her husband every time she protested about the affair. In particular, she related an incident in which she was pregnant in 1982 and was assaulted and had to be attended at Mutoko hospital from where her sister Daisy Hwema and her brother collected her, and she was treated in Harare and ended up transferring to teach in Murewa and she was staying at her parents' place until she delivered a son. She says that she only returned to her husband after he came to beg for her return and her parents persuaded her to go back and look after her children. This incident was confirmed in the evidence of Daisy Hwema who gave evidence on behalf of the plaintiff.

The plaintiff insists that the second defendant was secretly married customarily in 1980 and that the first defendant used their joint savings to pay lobola as she heard that the lobola paid was in the region of twelve herd of cattle. The second defendant is said to have transferred from Musanhi Primary School due to the affair with the first defendant. Furthermore, the plaintiff averred that the defendants then secretly purportedly solemnized their customary law union under the African Marriages Act, which fact she only became aware of in 2005 when the second defendant and the first defendant's siblings had a case before the Mutoko Magistrates Court for eviction wherein second defendant alleged that as a wife to the first defendant she could bar their eviction of her from the rural homestead.

The first defendant's testimony is incredible. Sight should not be lost that he solemnized a marriage with the second defendant and knowingly registered an untruth that he was married to the plaintiff in terms of customary law, well knowing that he had a civil marriage with her. His picture-perfect idea of the polygamous arrangement is also unbelievable as is the alleged docility of the plaintiff. He could not even lead evidence on the exact date of his marriage to the second defendant.

It is unbelievable that the second defendant who stayed in the plaintiff and second defendant's house was unaware of the nature of their marriage given the plaintiff's testimony which remained unshaken under cross examination that there were pictures of the wedding and the certificate itself hanging in the house. She also taught for close to 2 years at the same school and it is inconceivable that she would not have known or cared to establish the fact of the type of marriage before embarking on an affair. The second defendant's credibility on this issue is questionable as she initially said she only became aware of the civil marriage in 2019 when she received summons and then recanted to say it was in 2005. She even lied about her role in the 2005 proceedings, yet she was the applicant, and the marriage certificate was attached. She only conceded to this fact when pressed by plaintiff's counsel. The parties also attended the same church and knew the rules regarding the wearing of a church uniform by women married in terms of a civil marriage. Second defendant was clearly untruthful when she said she only saw the plaintiff in the uniform, much later, at a brother-in law's funeral.

Given the evidence before me, it is my finding that the second defendant went into this arrangement with her eyes wide open, well knowing that the first defendant and the plaintiff were in a civil marriage. She was confronted by the plaintiff who considered her an interloper and was advised of this, but she persisted, and such confrontation earned the plaintiff a beating by the first defendant. She was therefore fully aware of the risk she was taking.

In this regard, the second defendant's circumstances are miles apart from those of the women in cases such as *Makovah v Makovah* 1998 (2) ZLR 82(S) at 90A-B MUCHECHETERE J.A., referring to the provisions of section 7(1) of the Act, stated that: -

“In my view, the above provisions cover a marriage, such as the present one, which is declared null and void. If it were not the case it would **work an injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was valid. It would also unjustly enrich a dishonest party such as the applicant in this case simply because the property in question is either registered in his name or under his control.** Such a position is unconscionable and the legislature by using the expression “nullity of marriage” must have envisaged that a situation such as the present one would be covered.”

See also *Manjala v Maposa* HH 171/13 wherein for the period 1989 to October 2011 defendant believed her marriage to plaintiff was valid. At the solemnization of the marriage, she was made to believe she was the only wife. Later she realized plaintiff had other wives. There was

however no disclosure that any of the other wives was married to plaintiff in terms of the Marriages Act, [Chapter 5:11], which is monogamous. For a period more than 20 years the parties lived as husband and wife doing all manner of things as such.

*In casu*, however, the first and second defendant are not adversaries as in the above cases but are fighting in the same corner and the second defendant knew very well that she was not the only wife and there was plaintiff who was married in terms of a monogamous civil marriage.

The law regarding what happens in a case of a declaration of nullity of marriage in property distribution has already been aptly set out in *Manjala supra*, as follows:

“Precedent shows that where the marriage was nullified the courts have held that s 7 of the Act is applicable. In *Joseph Sibanda and another v Josephine Sibanda* SC117/04 the court held that as one of the parties was not aware of the fact that the other party had a prior marriage, the marriage was a putative marriage to which the provisions of section 7 of the Matrimonial Causes Act Chapter 5:13 are applicable.”

In *Sylvia Mupombwa v Matirasa Katsvairo & Tawainga Arnold Katsvairo* HH 166/21, Honourable MUREMBA J said the following about a putative marriage and the rationale for covering an innocent spouse in such a marriage under the provisions of the Matrimonial Causes Act:

“A putative marriage is an apparently valid marriage, entered into in good faith on the part of at least one of the partners, but that marriage is legally invalid due to a technical impediment, such as a pre-existent marriage on the part of one of the partners. A putative spouse is not legally married, although he or she believes himself or herself to be married in good faith. He or she is given legal rights as a result of his or her reliance upon this good-faith belief. The innocent spouse is entitled to the protections of a divorce for division of property.”<sup>1</sup>

Given my findings above, the second respondent cannot be covered on the claim of being an innocent spouse. The case of *Makovah supra* however provides that a finding of a putative marriage is not a necessity to trigger the application of s 7(1) (a) of the Matrimonial Causes Act. The section provides as follows:

“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 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.”

Honourable MUREMBA J observes:

“The provision also governs the distribution of property of parties whose marriage is nullified for whatever reason at the time of nullification of the marriage or at any time thereafter. This means

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<sup>1</sup> [https://en.wikipedia.org/wiki/putative\\_marriage](https://en.wikipedia.org/wiki/putative_marriage) accessed on 2 April 2021

that the applicant and the second respondent's marriage situation is covered. Whether their marriage was putative or bigamous does not matter."

I will therefore proceed to make findings as to whether the second defendant is entitled to any of the properties as claimed as I consider the equitable distribution of each property.

### **The applicable law on distribution of property**

I start by laying out the law relating to the distribution of assets upon divorce to assist in streamlining the evidence led to just the relevant aspects as the 8-day trial resulted in voluminous evidence.

Section 7 (1) of the Matrimonial Causes Act, [*Chapter 5:13*], provides that the court may make an order regarding 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 rights claimed by the spouses under s 7 (1) are dependent upon the exercise by the court of broad discretion. In giving effect to the broad discretion bestowed on it by s 7 (1) of the Act, the court must have regard to the factors set out in s 7 (4) which are:

- “(a) the income-earning capacity, assets, and other financial resources which each spouse and child has or is likely to have in the foreseeable future.
- (b) the financial needs, obligations, and responsibilities which each spouse and child has or is likely to have in the foreseeable future.
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained.
- (d) the age and physical and mental condition of each spouse and child.
- (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties.
- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage.
- (g) the duration of the marriage.

and in so doing the court shall 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 a normal marriage relationship continued between the spouses.”

**The income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future and the age and physical and mental condition of each spouse and child.**

This is a rare case involving three retired educationists of very advanced ages whose income earning capacity, assets, and other financial resources they have or are likely to have in the future are constrained.

The plaintiff is now a 77-year-old woman. She was a qualified teacher at the time of her marriage having started her career on 1 January 1964. She retired in February 2010 therefore her career spanned a total of 46 years. She stated that she has a medical condition which requires a specialized diet.

The first defendant is now 82 years old. He too was a qualified teacher at the time of the marriage, He retired in 2005 and in his evidence, he said that he believes that his career spanned about 50 years. No medical condition was alluded to in his evidence.

The second defendant retired from teaching in 2022. She is therefore over 65 years old. Having qualified as a teacher in 1989 her career must have spanned over 33 years without considering her 7 or so years of temporary teaching. No medical condition was mentioned in her evidence.

All three are in receipt of a government pension which is not much given the inflation in this country. The second defendant in her closing submissions put it thus, “they are living on paltry and miserable pensions.” The first and second defendant are resident at the farm which has the potential to generate income, but their evidence is that there is no commercial activity happening there now as all activities are merely for their sustenance. Even the number of cattle has dropped to just 10 yet there are paddocks there. There are pig pens and fowl run.

The Southerton property is said to be occupied by the second defendant’s children and is not rented out to generate any income.

All the children of the parties are now majors, except that the second defendant has a child living with a mental disability who is residing at the Southerton house. It appears too that the Kaunye homestead farm and garden are also not under any utilization as they were in the past. The homestead traditionally belongs to the first defendant and stands available for his use.

First and second defendant have each other for love and companionship whereas the plaintiff who is 77 years old is all alone and is unlikely to remarry and find love and companionship.

**The financial needs, obligations, and responsibilities which each spouse and child has or is likely to have in the foreseeable future.**

The plaintiff's evidence is that since end of 2018 when her last daughter wedded and the first defendant demanded that she hand over keys to her Southerton bedroom she was using having moved to Southerton after retirement, she has been homeless and has been moving around her children's homes. She has not gone back there as the second defendant's mentally ill child who resides there is sometimes violent and damages property, and she fears for her safety.

It is common cause that upon retirement of the first and second defendant, they have settled at the farm. They also have the use of the only functional motor vehicle of the parties and have access to the Southerton property as and when they so wish.

The plaintiff spoke to a medical condition she has which requires a special diet whereas the defendants have no such special dietary conditions or rentals.

**The standard of living of the family, including the way any child was being educated or trained or expected to be educated or trained.**

All three parties lived an average lifestyle as they were all educationists. The Southerton property was their decent urban home set up and an 18 roomed house is at the farm. There is also the Kaunye homestead which has a six roomed house, among other buildings.

**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.**

The plaintiff testified that the financial management arrangement they had at their home was that the second defendant would manage both their finances including her salary. This was said to extend to financial investments such as the purchase of Zuvarabuda Bus shares, purchase of immovable properties, payment of school fees for the children and general utilities.

She testified that during her entire marriage, her husband, as head of the household oversaw both their finances which were applied to the family upkeep and investments. During the era of the paysheet system in the early days, the husband was alleged to have collected the cash salary, particularly when he was the headmaster and was responsible for paying all the teachers at the school, who would sign in acknowledgement of receipt. Thereafter he would cash the cheques when payments were done by cheque, and they even held a joint account when salaries were paid

through the bank. In the beginning, plaintiff and first defendant were both teachers and getting the same salary and he was promoted to a headmaster later and had a bit more in salary.

Even though the plaintiff was a trained teacher, she said that she has a passion for farming and was committed at building a comfortable home for her family. She was not afraid to make her hands dirty and would engage in farming. She said that she was engaged in farming at the Kaunye homestead for sustenance of her husband's siblings and there was a garden there in which vegetables and potatoes were grown and sold at Mutoko hospital. She also had another garden at Musanhi school where she and the first defendant worked from which she grew vegetables which were sold in Harare at the African Independent Market. She claimed that it was from the proceeds of sale of such vegetables that she would feed the family including the children when they were staying in Harare at the Southerton property. The produce from the Kaunye homestead and the farm was allegedly sold at the Grain Marketing Board.

The plaintiff testified that when they bought the farm, she physically worked to increase the arable land by stumping trees together with the hired workforce and some school children who would need to work to raise school fees. One Chiringa Mudiwakure who is one of the students who worked with the plaintiff testified in support of her version. She said she was involved too in the building of the initial huts they put up at the farm as they never occupied the houses which had belonged to the previous owner.

In terms of income generation from the farm, the plaintiff said that they grew maize and groundnuts, reared chickens, cattle, and pigs. She produced a certificate of the training which she got from the Pig Industry Board to show that for a season, they were involved in a commercial piggery project in which her role was to rear the pigs and the first defendant would attend to the marketing and handle the income therefrom.

Another income stream pointed to by the plaintiff is the cattle fattening project in which she explained they would buy cattle from community members, fatten them, and sell in Harare. This was said to have been a lucrative venture in which she was involved as her own salary was used to buy the cattle.

Though the first respondent was a shareholder in the Zuvarabuda Bus Company wherein he together with other headmasters got a special offer to buy a bus and then bought a second one from the profits, the plaintiff stated that the initial investment was from the salaries of the plaintiff

and first defendant which defendant controlled and from the cattle fattening project in which both were involved.

The plaintiff testified that though she was not afraid to get her hands dirty and would lead from the trenches, the first defendant was not good at manual work and would just supervise and handle the finances. Though the defendants' counsel, under cross examination sought to question how a trained teacher would do the kinds of manual work described by the plaintiff, she remained unshaken and explained that she was driven by the passion for farming she had and the desire to build a home for her family as quickly and expeditiously as possible. Her identity, she implied, was not tied to her being a trained teacher as her own parents were serious farmers and she was used to that kind of work.

At the time of her customary law union to the first defendant, the second defendant was alleged to have been an untrained teacher who only went to college and qualified as a teacher in 1988. This was borne out by the Certificate of Education tendered by the second defendant which is dated November 1988. It was submitted that the second defendant was a burden on plaintiff and first defendant for the first 8 years of her unlawful union during which period the Southerton property and the farm were bought. The second defendant's children born before she qualified are said to have been beneficiaries of the plaintiff's salary which was managed by the first defendant.

The plaintiff was in fact saying that she contributed equally to the matrimonial assets as she was a teacher just like the first defendant who was later appointed a headmaster and she was also appointed as a teacher -in charge thus increasing her salary too. The second defendant was said to have been of no means during the period 1979 to 1987 when the Southerton property and the farm were bought.

The first defendant stated that he was solely responsible for the purchase of all immovable properties, the family investments such as Zuvarabuda Bus Company, the payment of all school fees for the 15 children including another child he had outside those born to plaintiff and second defendant. He said that he paid for all utilities and met all the financial needs of his children. In support of this he tendered letters written by the children requesting money for various things which were addressed to him. Over and above these responsibilities, he said that he took care of all his siblings and his mother. He boasted that he even bought expensive clothes and shoes for his wives from Botswana.

At the farm, the first defendant said that he was involved in farming cotton, groundnuts and maize and would reinvest the proceeds to buy seed and fertilizer. He said too that he had herds of cattle for sale at the farm whose proceeds he would use to pay the children's school fees.

The first defendant disowned a document in his bundle which was meant to show that he was involved in dairy farming at the farm. He said that he had never sold such large quantities of milk. The first defendant alleged that all the crop farming he did was with the help of the workers and not his wives. The plaintiff was said to have only cooked for them as they worked.

Regarding the cattle fattening project, the first defendant denied the plaintiff's involvement and said he had done this with his mother, siblings and aunt which project was done in the form of a cooperative with two others under the guidance of one Mr Ford. The plaintiff whom he said was at work, could not have been involved in the running of this project.

It was also the first defendant's allegation that he paid fees for the plaintiff's siblings. He however recanted under cross examination and said he allowed plaintiff to use her money to pay such fees and he would use the wives' money for their families.

Also denied by the first respondent was the plaintiff's allegation that she took care of the first respondent's siblings and extended family. His position was that he was self-sufficient and would not have needed any input from the plaintiff.

When asked how the plaintiff would use her money, the first defendant said that she would buy what she wanted such as a bed and blankets. He denied ever receiving and being custodian of the plaintiff's salary. He denied too that they operated a joint account and said that was only for a month as the plaintiff was unhappy and it was discontinued.

On the plaintiff's allegation of having been involved in manual work at the farm and in gardens at Kaunye and at the school, the first defendant said that it was not possible for a teacher to do that and that it was not a woman's job. The building at the farm was said to have been done by a company which was contracted to do the work. All the finances were said to have come from the first defendant only.

Furthermore, the defendant testified that he had several insurances which would mature at any time, and he would reinvest same. The source for the investments was said to be his salary. He said he served as a headmaster for 36 years before his retirement.

Regarding the dams or pools dug up at the farm in 2020, the first defendant said that this had been done without any assistance from the plaintiff but acknowledged the fuel assistance he received from the plaintiff's son. The second defendant was alleged to be the one who had assisted by cooking for those doing the work, but she too was said not to have given any financial assistance.

The first defendant denied having taken any students to the farm to work and said it would have been a shame and a crime to involve primary school students in such work but said he did carry some students for a joy ride to the farm. Regarding the garden allegedly worked on by the plaintiff at the school, the first defendant said that he knew there was a garden but did not visit it as he had no time. He was surprised that there were vegetables sold at the African Independent Market. According to him, the plaintiff was stealing from him if this was happening as the garden was availed by his friend.

According to the first defendant, in the Shona custom, it is not allowed to take a woman's property as that would result in "Ngozi", which is to attract evil upon oneself. He believes the plaintiff has brought this action because of old age as he has always satisfied all her needs and is ready to set up a rural home for her if she is no longer comfortable in Southerton. He acknowledges that the plaintiff bore him 10 children and is not willing to throw her out.

The only role of the plaintiff and second defendant was said to have been assisting with food and clothing for the children occasionally. He said it was largely him and his mother, when she was still alive, who were largely responsible for catering for these needs. He even said he would give the children his debit card to swipe for groceries and the letters requesting for money would only come when they had run out of funding.

When quizzed under cross-examination how after shouldering all the family responsibilities as he said, he managed to save money from his salary, he pointed to other sources of funding such as the cattle fattening project, piggery and poultry projects, market gardening. He even extended his responsibilities to include having looked after his mother, siblings and wives of his brothers.

A share certificate was tendered as evidence from Barclays Bank and first defendant said that the money he used to invest was from the sale of cotton and groundnuts from the farm which

farming was done with the help of workers as plaintiff was at work. He also said he was a shareholder at Cottco. He was also a trustee at Cotton Growers, amongst others.

Amongst the documents tendered by the first defendant were several letters addressed to him by his children who were living in Southerton. They were requesting for money for school fees and even pants and bras. The first defendant says this was because the daughter was not free to ask her mother for these. He also produced documentary evidence of water and electricity bills for Southerton and owners' rates for the farm, which he said he would pay himself.

On the plaintiff's training at Pig Industry Board, the first defendant said he was the one responsible for sending her there, but the project did not continue after the plaintiff had a misunderstanding with the workers which ended up before the courts. The first defendant went as far as saying that he sent his wives to school, notwithstanding that the plaintiff was a trained teacher when he married her.

When it was put to the first defendant that his wives would obviously take over the responsibilities of maintaining him and the children as he was servicing the mortgage, he vehemently denied this and said that he had enough money, and he would also buy them food. The second defendant was said to have been carrying out farming activities at Kaunye including crops like maize and groundnuts mainly for family consumption and some of the maize would be used for the piggery project at the farm. She is alleged to have carried out a poultry project which included road-runners, and broilers largely for the family consumption. Some of the crop surplus was said to have been taken to the Grain Marketing Board. The Kaunye garden was said to have been worked by the second defendant to grow vegetables for family consumption.

The only valuable assets allegedly bought by the second defendant were said to be a bed and kitchen utensils and some furniture. The first defendant said he assisted the second defendant to construct the six-roomed house at the Kaunye homestead and said it was therefore hers. He however denied that the second defendant had contributed financially to the purchase of the rest of the immovable property. This stands in stark contrast to the evidence given that the plaintiff never bought any tangible movable property, even a bed, and that all such property was either bought by the second defendant or first defendant and his children and that plaintiff was only assisting her maiden family. All she seems to be acknowledged to have done is sustenance of her own children and her siblings.

Though the first defendant first said he had saved money to buy the Southerton house from his salary, under cross examination this was revised to say that some of the money came from the lobola of his sisters and yet still that it was returns from investments in Cottco, Standard Chartered, Barclays, Post Office and Old Mutual.

The second defendant gave evidence and stated that soon after her marriage in October 1979, she started contributing to the household finances even though she did not yet have children because she was in continuous employment as a temporary teacher. When she went to college in 1985, she says that no fees were paid for her as she was in receipt of a government loan which she latter paid off through deductions on her salary. She claims to have also paid for her degree which she did through distance learning. Her children would stay with her before school going age and move to Southerton to go to school.

It is not surprising that the second defendant's evidence complemented that of the first defendant. She said she would farm and give children food and provide clothing and they would take turns in doing this with the plaintiff under the coordination of the first defendant. She painted the picture of the submissive wife who would advise her husband of the arrival of her salary, and he would tell her if he needed any money for anything which she would avail and then buy food and clothes for herself and the children. She said that as temporary teacher she would get paid \$53.75, a trained teacher would receive \$66.00 whilst a headmaster would get \$75.00. There was, however, no documentary proof of this.

Another key responsibility the second defendant claimed to have had was to look after her mother-in-law from 1989 to 2004 when she passed on. This was by cooking, washing, fetching water for her. She however said that she did not provide for first defendant's siblings. After the first defendant's retirement to the farm, the second defendant says that she then was visiting him there and taking care of him.

In terms of other sources of income, the second defendant said she is a ZIMSEC examination marker, once every year. She was also a polling officer during elections once every five years and would participate in the Census every ten years and would get allowances. Such money was said to have been applied towards food, groceries, paying workers and other areas of need.

She confirmed having been involved in crops, poultry, and egg farming and that these would be sold. Her testimony was that she would have higher yields than first defendant and plaintiff as she was staying at Kaunye and would directly supervise the workers. She claims that some of her chickens would be taken to be sold at Musanhi School. This project was said to be in batches of up to 100 at a time and she financed all of it. Layers were said to have been 50 at a time. The first defendant was said to have been the only other person who had tried once to do the poultry project at the farm after his retirement.

Regarding the Southerton house purchase, the second defendant confirmed that all she did was to advise the first defendant to clear off the mortgage loan payment in two years instead of twenty-five years. Her own children have not made any improvements on the house, and she agreed under cross examination that all she did was to put her children in the house. On the farm she said that she accompanied the first defendant when he attended the lawyers' offices for conveyancing. She attributed all the developments on the farm to the first defendant but said she assisted with the costs of fencing. She said too that she cooked for the dam constructors and sometimes bought their food.

Documentary evidence was tendered to show that the second defendant has funeral policies covering her and the first defendant and their children as well as medical aid cover which covers only two out of their children. There was also an educational policy with ZIMNAT which failed. The second defendant says she was cooking for the husband and acknowledged that whilst the plaintiff was in Southerton, she would look after her own mentally handicapped child. When the second defendant went to college, her two children aged two and four were said to have been left under the care of the mother-in law and a maid with first defendant taking care of them financially. Though the second defendant had a child of her own before joining the Katsvairo family, she professed that she never looked after that child for the whole of her 28-year lifetime, whose maintenance became the burden of her parents. She even described herself as an irresponsible mother.

The second defendant confirmed that she did not make any direct financial contribution to the purchase of the farm. She stated that the investment into Zuvarabuda Bus Company was from first defendant's savings from his salary. All she did was cook and wash for the first defendant who financed even all the developments there save for their chipping in, and buying roofing

material, paying, and feeding workers. It was the plaintiff's son, Whitman who is said to have contributed to the extension of pig sties and the initial financing of the project, whilst first and second defendant paid for the fowl run construction. Second defendant said too that she contributed to the fencing project and paddocks whenever the first defendant requested assistance. Under cross examination by first defendant's counsel, the second defendant explained her work at the farm to have included weeding, cooking for workers, harvesting and cattle gathering from the paddocks. Regarding the Chinzanga stand, it was second defendant's evidence that she did not contribute financially, and it was just first defendant who paid for it from his savings at the bank. According to her, the first defendant would save his money up for major things like purchase of immovable property and school fees, whilst she would cater for the smaller things. She confirmed that she was not the only one buying food as plaintiff also catered for the children and her position is that the two of them contributed equally.

From the evidence of the parties, the first defendant exaggerated his income levels and responsibilities. He wants this court to believe that he looked after and sent 15 children to school single handedly, whilst also looking after his mother, siblings and brothers' wives plus his wives whom he dressed fashionably. Amid that he was able to buy three immovable properties and develop them. He paints himself to be a superman who was self-sufficient. If the salary figures given by the second defendant are an indication of the different salaries they earned, that is not possible.

He was also inconsistent on the source of saved funds for the Southerton house. He first said it was his salary, then he added the lobola money from his sisters which on another hand he said was used to educate his siblings. Yet again, he spoke of investments, trusteeship and policies. All these seem to have come way after the acquisition of the farm and Southerton properties. The letters adduced which came from the children asking for money from him instead of the plaintiff, only show that the children were aware of who the financial controller was in the family and the protocol to be followed to get results. This supports the plaintiff's assertion that he was responsible for funds allocation.

Another inconsistency in the first defendant's evidence relates to how the plaintiff used her salary over the 46 years of her career. He first said that she bought a bed, blankets and whatever else she wanted including looking after her maternal family. Under cross examination he then said

that she never bought any movable property except the second defendant who bought beds for the children. He then claimed that any movable property she was claiming was bought by him and the children.

It is inconceivable that one can work for 46 years and have totally nothing to show for it. The only conceivable conclusion is that the first defendant oversaw the plaintiff's money and would allocate it towards different investments and needs of the family.

It is interesting that the first defendant sought to dispel the plaintiff's claim of having been involved in farming by saying she could not have been so involved as she was at work but both he and the second defendant were equally at work but claimed to have been involved in farming and pointed to this as a source of income. If they could work and farm, so could she.

The first defendant betrayed the second defendant in his evidence when he said that she did not contribute to the farm developments financially save to cook for the workers. This was to bolster his image of being self-sufficient.

It is interesting how the first defendant sought to use culture and claimed that there would be "ngozi" if he used his wife's property yet on the other hand, he claims that his own mother, another woman, is the one who would assist him run his household, including putting the precast wall in Southerton. Even though he said that his wives owned their own property, he remarked that if the plaintiff was indeed selling garden produce from the garden at Musanhi in Harare, a garden he said he had never visited, then she was stealing from him. Furthermore, he said too that he would allow his wives to use their money to assist their families and that he would use the wives' money for their families. When the plaintiff and second defendant furthered their education, he said he had educated them even though it was most likely at no cost to him, and plaintiff was already a trained teacher.

In her evidence, the plaintiff said that all she did was work and the first defendant managed the finances. There was nothing peculiar about such an arrangement at that time.

The attitude of the first defendant is described in Ncube W, *Family Law in Zimbabwe*, 1989, p 170 to 171 as follows:

"Customary law rules governing the ownership, control and re-allocation of matrimonial property were formed and shaped by the feudal relations of production under which men, because of their control of productive resources, assumed a dominant role over women. As a result, customary rules governing matrimonial property rights of spouses inevitably reflect the dominant position of men within the feudal production process.

Under customary law women were perpetual minors with neither contractual nor proprietary capacity. Thus married women lived under the total guardianship of their husbands insofar as any property they acquired automatically vested in the husband unless it fell within specific recognized categories, they can be said to have worked for their husbands. As JUSTICE GUBBAY put it in *Jenah v Nyemba* SC 49/86, “property acquired during a marriage becomes the husband’s property whether acquired by him or his wife.”

Ncube continues with his observation,

“Under customary law all meaningful property is owned and controlled by the husband. Women are often, if not always, reduced to the status of property-less dependents who have to submit to the will of their husbands in order to survive. The customary laws on matrimonial property perceive a married woman as an unpaid servant of her husband. She works for him, looks after his family, acquires and preserves property for him. At the end of the marriage, she leaves the matrimonial home property-less and destitute like a sacked employee.”

Though the plaintiff and first defendant were married in terms of a civil marriage and customary law would be inapplicable, the first defendant’s evidence shows that his mind set was steeped in customary law as he said that he had always intended to be married in terms of customary law and no-one he knew including the church marriage officer ever followed the monogamous nature of the civil marriage. He kept referring to cultural norms which he subscribed to.

Ncube describes aptly the lot of the plaintiff and many other women whose husbands still believed that the wife was working for them. I hazard to think that this may be why the second defendant could not even look after her child whom she dumped with her parents when she was around two years old. In her evidence, she was however advancing the first defendant’s case and said that she controlled her own income. There was however a tinge of regret when she was asked to describe herself as a mother to her daughter and she said that she had been an irresponsible mother as she had not looked after her for 28 years till her demise.

Daisy Hwema, plaintiff’s sister said that after her sister got married, she had no money to give her family and they would assist her as they did not want her to leave her children. It would not be far-fetched to conclude that the first defendant ran his household with an iron fist and is the man described by Ncube as a husband who perceived his wife as an unpaid servant.

In the circumstances, I accept the plaintiff’s evidence that the first defendant controlled all the income she made, and he also attended to allocation of funds at all levels. The second defendant, by her own evidence said that things were different for her, and she controlled her own money.

### **Southerton Property**

It was the plaintiff's evidence that the decision to buy the Southerton property as a shelter for their children during the war was made between her and first defendant, in or about April 1979 and they had adequate funds saved up which were in the first defendant's custody as the one responsible for funds management in their family which came out of both their salaries from 1965. As evidenced by the title deeds on record, the house was transferred into first defendant's names in November 1979 and under cross examination, the plaintiff explained that during that period, women could not own immovable property in their names, and she did not see a need to worry as their family arrangement was to work towards the family good.

The plaintiff insisted that at the time of the purchase of the Southerton property in 1979, the second respondent was not yet on the scene as the secret customary law union only happened in 1980 and not 1979.

The first defendant testified that he solely bought the Southerton property for his mother, two wives and children and this was financed by a mortgage loan he got from Beverley Building Society and repayment was done through deductions from his salary. This loan which was to be repaid over 25 years was paid off in two years, thanks to the advice of his second wife. He confirmed that though he got a mortgage, there was money in his account. In terms of explaining how these funds were built up, he said that he had a number of insurances such as Mashco Pay as You Earn, Barclays Bank, Standard Chartered and POSB wherein paid-up policies would mature and he would sometimes reinvest the money. The initial investment money was said to have come from his salary as a teacher and he became a headmaster from 1983. Further, the first defendant averred that the only person who assisted him with the Southerton property was his mother who erected a precast wall. It is his position that he got no financial assistance from the plaintiff whatsoever. The second defendant was said to have been still new and young and still not trained so she could not assist at all financially.

The second defendant submitted that the Southerton property was bought in 1979 after her marriage on 10 October 1979. She conceded that she did not contribute financially but only gave advice for the mortgage loan to be paid up in two years. She further conceded that all the developments at this property being, painting, floor tiles, built in cupboards, garage and screen

gates, amongst others were done by plaintiff's children. None of her children or herself had put in any developments.

The title deed on record as exhibit E for the Southerton property shows that the Power of Attorney to Pass Transfer was executed in November 1979. As per the first defendant's evidence, the second defendant was young, untrained, and new. She had just arrived on the scene. The agreement of sale was not availed to show when the sale was concluded but given the usual period in conveyancing that could not have been after 10 October 1979. It can only have been as early as stated by the plaintiff or a date much earlier than 10 October 1979.

If the second defendant was to get a share of this house, she would be reaping where she did not sow. The first defendant accepted that at the time of purchase, there was enough money saved up to buy the house. Such money came from both him and the plaintiff as he controlled her money. The fact that the first defendant first got a mortgage loan which was paid off in two years is neither here nor there. It had been his bad financial decision to get it in the first place. The second defendant conceded that her advice would not entitle her to a share in the house. This house stands to be shared between the plaintiff and the first defendant.

### **The Farm**

Similarly, when the farm was acquired in 1987, the second defendant was at college training to be a teacher. The money invested in the Zuvarabuda Bus Company had come from both plaintiff and first defendant's resources. It was agreed that the purchase price for the farm came from the disposal of the Zuvarabuda Bus Company buses. The second defendant conceded that she did not make any financial contribution to the purchase of the farm. Her claim was just for her indirect contributions. Though she claimed to have contributed to the developments thereat, the first defendant denied this and said all she did was cook and sometimes provide food for the workers.

This farm would fall for distribution between the plaintiff and the first defendant only.

### **Chinzanga property**

This property too was bought with funding from the plaintiff and first defendant. The second defendant clearly distanced herself from having bought this. She is equally excluded from its distribution.

### **Kaunye homestead**

In closing submissions, the plaintiff conceded that the homestead would fall to the first defendant according to customary law. On his part the first defendant has no problems with the second defendant getting the six roomed house which he says they built together. Since they are still staying together as husband and wife, whatever falls to the one fall to the other.

### **Application of case law**

Honourable TSANGA J wrote a seminal judgment on division of matrimonial property upon divorce in the light of international and regional instruments and the local law in the case of *Mhangami v Mhangami* HH 523/21. I can do no better than quote extensively from her:

#### **“THE LEGAL POSITION**

[12] Section 26 of our Constitution of Zimbabwe<sup>2</sup> deals with marriage. Therein, it espouses the principle of “equality of rights and obligations of spouses during marriage and at its dissolution”. Section 56 also lays down equality and non-discrimination as fundamental rights. Discrimination is prohibited on grounds such as custom, culture, sex and gender among others. Furthermore, in interpreting the provisions on fundamental rights and freedoms, s 46 also requires the courts to take into account international law and all treaties and conventions to which Zimbabwe is a party. Zimbabwe is party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Declaration of Human Rights; the Covenant of Civil and Political Rights; and the African Charter on Human Rights and its Protocol on the rights of women. All these instruments contain provisions on men and women’s status within the family. As such the principles out laid in these instruments with respect to marriage and family are crucial considerations in dissolution of marriage.

[13] On marriage, Article 16 (c) of CEDAW<sup>3</sup> for example stipulates equality in marriage and at its dissolution as a fundamental principle. Article 5 of CEDAW also requires States to actively address stereotypes on roles of both men and women that impede equality. As another example the Protocol to the African Charter on Human and People’s Rights on the rights of women also requires State parties in its article VI, to ensure that women and men enjoy equal rights and are regarded **as equal partners** in marriage. The net effect is that there is bedrock of principles both constitutionally and from obligations under international treaties that are of relevance. As part of State machinery, courts are therefore enjoined to ensure that the treatment of both men and women in law and in private life accords with the principles of equality and justice when it comes to marriage.

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<sup>22</sup> Amendment (No 20) Act 2013

<sup>3</sup> See Art 16 (1) (c) and ( h ) of CEDAW and also CEDAW General Recommendation No 21 on Equality in Marriage and Family Relations

[14] In addition, the Matrimonial Causes Act [*Chapter 5:13*] in s 7(4) in particular, lays out the considerations that the courts must consider in the exercise of their discretion as to how property is to be distributed upon divorce. These include factors such as the income earning capacity of the spouses; financial needs, obligations and responsibilities; standard of living, age, physical and mental condition of each spouse; direct and indirect contributions, value of pensions and gratuities; and the duration of the marriage.

In *casu*, in laying out the evidence, I have already considered the different aspects which I must consider and how they play out in this case. The key considerations in *casu* are the advanced ages of the parties, the direct and indirect contributions of the plaintiff and first defendant in the acquisition of the property, the homelessness of the plaintiff, the lack of any direct contributions by the second defendant to the acquisition of the immovable properties, the knowledge by the second defendant of the unlawfulness of her marriage to the second defendant and the gendered nature of the roles of the parties to this marriage. Important too are the needs of the mentally handicapped child of the second defendant and plaintiff's medical condition. All three were in the teaching profession. On his part, the first defendant complemented the plaintiff's role by handling the finances of the family whilst she worked both as a teacher and in farming. She bore 10 children. Noteworthy too is that the first and second defendants are not divorcing and the equality principles upon divorce would not come into play between the two of them.

In *Mhora v Mhora* SC 89/20 the Supreme Court noted the complementarity of roles and had this to say on indirect contributions:

“Indirect contributions encompasses much more than the performance of domestic duties. It encompasses all aspects of a spouse's role in the life of the other spouse and their children in the day to day running of a family”.

Honourable TSANGA J continues in Mhangami *supra* as follows

“[17] This thrust by the courts towards according financial and non-financial contributions the same weight in marriage is thus in line with not just constitutional but also international obligations on equality during marriage and at its dissolution. Women just as men must enjoy substantive equality at the dissolution of a marriage. Once a matter finds itself in court for resolution, principles of fairness and justice in terms of the law become central considerations. Whilst courts have articulated and embraced a framework of equality that is also based on difference in resolving disputes centred on non-financial contribution, it remains evident mainly though not exclusively from male litigants, that their perceptions of fairness continue to be shaped by more rigid ideas of family and gender roles that tend to devalue the gendered roles of women.”

The Act gives this court the discretion to deal with each matter on its own merits. The peculiar nature of this matter requires that this approach be followed.

The need for an individualized approach in each case was set out in *Mhora v Mhora* SC 89/20 wherein UCHENA JA put it thus:

“However, it must be borne in mind that each case must be dealt with according to its own circumstances and merit”.

Honourable TSANGA J comments as follows on this:

“Thus, judicial discretion remains a guiding principle, allowing for factual variations in terms of what is equal. The present approach towards property distribution on divorce within our jurisdiction can therefore be best described as a hybrid one. It embraces equality in line with the thrust of the 2013 Constitution and obligations under international treaties whilst at the same time accommodating individualised considerations guided by the Matrimonial Causes Act. Such an approach does not at all water down the ethos of equality but simply allows the courts to reach a conclusion on equality that is informed by the circumstances of a case since these may often differ in the real world.”

In this case, it is noteworthy that first and second defendant are not divorcing but are living together. She is not planning on remarrying as she stated that the first defendant and her are giving each other love and companionship and are going strong. She stands to benefit from whatever is awarded to the first defendant.

It has been observed in *Shenje v Shenje* 2001 (1) ZLR 160 (H) that there is need to place the needs of the parties at the centre and not their respective contributions. This however has a totally different complexion in a case such as this one where the distribution is not just about the divorcing spouses but there is a third party, who as I found out earlier, comes into the civil marriage well knowing that she is unlawfully doing so. In *Shenje supra* GILLESPIE J had this to say:

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantage, to the extent they are not inevitable, of becoming divorced.”

Given the complementary nature and equal direct contributions of the plaintiff and first defendant to the acquisition of the Southerton house and the farm, it is only fair that, as a starting point, that each one gets 50% of both. Whereas the plaintiff was not afraid to get her hands dirty on the farm, her indirect contributions stand to be compensated. The first defendant was even ready to have her get 12.5 % just for indirect contributions. It would be equitable that for the farm she

therefore gets an additional 10% thus entitling her to 60% of the farm whilst the first defendant gets 40%. The first defendant has the added advantage of the Kaunye homestead which is available for him and the second defendant whilst the plaintiff has nothing.

### **Can the second defendant's claim be sustained based on unjust enrichment?**

Her claim cannot be sustained based on unjust enrichment. In the case of *Gamanje [Pvt] Ltd v City of Bulawayo* SC 94/04 the requirements to be met are:

“The requirements for an action for unjust enrichment are, firstly, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the expense of the plaintiff; thirdly, that the enrichment is unjustified (in the sense that it would be unjust to allow the defendant to retain the benefit); fourthly, that the enrichment must not come within the scope of one of the classical enrichment actions; and fifthly, there must be no positive rule of law which refused an action to the impoverished person.”

In her evidence, the second defendant made clear that she did not contribute financially to the acquisition of any property, she controlled her own finances. She is in fact the one who was enriched by walking into an already comfortable lifestyle which plaintiff and first defendant had already established. The Southerton sale agreement was already signed, the farm was bought when she was in college, the plaintiff's son developed the Southerton house further. It is her children who are currently benefitting, and she enjoys riding in the car bought by the plaintiff's son for his parents whilst the plaintiff is homeless and without a car. Without showing any direct contributions to the acquisition of the property, the unjust enrichment claim cannot succeed.

### **Movable property**

The plaintiff's claim is for two sets of sofas, kitchen utensils, kitchen cupboards and 50% share of goats, cattle, pigeons and chickens. She wants the first defendant to get wooden display sets, 1 television set, farming and gardening tools, 1 set of sofas, Nissan Terrano vehicle registration number ABV 3808 and 50% share of cattle, goats, pigeons and chickens.

The first defendant's claim is that the plaintiff and second defendant share, depending on their respective contributions, all household goods and effects. Of the livestock, he claims that there are only 10 cattle remaining. Of those, he wants to retain 5 and plaintiff gets 2 which are her “umai” property and the second defendant gets 3 which are also her “umai” property. It is alleged that there are only 2 goats remaining which belong to the plaintiff, and she should get them. He wants the second defendant to get all the chickens and pigeons.

Of all the movable assets, the second defendant claims the following:

- 1.1 wardrobe and one bed situated at the Southerton house
- 1.2 I wardrobe and 1 double bed situated at the farm
- 1.3 3 cattle
- 1.4 All utensils at the farm and at Kaunye Secondary School, her workplace
- 1.5 All chickens, turkeys, guinea fowls and pigeons at the farm

In her claim, the plaintiff alleges that there are 20 cattle, 10 goats, 100 pigeons and 40 chickens.

The first defendant who is resident at the farm since 2005 when he retired indicated that the livestock has depleted and only 10 cattle remain. Since 5 of the cattle are the “umai” property for the plaintiff and second defendant, only 5 cattle are up for distribution. I note that the first and second defendant have been tending to the livestock. It would be fair and equitable that the 5 cattle are distributed as follows:

- 1 Plaintiff to get 4 cattle being her 2 “umai” ones and an additional 2.
- 2 First defendant to get 2 cattle.
- 3 Second defendant to get 4 cattle being her 3 “umai” ones and an additional 1.

Since the evidence given is that there are only 2 goats remaining and not 10 as alleged by the plaintiff, the 2 goats are awarded to the plaintiff as they are said to belong to her. Under cross-examination, the plaintiff said she is not aware of the numbers.

Since the plaintiff has not really been at the farm, except for functions such as lobola payment for the children, it means that she does not know how much pigeons or chickens there are. The ones she is claiming most likely perished. The second defendant explained that there are chickens, pigeons, turkeys, and guinea fowls which she is claiming as her sole property. I consider it only fair that she be awarded these.

The motor vehicle, Nissan Terrano registration number ABV 3808 has been offered to the first defendant and I award it to him.

I already found that the first defendant in buying movable property was applying both his and plaintiff’s resources. The plaintiff said they bought some of their property from departing white people during the peak of the war. She also said that upon retirement she took most of the moveable assets she had been using at Musanhi, to the farm and that is the furniture used in the

dining room. She also claimed that at the farm there are rooms with her own property. The parties were agreed that all the household goods at Kaunye were stolen including the plaintiff's wedding gifts.

### **Disposition**

To assist in giving a practical and just result, I requested the parties to give indications on the values of the properties. They engaged Advent Properties (Pvt) Ltd who valued the three immovable properties and came up with the following market values:

1. Budgja Farm USD 800 000.00
2. Southerton USD 70 000.00
3. Chinzanga property USD 4 000.00

The second defendant's counsel protested the values which, in their opinion appeared unreasonably high, particularly for the farm. I am proceeding to deliver my judgment based on percentage shares to the plaintiff and first defendant as already laid out above.

I have struggled with how to ensure that my order gives the most practical and just result for the plaintiff and first defendant. I need to ensure that this order gives the plaintiff a roof over her head and takes away the indignity of shuttling from one child to the other's house. She worked for 46 years and should be resting easy in her retirement days and should not be reduced to a beggar. She should walk out of this marriage in a position which places her as closely as possible to the position she would have been, had the divorce not occurred. I would have awarded her the Southerton property as her sole property but recognize that the second defendant's mentally handicapped son has been living there and the house is near Harare hospital. I note however that the first and second defendant have the only functional car of the family and if they stay with this child, they will be able to take him for medical checkup, easily.

After the divorce, the plaintiff will no longer have the right to occupy or use the Kaunye homestead. It will be available for the first and second defendant. This is because s 7 (1) (c) of the Communal Land Act [*Chapter 20:04*] provides that no person shall occupy or use any portion of communal land unless he or she is a spouse, dependent relative, guest or employee of a person who occupies or uses communal land.

In the circumstances, I order as follows:

1. A decree of divorce be and is hereby granted as between plaintiff and first defendant.
2. (a) The plaintiff and first defendant are awarded the property situate in the District of Salisbury called Stand 8067 Salisbury Township of Salisbury Township Lands measuring 506 square metres in the ratio 50% each.  
(b) The plaintiff and first defendant will agree on the value of the property failing which the property shall be valued by a valuator nominated by the Registrar of the High Court within 30 days from the date of this order and the plaintiff and the first defendant shall meet the valuation costs proportionately.  
(b) The plaintiff and the first defendant shall exercise the option of buying each other out based on the valuation report within 60 days of the report.  
(c) Should the plaintiff and the first defendant exercise the buy-out option, documents necessary to transfer ownership shall be signed as applicable within seven (7) days of written request. Should any party fail to sign the necessary documents to effect transfer, the Sheriff of the High Court is authorized to sign all such documents.  
Alternatively,  
(d) Should the plaintiff and the first defendant fail to buy each other out as aforesaid, the property shall be sold to best advantage and proceeds shared in the ratio 50% to plaintiff and 50% to defendant.
3. (a) The plaintiff and the first defendant are awarded certain piece of land situate in the district of Mutoko, measuring 82,0895 hectares, called Budgja 18 in the ratio 60% to the plaintiff and 40% to the first defendant.  
(b) The plaintiff and first defendant are ordered to make proportionate contributions towards the costs of surveying, subdivision, and transfer.  
(c) Unless the parties agree on the value of the property, the property shall be valued by a valuator nominated by the Registrar of the High Court within 30 days from the date of this order and the plaintiff and the first defendant shall meet the valuation costs proportionately.  
(d) The plaintiff and the first defendant shall exercise the option of buying each other out based on the valuation report within 60 days of the report.

- (e) Should the plaintiff and the first defendant exercise the buy-out option, documents necessary to transfer ownership shall be signed as applicable within seven (7) days of written request. Should any party fail to sign the necessary documents to effect transfer, the Sheriff of the High Court is authorized to sign all such documents.
  - (f) Should the plaintiff and the first defendant fail to buy each other out as aforesaid, the property shall be sold to best advantage and proceeds shared in the ratio 60% to plaintiff and 40% to first defendant.
4. Stand 2173 Chinzanga Township, Mutoko is awarded to the plaintiff and first defendant on a 50% ratio each.
- a. Unless the parties agree on the value of the property, the property shall be valued by a valuator nominated by the Registrar of the High Court within 30 days from the date of this order and the plaintiff and the first defendant shall meet the valuation costs proportionately.
  - b. The plaintiff and the first defendant shall exercise the option of buying each other out based on the valuation report within 60 days of the report.
  - c. Should the plaintiff and the first defendant exercise the buy-out option, documents necessary to transfer ownership shall be signed as applicable within seven (7) days of written request. Should any party fail to sign the necessary documents to effect transfer, the Sheriff of the High Court is authorized to sign all such documents.
  - d. Should the plaintiff and the defendant fail to buy each other out as aforesaid, the property shall be sold to best advantage and proceeds shared in the ratio 50% to plaintiff and 50% to first defendant.
5. The plaintiff is awarded the following movable property:
- a. 4 head of cattle including her 2 “umai” ones
  - b. 2 goats
  - c. All the household furniture at the farm which came from Musanhi school, including two sets of sofas, her kitchen utensils and kitchen cupboards, inclusive of furniture from the Southerton house.
6. The first defendant is awarded the following movable property:
- a. A Nissan Terrano motor vehicle ABV 3808

- b. 2 heads of cattle
  - c. Wooden display cabinets
  - d. 1 TV set
  - e. Farming tools
  - f. 1 set sofas
7. The second defendant is awarded the following:
- a. 4 head of cattle including 3 of her “umai” ones
  - b. 1 wardrobe and 1 bed at Southerton
  - c. 1 wardrobe and one double bed at the farm
  - d. Own kitchen utensils at the farm
  - e. All chickens, turkeys, guinea fowl and pigeons at the farm.
8. Each party bears its own costs.

*Sinyoro & Partners*, plaintiff's legal practitioners  
*Mubangwa & Partners*, first defendant's legal practitioners  
*Chirorwe & Partners*, second defendant's legal practitioners