

DINIAS AMRATH NARAN
versus
FENNY NARAN

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 20-22 September, 2021 and 10 March 2022

Civil Trial

H Nkomo, for the plaintiff
R N Fitches, for the defendant

MAXWELL J:

The plaintiff and the defendant were married on 9 June 2000 at Harare in terms of the Marriage Act [*Chapter 5:11*]. Their marriage was blessed with two children, a son aged 20 years and a daughter aged 14 years. Due to irreconcilable differences on 4 April 2017 the plaintiff issued summons out of this court for a decree of divorce and ancillary relief. The Defendant defended the matter and filed a counterclaim. In seeking the dissolution of the marriage the plaintiff alleged that the marriage relationship between the parties has irretrievably broken down to such an extent that there are no prospects of restoration to a normal marriage relationship in that:

- a) The Plaintiff has lost love and affection for the Defendant.
- b) The parties no longer share any conjugal rights.
- c) The defendant has treated the Plaintiff with such cruelty to such an extent that the Plaintiff finds it incompatible with a normal marriage.
- d) The Defendant has turned the children of the marriage against the Plaintiff.
- e) The Defendant has denied the Plaintiff access to the children of the marriage.
- f) The parties have separated from bode and bed since August 2016.

As a consequence of the above factors the plaintiff prayed for a decree of divorce. On ancillary relief, the plaintiff alleged that during the subsistence of the marriage the parties acquired some movable and immovable assets. He thus prayed for the distribution of such assets in a manner he deemed just and fair. On immovable assets the plaintiff proposed that he be awarded Flat number 2002 Atwing Oberio Springs off New Link Road, Andheri West, Mumbai, India whilst the Defendant is awarded Flat number 811812, 8th Floor, Samarth Deep off Link Road, Oshiwala,

India. On the distribution of movable assets, Plaintiff proposed that he be awarded a Toyota Prado registration number ABX 8333 and all household goods and effects in his possession whilst the Defendant is awarded a Honda CRV registration number AAP 2265 and all household goods and effects in her possession. Initially the plaintiff had also proposed that he be awarded custody of the minor child whilst Defendant is granted rights of access. At the trial, Plaintiff proposed that custody of the minor child be awarded to the Defendant whilst he is granted rights of access.

The defendant, in her plea, contended that the Plaintiff solely contributed to the irretrievable breakdown of their marriage. She denied the factors for the breakdown of the marriage relationship alleged by the plaintiff. She pleaded that Plaintiff is the one who treated her together with the children with cruelty to such an extent that renders it incompatible with a normal marriage. She also pleaded that plaintiff is the one who has been abusing the children born of the marriage to an extent that psychiatrists had to be roped in to counsel them. She alleged that since separation of the parties, plaintiff has neglected to cater for the children's welfare in a manner he accustomed them to. She pleaded that it would not be in the interest of the children to grant custody to plaintiff as he had been deemed unfit for unsupervised access by a competent court pursuant to his abusive tendencies towards the children. She further pleaded that she should remain the custodian parent with plaintiff exercising his access rights. She also raised the issue of maintenance for herself and the children.

On assets of the spouses, the defendant contended that the plaintiff had left out some properties from his list. She pleaded that she be awarded both flats in India together with other immovable assets which plaintiff had concealed and are laid bare in the counterclaim. She agreed with the proposed distribution of the movable assets but pleaded that plaintiff should be responsible for the maintenance of the motor vehicle awarded to her.

In her counter claim, defendant alleged that the marriage relationship between the parties has irretrievably broken down to such an extent that there are no prospects of restoration to a normal marriage relationship in that the Plaintiff has:

- a) been an extremely violent and abusive husband both verbally and physically,
- b) failed to treat Defendant with proper love, due respect and affection and has denigrated her in front of her children, visitors and members of the public,

- c) insulted the children born of the marriage using abusive language for children their age thereby inflicting a traumatic experience which had to be rectified by counselling,
- d) abusing and inappropriately touching Gitanjali, a daughter born of the marriage as well as hitting the children,
- e) neglected to provide domestic services to his wife and family as would be expected of a conscientious, caring and loving father and husband in a normal marriage,
- f) has been quarrelsome and picked arguments with Defendant at every turn and for no apparent reason in a manner inconsistent with a companion and husband,
- g) treated Defendant with such cruelty to such an extent that Defendant finds it incompatible with a normal marriage.

She listed property she claimed to have been jointly acquired during the subsistence of the marriage Plaintiff had left out. She begged leave to include any other property she may be able to identify during the course of the divorce action. The list comprised of the following:

- “A. Immovable property- in addition to the two flats in India -
- a. undivided 10% share being share No 4 of Lot 31 Newlands Township measuring 6691 square metres,
 - b. stand 1442 Salisbury Township measuring 892 square metres,
 - c. Lot 1 subdivision A of Lot 50 Highlands Estate of Welmoed measuring 3642 square metres,
 - d. Stand number 954 Kwekwe also known as number 71 Goldwater Link Road,
 - e. Stand number 225 Beverley East Township of Doon measuring 2,2569 hectares
- A. Movable Properties-including the two motor vehicles stated by Plaintiff
- a. Nissan Hardbody registration number ABG 8032,
 - b. Mazda T3500 registration number ACB 1883
 - c. Hino Super Rigid Truck registration number ADI4660
 - d. Nissan Hardbody Single Cab registration number ADV 3746
 - e. Nissan X09 Pickup [vannete/delivery/tricar] registration number ACM 7481
 - f. Nissan Pickup [vannete/delivery/tricar] registration number AAX 1558
 - g. Mazda T3500 [vannete/delivery/tricar] registration number AAA 0277
 - h. Nissan Hardbody K04 Pick up [vannete/delivery/tricar] registration number ABG 8032
 - i. Toyota DYNA Truck registration number ADM 6250
 - j. Datsun/ Nissan Hardbody Pickup [vannete/delivery/tricar] registration number ABA 7137
 - k. Toyota Hilux Double Cab registration number AAG 1208
 - l. Isuzu KB 280 Station Wagon registration number AAU 1649
 - m. Nissan Double Cab registration number ADA 2988
 - n. Mazda B2500 Double Cab registration number ACB 1884.”

She also claimed household goods and effects as well as monies in bank and offshore accounts. She stated that she was a joint holder of an account in HBSC Jersey Bank. She stated that it will be just and equitable that the custody of the children be granted to her with Plaintiff

being allowed supervised access. She claimed maintenance in the sum of USD15000.00 per month for the children until they attain the age of majority or become self-supporting, whichever occurs first. She also claimed USD4000.00 per month as maintenance for herself until she remarries or dies, whichever occurs first. She further claimed medical aid, medicines and personal accident cover for herself and the children as well as holiday provisions, fitness, sports and health training expenses. Defendant further claimed educational and counselling expenses for the children She proposed that Plaintiff be awarded the properties he is hiding and that she be awarded those which she has discovered or unearthed.

The plaintiff did not agree with the defendant's proposal therefore a pre-trial conference was held. The joint pre-trial conference minute reflects that the parties agreed that the following are the issues: -

1. What order of access should be made in favour of the Plaintiff in respect of the minor child Gitanjali Naran (born 27th November 2007)?
2. The amount of maintenance to be paid by the Plaintiff for Gitanjali Naran (born 27 November 2007) until she attains the age of 18 or becomes self-supporting whichever occurs the later.
3. What is a fair and equitable distribution of the movables and immovable assets of the parties?
4. What order, if any, of maintenance should be made in favour of the defendant after divorce?
5. What order as to costs should be made?

ACCESS

The first issue is on the order of access to be made in favour of the Plaintiff in respect of the minor child Gitanjali Naran (born 27th November 2007) (Gitanjali). Plaintiff has sought an order for unsupervised access but Defendant wants Plaintiff to be allowed supervised access. Plaintiff pointed out that MUNANGATI-MUNONGWA J granted unsupervised access in HC 10052/17 by consent of the parties and that that order is still extant. The *curator ad litem*, in a report dated 5 August 2019, agreed with the order in HC 10052/17 and proposed that its terms be obeyed. In Defendant's closing submissions it is stated that the issue of access is *res judicata* on the basis of judgment number HH 508-20. That submission has the effect of supporting Plaintiff's request for unsupervised access. In HH 508/20, CHIRAWU-MUGOMBA J stated:

“What is imperative is that there is an existing order from the Children’s Court obtained in April 2017 as varied in October 2017.”

An attempt is made to impugn the order in HH 10052/17 in Defendant’s closing submissions. What the Defendant and/or her counsel failed to appreciate was that that order was in line with the variation of October 2017. With the variation extant, Plaintiff’s submissions that Defendant is issue estopped from alleging that the Plaintiff is not fit to exercise unsupervised access is on point. As stated in *Kashiri v Muvirimi* 1998 (1) ZLR 270 (S) the parties are estopped from disputing an issue decided by a judgment of a court of competent jurisdiction. The variation order is on pp 372-373 of the record and is stamped 17 October 2017.

The order is couched in the following terms:

“IT IS ORDERED THAT:

1. That the Applicant is granted unsupervised access to the minor children namely **Sohm Naran** born (2nd January 2001) **Gitanjah** (*sic*) **Naran** (born 27th November 2007) as follows: -
 - 1.1 Every alternate weekend.
 - 1.2 That the Applicant shall collect the children at 1730 on Friday until Monday on or before 0830.
 - 1.3 That the Applicant shall transport the children to school on Monday.
2. In the event of the Respondent resisting to handover the children the Messenger of Court or the Officer-In-Charge, Harare Central Police or any police station in whose jurisdiction the minor children are residing, be and is hereby directed and authorised to assist the Applicant to pick-up the children for purposes of enforcement of this order.
3. Each party shall bear its own costs of suit.”

Submissions for the defendant are silent on that variation order. The terms of that order are almost the same as what applicant is seeking. Whereas *in casu* he is seeking unsupervised access every alternate weekend and every alternate school holiday, in the varied order he was granted unsupervised access on every alternate weekend only. The issue of the school holiday was not addressed. Also, *in casu*, Plaintiff is proposing that he conducts the school run every Monday and Wednesday subject to his availability. The varied order provides that he transports the children to school on Monday only. However, the order in HC 10052/17 includes Wednesday in the school run. I find no basis to deny the terms of access requested by the Plaintiff.

MAINTENANCE

Defendant claimed different amounts in her plea and in her counter-claim. In her plea, she claimed maintenance of USD15 000.00 per month for the children until they attain the age of

majority or become self-supporting, whichever occurs first. She also claimed USD4 000.00 per month for herself until she remarries or dies, whichever occurs first. In the counter-claim, she claimed USD17 202, 45 for the children and USD10 506, 80 for herself. In view of the fact that the eldest child is no longer a minor, Defendant conceded that the amount claimed for him should be disregarded. In her oral submissions Defendant claimed USD5000.00 for herself to be paid per month until everything is settled. In his declaration, plaintiff proposed that there be no order for the maintenance of the children and that he provides defendant with accommodation and an allowance of \$500.00 from the date of dissolution of the marriage until the expiration of two years. In his evidence-in-chief he indicated that he was solely responsible for the children's needs. This was not disputed by the defendant.

Defendant's closing submissions did not address the issue of maintenance. In view of the fact that Plaintiff has been solely responsible for the children's welfare and has vowed to continue doing so, I find no reason to order maintenance for the children. The request by the Defendant that she be maintained until she remarries or dies, whichever occurs first is contrary to the position stated in case law. In *Kangai v Kangai* HH 51/2007, GOWORA J (as she then was) said:

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

Defendant cannot be categorized as an elderly woman entitled to permanent maintenance as per above quote. In my view she is middle aged. Plaintiff, in the closing submissions offered to pay maintenance for Defendant for a period of one year in the sum of USD500 per month. No reason was given for the change in the period of payment from the two years proposed in the declaration to one year in the closing submissions. In the absence of an explanation for the change, the period of payment will be two years. On the issue of the amount to be paid, in the absence of submissions from the Defendant on the issue in her closing submissions, the amount of USD500.00 is awarded. This is what Plaintiff consistently offered from the time he initiated this litigation.

DISTRIBUTION OF ASSETS

The distribution of assets of the spouses at the dissolution of a marriage is governed by s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. Section 7(1) thereof states that:

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—
(a) The division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other.”

The first issue should therefore be to ascertain the assets of the spouses available for distribution. The distribution or apportionment of such assets is then proceeded with on the basis not of which spouse should get what but on what would be a fair and equitable distribution of the assets of the spouses. In the exercise of its discretion the court is not limited to awarding whole assets but may in fact apportion shares in certain assets and provide the procedure by which each spouse will realise their share from the particular assets. The apportionment, division or distribution of the assets must be done in such a way that each spouse is awarded what the court, upon consideration of all the circumstances of the case, deems fair and just. In this regard s 7(4) enjoins the court to consider all the circumstances of the case in these terms:

“In making an order in terms of subsection (1), an appropriate court shall have regard to all the circumstances of the case including the following:

- (a) The income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future.
- (b) The financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future.
- (c) The standard of living of the family, including the manner in which any child has been educated or trained or expected to be educated or trained.
- (d) The age, 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 spouse or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage.
- (g) Duration of the marriage;
and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.”

These factors are not exhaustive as the court may consider other factors or circumstances established by the evidence adduced. In *Shenje v Shenje* 2001(1) ZLR 160 (H) at 163E – 164 A GILLESPIE J aptly noted that:-

“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.

The factors listed in the subsection deserve fresh comment. One might form the impression from the decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of seven considerations. The first four listed considerations all address the needs of the parties rather than their dues. Perhaps it is time to recognise that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties’ needs are met rather than that their contributions are recouped.”

It is common cause that defendant did not make any financial contribution to the assets of the spouses. The parties are agreed that defendant made some indirect contribution. Plaintiff described defendant’s contribution as negligible. Defendant herself stated that she looked after the growing young family, freeing plaintiff to operate his businesses and to build his impressive business empire. In her closing submissions she stated that she spent the whole of her married life looking after the home and children and thus foregoing career opportunities. Defendant pleaded that a clean break should be provided for. Defendant’s closing submissions cited the case of *Nyatwa v Nene* 1990 (1) ZLR 97 in which it is stated that:

“The clean break principle envisages that, wherever possible the parties to a divorce should not be bound together by financial obligations. There are obvious economic and sociological advantages to such independence. In appropriate cases it can be achieved by a judicious sharing of the property in such a way as to obviate the necessity of a maintenance order.”

She claimed a monthly payment until the clean break lump sum payment has been paid as per the case of *Shenje v Shenje* 2001 (2) ZLR 160. In response to that submission, Plaintiff’s counsel pointed out that Defendant materially departed from the claim set out in the pleadings. Plaintiff’s counsel’s submission is borne out by the record of proceedings. The issue of the clean

break and lump sum payment was first mentioned in oral evidence. No amendment to the pleadings was sought to incorporate that aspect. It is trite that an amendment may be made at any stage of the proceedings. However in the event of an objection, an application to the Court may also be made at any stage before judgment and can accordingly be granted at different stages in the proceedings. See Herbstein & Van Winsen *The Practice of the High Courts of South Africa* 5th ed, page675. It is stated in *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173@ 198 that:

“The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings.”

Despite the objection, there was no application to amend Defendant’s pleadings. Reference was made to the case of *Mtuda v Ndodzo* 2000 (1) ZLR 710 (H), for the position that even where no amendments have been applied for, both trial courts and courts of appeal, in appropriate cases, adjudicated on issues not raised on the pleadings but fully canvassed at the trial. I am of the view that the *Mtuda v Ndodzo* case (supra) is distinguishable. In that case the issue that had not been pleaded was identified during the pre-trial conference as one of the issues for determination at the trial. In addition, the extent to which each of the parties contributed was fully canvassed during the trial. *In casu*, the issue of the clean break and lump sum payment was not part of the pre-trial conference issues. Plaintiff’s Replication to Defendant’s Closing Submissions refer to the case of *Sager’s Motors (Pvt) Ltd v Patel* 1968 (@) RLR 274 where the court held that where there has been a full and thorough investigation into all the circumstances of the case and a party has had every facility to place all the facts before the trial court, the court will not decline to adjudicate on an issue thus fully canvassed simply because the pleadings have not explicitly covered it. The circumstances of this case do not warrant the exercise of discretion to allow consideration of an issue that is not part of Defendant’s pleadings. To begin with, no amendment to the pleadings was sought. In addition, Defendant’s counsel indicated that in referring to the issue of a clean break, reference was being made to the case of *Shenje v Shenje* (supra). That case was decided in 2001. No reason was given as to why the principles therein were not incorporated in Defendant’s pleadings at the initial stage. Moreover, as stated for the Plaintiff, no full or thorough investigation was made. What a full investigation entails is stated in the case of *Middleton v Carr* 1949 (2) SA 374 as a situation where there is no reasonable ground for thinking that further examination of the

facts might lead to a different conclusion. I am of the view that a full investigation was not done *in casu* and therefore an injustice would result from treating the issue as being properly before the court. The claim for a clean break and the payment of a lump sum is accordingly dismissed.

IMMOVABLE PROPERTIES

Plaintiff proposed in his declaration that Defendant be awarded the flat in Oshiwala, India, while he gets the one in Mumbai, India. Defendant claimed both flats and in addition five other assets she said had been concealed by Plaintiff. These assets are listed in paragraph 4.1 of the declaration in the Counter Claim. Plaintiff responded saying he did not intentionally conceal the properties as they were purchased through different companies owned by a trust. He stated that he was wrongly advised that the trust property did not form part of the assets of the parties and that Defendant and the two children are the beneficiaries of the trust.

The properties for distribution are as follows:

- a) Flat number 2002 Atwing Oberio Springs off New Link Road, Andheri West, Mumbai, India and Flat number 811812, 8th Floor, Samarth Deep off Link Road, Oshiwala, India.

Plaintiff conceded that both these flats be awarded to the Defendant.

- b) Undivided 10% share being share No 4 of Lot 31 Newlands Township measuring 6691 square metres.

Plaintiff indicated that this property was acquired in 1998 before he was married to the Defendant. He however stated that the Defendant has lived there for the entirety of the marriage and the minor child has lived there all her life. Plaintiff, in his closing submissions, proposed that the property be shared equally between the parties with the Defendant being given the first option to buy the Plaintiff out. In addition, plaintiff prayed for a caveat that the house will not be sold until the minor child reaches 18 years of age or reaches self-sustenance, whichever occurs first. Defendant did not respond to this proposal. However, in his plea to the defendant's Claim in Reconviction, Plaintiff had proposed that Defendant be awarded 100% of this property. No explanation or justification was given for the reduction of the offer to 50%. I find it just and equitable that the initial position be upheld. This property is therefore awarded to the Defendant.

- c) Stand 1442 Salisbury Township measuring 892 square metres.

Plaintiff pointed out that this property is registered in the name of Ref Hurt Investments (Pvt) Limited and should be awarded to him. He submitted that Defendant never worked for Ref

Hurt Investments (Pvt) Limited and never contributed anything to it, financially or otherwise. Defendant did not dispute the submission by the Plaintiff. However, in his plea to the Defendant's Claim in Reconvention, Plaintiff had proposed that Defendant be awarded 20% of this property while he gets 80%. No explanation or justification was given for the change in the proposal. I find it just and equitable that the initial position be upheld and that 80% of this property be awarded to the Plaintiff while Defendant gets 20%.

d) Lot 1 subdivision A of Lot 50 Highlands Estate of Welmoed measuring 3642 square metres.

Plaintiff indicated that he resides on this property and should therefore be awarded it. He pointed out that the property was purchased in 2014, 4 years after separation with the Defendant. He also pointed out that Defendant has never lived there. Defendant did not express any interest in this property. It is therefore just and equitable that this property be awarded to the Plaintiff.

e) Stand number 225 Beverley East Township of Doon measuring 2,2569 hectares

Plaintiff stated that this is a business complex of which he owns 2.66 %. He further stated that the property was acquired in 2003 without contribution from Defendant. He also stated that the property is under the name of Radio City Properties (Private) Limited and Defendant did not claim any share of this company in her pleadings. However, in his plea to the Defendant's Claim in Reconvention, Plaintiff had proposed that Defendant be awarded 10% of this property while he gets 90 %. No explanation or justification was given for the change in the proposal. I find it just and equitable that the initial position be upheld. It is therefore just and equitable that 90% of the property be awarded to the Plaintiff and 10% to Defendant.

f) Chinhoyi Street Mall.

Plaintiff pointed out that the property was acquired after the parties had separated and is owned by a company in which Defendant is not claiming any shares. Plaintiff stated that he has always been using income from this property to take care of the needs of the children and if it is taken away he will not be able to meet some of his financial obligations. This allegation was not disputed. Defendant testified that she wanted Steel Brands and the two flats in India and that she would take care of the children. It is common cause that the Plaintiff has been taking care of the children and meeting all their financial needs. Section 7 (4) of the Matrimonial Causes Act [*Chapter 5:13*] enjoins the court to endeavour as far as is reasonable and practicable to place the

spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses. In view of that provision, it is just and equitable that the Plaintiff be awarded the Chinhoyi Street Mall so that he retains the capacity to meet his financial obligation in relation to the children's welfare and education.

g) Steel Brands (Pvt) Ltd

It was not disputed that Steel Brands (Pvt) Ltd was formed in 2014 and started operating in 2018. The parties had separated in 2010. There was no allegation that Defendant had directly or indirectly contributed towards its formation and operation. Plaintiff submitted that the company is one of the sources of the children's school fees up to university, his sustenance and the maintenance of the minor child. The submission by Plaintiff was not controverted. It is therefore just and equitable that the Plaintiff be awarded Steel Brands (Pvt) Ltd so that he retains the capacity to meet his financial obligation in relation to the children's welfare and education.

h) Undivided 66.67% share in an undivided 30% share, being share 3 of a certain piece of land situate in the district of Kwekwe called 105 Robert Mugabe Way, Kwekwe.

Plaintiff submitted that the Defendant did not contribute anything, financially or otherwise, directly or indirectly towards the purchase of this asset. The asset was not addressed in Defendant's pleadings or evidence. In his plea to the claim in reconvention, Plaintiff offered the Defendant a 10% share of his 66.67% share in the property. He still offered it in his closing submissions. In the interest of justice, a 10% share of the undivided 66.7% share in an undivided 30% share of share 3 of 105 Robert Mugabe Way, Kwekwe, is awarded to the Defendant.

i) Haansbro (Pvt) Limited and Lucky Brand (Pvt) Limited.

Plaintiff submitted that Defendant did not claim these two companies in her pleadings. He further submitted that the Defendant did not contribute directly or indirectly to the establishment and running of these companies and that she showed no interest in his commercial endeavours during the marriage. In addition, Plaintiff pointed out that Defendant specifically said he can have these companies in her evidence-in-chief. It is therefore in the interest of justice that these companies be awarded to the Plaintiff.

j) Defendant had also claimed Stand number 954 Kwekwe also known as number 71 Goldwater Link Road. Plaintiff stated that this property belonged to his parents and that

it has since been disposed of. This property therefore did not form part of the properties of the spouses subject to distribution.

k) Defendant also prayed for the dissolution of the DAN Trust and that the assets therein be apportioned between the parties and the two children of the marriage. In her Summary of Evidence, defendant stated:

“3.3 that the DAN Trust be dissolved and the proceeds be divided equally among the beneficiaries of the trust namely; the Defendant and the two minor children ratio of 3:1. The Defendant will lead evidence to show that it is fair, just and equitable that the DAN Trust be dissolved and the proceeds therefrom be shared in the ratio 3:1 that is 3 shares for Fenny Naran and the minor children and one share for Dinias Amarath Naran. That in relation to the remainder of the assets an equitable distribution be ordered.”

In her evidence in chief, Defendant is asked if she wants DAN Trust dissolved. Her response is that she wants Steel Brands (Private) Limited. On being referred to her counter-claim, when asked whether what she is claiming will not damage the Trust. Her answer is a simple “Yes”. On re-examination, she is asked if her being offered properties will keep DAN Trust intact. Her answer is again a simple “Yes”. Clearly Defendant was approbating and reprobating. Though she indicated that the Trust should be dissolved in her summary of evidence, her evidence in chief was the exact opposite of that. The two positions or stances are mutually exclusive and cannot co-exist. Clearly the Trust was set up in the best interest of the children. To dissolve it because the marriage of the parties has fallen apart will be to negate the purpose for which the Trust was set up. However Defendant is entitled to benefit from the Trust as she is a beneficiary. The justice of the case requires that those assets in the Trust which were not addressed above be valued and shared in the ratio 3:1, that is, 3 shares for the Plaintiff and the children and one share for the Defendant.

MOTOR VEHICLES

In his declaration, Plaintiff proposed that Defendant be awarded a Honda CRV AAP 2265 and all household goods and effects in her possession. In her plea, Defendant noted the proposal and prayed that Plaintiff be responsible for the maintenance of the vehicle to be awarded to her. Her summary of evidence shows that the parties jointly acquired two vehicles, a Toyota Prado registration number ABX 8333 and a Honda CRV registration number AAP 2265. In her counter claim, however, Defendant claimed 14 more vehicles. Plaintiff, in his plea to the claim in reconvention, pointed out that the 14 vehicles claimed by the Defendant are owned by Lucky Brand (Private Limited). In her evidence-in-chief and closing submissions, Defendant abandoned the

claim for the 14 vehicles and requested. For a late-model vehicle, Prado. I interpret that position to mean that Defendant conceded that the 14 vehicles are not available for distribution. Concerning the two vehicles available for distribution, the court is guided by the position the parties would have been in had a normal marriage relationship continued between them. As submitted for Plaintiff, Defendant would have been using the Honda CRV if the marriage had continued. She will therefore be awarded that vehicle.

BANK AND INVESTMENT ACCOUNT BALANCES

On the 5th of August 2020, Defendant sought further discovery of bank statements of the following accounts held with HSB Bank International Limited in the name of Mrs and Mrs (sic) Naran from 2018 to date:

- a) 40612 15510376
- b) 023299803-705
- c) 023299803-550
- d) 023299803-540

Plaintiff's Legal Practitioners gave the required information through a letter dated 21 May 2021. The balances in the four accounts were stated amounting to a total of USD 64 946.00 for the period 2015 to 2016. It is in the interest of justice that any amounts in any of these accounts which are jointly held be shared equally. Defendant submitted that there is a jointly held account in HSB Jersey. Plaintiff proposed that the balance in that account be shared equally. He also testified that there is a Franklin Blue Chip Investment account controlled by HSB India which was doing well but covers the mortgage he got from HSB Bank. It is in the interest of justice that the investment be left intact to discharge the mortgage payments.

Fundamental changes in the parties' lives will result from the divorce. Each party is faced with the reality of starting a new life without the other. It will not be easy to start afresh but that is the reality that they have to face. Divorce comes with the consequences of property sharing. In the circumstances the following order is granted.

DISPOSITION

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child, Gitanjali Naran (born 27 November 2007, be and is hereby awarded to the Defendant with the Plaintiff being granted unsupervised access every alternate weekend and every alternate school holiday.
 - a) The Plaintiff or his representative shall collect the minor child from school on Friday

- b) The Plaintiff or his representative shall return the minor child to the Defendant by 10:30 a.m on Sunday.
- c) The Plaintiff shall conduct the morning school run in respect of the minor child every Monday and Wednesday of the week subject to his availability which availability shall be communicated in advance to the Defendant.
3. The Plaintiff shall pay post-divorce spousal maintenance to the Defendant in the sum of \$500 (five hundred dollars) USD per month for two years from the date of this order.
4. The Plaintiff be and is hereby awarded the following immovable properties
 - a) 80% share in Stand 1442 Salisbury Township measuring 892 square metres.
 - b) Lot 1 subdivision A of Lot 50 Highlands Estate of Welmoed measuring 3642 square metres.
 - c) 90% share in Stand number 225 Beverley East Township of Doon measuring 2, 2569 hectares.
 - d) The entire issued share capital of Steel Brands (Private) Limited.
 - e) 90% share of the Undivided 66.67% share in an undivided 30% share, being share 3 of a certain piece of land situate in the district of Kwekwe called 105 Robert Mugabe Way, Kwekwe.
 - f) The entire issued share capital of Haansbro (Pvt) Limited.
 - g) The entire issued share capital of Lucky Brand (Pvt) Limited.
 - h) The entire issued share capital of Ref Hurt Investments (Private) Limited.
 - i) The entire issued share capital of Radio City (Private) Limited.
 - j) The entire issued share capital of Sigma Gold (Private) Limited.
5. 50% of the balance in the HBSC Jersey Bank account.
6. 50% of the balance in any of the following HSB Bank International Limited which are jointly held
 - a) 40612 15510376
 - b) 023299803-705
 - c) 023299803-550
 - d) 023299803-540
7. The Defendant be and is hereby awarded the following properties;-
 - a) Flat number 2002 Atwing Oberio Springs off New Link Road, Andheri West, Mumbai, India

- b) Flat number 811812, 8th Floor, Samarth Deep off Link Road, Oshiwala, India.
 - c) Undivided 10% share being share No 4 of Lot 31 Newlands Township measuring 6691 square metres
 - d) 20% share in Stand 1442 Salisbury Township measuring 892 square metres
 - e) 10% share of the Undivided 66.67% share in an undivided 30% share, being share 3 of a certain piece of land situate in the district of Kwekwe called 105 Robert Mugabe Way, Kwekwe.
8. 50% of the balance in the HBSC Jersey Bank account.
9. 50% of the balance in any of the following HSB Bank International Limited which are jointly held
- e) 40612 15510376
 - f) 023299803-705
 - g) 023299803-550
 - h) 023299803-540
10. The value of one share of the assets of the Trust which are not addressed above.
11. The parties shall agree on the values of the assets in 7 (c), (d), (e) and 10 above within 30 days of this judgment failing which they shall appoint a mutually agreed estate agent to evaluate the properties within 30 days from the date of such failure.
12. Should the parties fail to agree on an evaluator the Registrar of the High Court is hereby directed to appoint an evaluator from his list of evaluators.
13. The Plaintiff is hereby granted the option to buy out the Defendant's share in 7 (c), (d) and (e) within 12 months, or such longer period as the parties may agree, from the date of receipt of the evaluation report.
14. Should the Plaintiff fail to pay the Defendant's share within the stated period, or such longer time as the parties may agree, the properties shall be sold to best advantage and proceeds there from shall be shared in accordance with the proportions in the award.
15. Plaintiff is awarded a Toyota Prado registration number ABX 8333 and all household goods and effects in his possession
16. Defendant is awarded a Honda CRV registration number AAP 2265 and all household goods and effects in her possession.

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

Mhishi Nkomo Legal Practice, plaintiff's legal practitioners

Gill Godlonton & Gerrans, defendant's legal practitioners