JOHNPHAS GWERU

versus

MERCY GWERU

HIGH COURT OF ZIMBABWE

MAVANGIRA J

HARARE, 15 and 16 February, 1, 2 and 3 March 2010, 25 June, 20and 30 July 2012 and 20 December 2012

**Divorce Action**

*A A Debwe,* for the plaintiff

*Mrs S Evans,* for the defendant

MAVANGIRA J: The parties to this divorce action got married on 16 August 1996 at Bulawayo, Zimbabwe. Their union was blessed with three children all of whom are still minors. The plaintiff now seeks from this court a decree of divorce, custody of the three minor children of the marriage and distribution of the matrimonial estate. In justifying his prayer he avers in his Declaration that his marriage to the defendant has irretrievably broken down. He also avers that there are no reasonable prospects of its restoration to normalcy as the defendant has, during the subsistence of the marriage, committed acts of adultery and has also deserted the plaintiff, taking the minor children of the marriage with her to a place unknown to him.

In her plea the defendant admits that the marriage relationship has irretrievably broken down but gives different reasons therefor. She then counterclaims for a decree of divorce, custody and maintenance of the minor children of the marriage and division of the matrimonial estate inclusive of both the movable and immovable assets. As justification for her counterclaim she avers that the plaintiff was very abusive towards her and the minor children and that it was this abuse that forced her to move out of the matrimonial home. She further avers that the plaintiff treated her without love and affection or consideration; that he displayed an aggressive and argumentative disposition and that he pursued his interests at her expense and to her exclusion. She denies having committed adultery during the subsistence of the marriage. In her evidence she stated that her only prayer was for the court to grant in her favour an order for the custody and maintenance of the three minor children and distribution of the immovable property.

Of the 7 issues identified at the pre-trial conference as the issues to be determined by the trial court,both parties led evidence pertinent only to the following issues:

“(a) who should be awarded custody of the minor children of the marriage?

(b) If defendant, how much maintenance should be paid by the plaintiff for each

 child?

(c) How should the immovable matrimonial property be apportioned? “

The parties gave evidence relating only to the division of Stand 1790, Mainway Meadows, Prospect, Waterfalls, Harare, as the only immovable property to be distributed by the court. The parties also led evidence pertaining to the breakdown of the marriage relationship with each party clearly stating that they no longer had any love and affection for the other as well as indicating that they no longer desired to continue in marriage with the other.

In the plaintiff’s closing submissions it is stated that the issues of the parties’ movable assets save for the Mazda B2200 motor vehicle, DVD and Lacey, the dog were resolved at the pre-trial conference stage. None of the parties adduced any evidence in relation to these items. In this regard note is taken of the fact that the defendant stated in her evidence that she abandons all other claims except those relating to the custody and maintenance of as well as access to the minor children and also to the division of the immovable property.

CUSTODY OF THE MINOR CHILDREN

At this court’s instance and request made in March 2010 at the close of the plaintiff’s case, the Department of Social Services, Marondera, prepared a report in respect of the custody issue pertaining to the minor children of this marriage. They got the assistance of the Highfield, Harare, Social Welfare Office whose Probation Officer visited the matrimonial home in Prospect, Waterfalls, Harare, carried out interviews and prepared a report which was forwarded to Marondera. The Marondera Office’s Probation Officer visited the rented residence in Marondera where the defendant resided with the children. The Highfield report which the Marondera office reportedly took into account in the preparation of the final report, recommends that the custody of the minor children be awarded to the plaintiff. The Marondera report which was said to be the Department’s final report recommends, on the other hand, that custody of the children be awarded to the defendant. Regrettably, the reports were only availed to the court and to the parties in 2012 resulting in the dragging of the trial which has taken an inordinately long period of time to be completed, thus causing delay in the finalisation of this matter.

The plaintiff contends that he should be awarded custody of all three minor children. He contends that the defendant has failed to show that he is an unfit or irresponsible parent or that it is not in the best interests of the children that their custody be awarded to him. He contends also that the defendant’s evidence that he used to assault the eldest child and also to take the child with him on his drinking sprees was mere fabrication as this was never mentioned in her pleadings nor was he asked about it in cross examination. The plaintiff urges the court to disregard the findings recorded in the Marondera Probation Officer’s report. He attacks it for a number of reasons. He contends that it was not professionally prepared as it is defamatory of him, his sister and the maid; it also contains false and irrelevant information; is biased against the plaintiff and does not make any mention of the defendant’s adulterous association notwithstanding overwhelming evidence of the same. He further contends that it does not incorporate the findings made by the Highfield District Probation Officer who interviewed him.

The court is urged to disregard the defendant’s evidence that during the period when they were staying with the plaintiff the children would always be late for school as their report cards for the relevant period, exh(s) 9 and 10, reflect that the children would in fact be punctual. The court is urged to take into account the fact that the defendant left the matrimonial home in January, 2008 with the minor children and without his knowledge notwithstanding a Juvenile court order granting plaintiff unlimited rights of access to the children. It was the plaintiff’s evidence that for a period of 7 months he did not know the whereabouts of his children. He said that the defendant only appeared at the High Court on 10 July 2008 in response to a Notice of Set Down that had been published in the Herald pursuant to a court order for substituted service. He told the court that it was only after the pre-trial judge’s intervention that the defendant allowed him to exercise his rights of access. He also said that the defendant was most probably enticed and persuaded by her boyfriend to desert the marital home. He said that her immoral conduct during the subsistence of the marriage makes her an unsuitable custodian parent. He contends that as a result of her immorality the eldest child is now reported as being rude yet he used to be regarded by school teachers as a friendly and cheerful pupil during the period when the family was still staying together. He urges the court to award the custody of all the children to him for these reasons as well the fact that they are no longer of such a tender age as to be inparticular need of a mother’s care. With particular reference to the eldest child, he contends, in addition, that at 15 and being a boy, he certainly now requires the father’s guidance.

The plaintiff has accused the defendant of infidelity during the subsistence of the marriage. He has done so in his pleadings and in his evidence before the court he gave very specific details of specific incidents including car chases some of which sounded quite dramatic to the point of sounding like he was describing the details of an action packed or fast speed movie. He also produced photographs of the defendant’s alleged lover as well greeting cards with love messages from the lover to the defendant which items he said he had discovered in the matrimonial home during the period that they were still living together in the matrimonial home. He described how the defendant and her lover were known at a Christian congregation as husband and wife, the lover being the bishop of the organisation; how the defendant would prepare the day’s meals on Sundays for the rest of the family in order to leave the matrimonial home on the pretext of going to church. They had last afforded each other conjugal rights in 2004. He has instituted civil proceedings against the lover and the matter is still pending before the courts. He contends that due to her adulterous affair with the alleged lover the defendant is not a fit and proper person to be awarded custody of the minor children of the marriage. He contends that it is because of this conduct on her part that their eldest child, now aged 15, is now reportedly a rude child according to the school authorities yet he used to be friendly and polite. He contends further due to the said misconduct the defendant should not be awarded a 50% share of the immovable property in Prospect.

The plaintiff called two witnesses. The first was Jestinah Musabaeka whose evidence was that she knew the defendant as one of her former students whom she taught at Jameson High School in Kadoma. She taught the defendant in 1987 and 1988. Though a member of staff she lived in the same hostel as the defendant. She was very close to the defendant who she treated as her little sister. She left the school in 1989. When she visited the school in 1990 whilst in the company of her fiancée, she got to see the defendant and other students. She got married to her fiancée in December of the same year. They invited the defendant to accompany them to Mont Clair, a holiday resort in Nyanga. They returned home to Harare on a Sunday. On the Monday she went into town with her husband. When they returned home they found the defendant gone without having bidden them farewell. The defendant next featured in the witness’ life in 1994 or 1995 when the witness saw the defendant’s telephone numbers at Hillside Teachers’ College in her husband’s diary. She took the issue up with her husband who declared his innocence to her. Soon thereafter the defendant’s brother whom she had also taught at Jameson High School came to work for her husband in his business at Express Motorways. Her husband advised her that he had employed him as he was unemployed.

The witness said that the plaintiff located her in 2004. By then she was on separation with her husband. The plaintiff asked her to be a witness in certain proceedings at the magistrates’ court in Harare. Presumably this was the hearing before the juvenile court which resulted in the defendant being awarded custody of the children. The witness said that in 2009 she saw the youngest two of her four daughters. She had not seen them in a long time. She then got to know that the defendant was the step mother to her children. After having separated from her husband in 2001 they were divorced in 2009. Before the divorce she had been denied access to the children. She had agreed to sign papers for a divorce by consent because she would then at least have access to her children. Besides her four daughters her-ex-husband had had three other children, one of whom was late. She said that she could positively say that the defendant was having an affair with her ex-husband. She also said that when she first got to know her, the defendant was only 13 or 14 years old and she gave the impression of a very loving and responsible young girl. The witness also said that she recognised the handwriting on the cards with love messages that had been produced by the plaintiff as her ex-husband’s handwriting. This witness gave her evidence well. Her evidence was generally unshaken by cross examination. She said that she harboured no ill feelings against the defendant. Her demeanour and deportment before the court gave the impression of one who has been so numbed by pain as to be beyond any desire to spitefully vilify the defendant. She merely narrated events that had occurred and cross examination did not dent her testimony. She was a credible witness.

The second witness called by the plaintiff was one Chesterfield Areketa. He pointed out the defendant in court and identified her not as Mrs Gweru but as Mrs Musabaeka. He said that he got to know her at Fountain of Life Church. He said that he first saw her at what he described as the church’s birthday at Hillside in Harare. She was in the company of Mr.Musabaeka who was the bishop of the church and the defendant was introduced as his wife. There were visitors from South Africa at the church on that day. The witness became a member of the church in 2008. He said that the defendant would sometimes preach in church. At the end of church services the elders would go out first and stand by the entrance where they would shake hands with the congregants as they walked out. He thus shook hands with both the bishop and the defendant in this manner.

The witness said that he was approached by a friend of his uncle who turned out to be the plaintiff in this matter. The plaintiff made enquiries about the person who was then known to him as the bishop’s wife. The plaintiff wanted him to take photographs or videos of proceedings at the church. He was later shown wedding pictures of the plaintiff’s and defendant’s wedding. He eventually took the photographs that the plaintiff had requested him to take. He did so after deciding to help the plaintiff who seemed to be a troubled person. He however stopped going to that church thereafter. He later got to hear from one Elvis that there were going to be court proceedings about the photographs that he had taken at church. Elvis advised him that he would be given some money if he did not attend court. One Chris also approached him and told him that he should not attend court as he might be arrested. He telephoned and advised the plaintiff about this. The plaintiff came and accompanied him to a police station. The police advised him to attend court and tell the truth of what he knew. The witness was cross examined at great length. However, there appeared to be no motive for him to fabricate evidence against the defendant. There would be no need for him to fabricate the minute details of the occasions when he saw the defendant at the church. Although he was not asked to produce the photographs that he said he took pursuant to the plaintiff’s request, hewas a credible witness.

The defendant on the other hand said that there is in existence a Juvenile Court order in terms of which she was awarded custody of the three minor children and the plaintiff afforded unlimited access rights. This order was apparently obtained after she had left the matrimonial home in January 2008 with the children. She said that for the past four years she has been living with the children with the plaintiff exercising his rights of access during half of the school holidays and sometimes during fixture-free weekends during term time. She contends that the best interests of the minor children demand that she remains as the custodian parent for a number of reasons including the following. She contends that despite the plaintiff’s endeavour to tarnish her image and personality the evidence that she adduced as well as the Social Welfare report clearly show the close relationship that exists between her and the children; that she is able to spend time with them and assist them with their school work both academic and extra-curricular; that she has a diploma in counselling and is therefore able to handle any of the children’s issues regardless of the child’s sex; that the nature of her job involves interacting with children at different levels and this has the effect of enhancing her ability to communicate with and understand all her children even on sensitive issues.

The defendant contends that the plaintiff on the other hand, from his evidence and from the Social Welfare report, has sought to unnecessarily involve the children, particularly the eldest, in the divorce issues between the parties. The defendant attributes the eldest child’s allegedly changed behaviour to the plaintiff’s negative influence on him and contends that custody should be awarded to her. She alleged during her testimony that during the period when the parties lived together in the matrimonial home the plaintiff used to physically abuse the child and also used to take the child with him on his drinking sprees. She denies that she has engaged in an extra marital affair or committed adultery during the subsistence of the marriage. She refuted the plaintiff’s accusations and stated that the alleged lover is in fact a family friend who is known to her parents and siblings. During the course of the proceedings the defendant’s legal practitioner said that the alleged lover of the defendant would be called as a witness. For reasons that were not explained he was not called. The plaintiff chose not to make specific responses to or comments on the numerous specific issues and incidents that were recited by the plaintiff as pointers to or indications of her adulterous affair with the named alleged lover. She rather commented that as they had moved on with their lives, the plaintiff ought not to keep on harping on these issues. Besides giving a generalised or globalised denial of the given details of the alleged adulterous affair, in a few instances she gave rather scanty responses to some of the specific events or details as will be shown later in this judgment.

 The defendant contends that by the nature of his job the plaintiff will not be able to devote as much time to the children as she can and that he will have to rely on the maid and his sister for the children’s day to day care. She contends that as their biological parent she is better suited to attend to the children’s needs.

When the trial resumed this year the plaintiff advised the court that the defendant had during the intervening period since the court last sat, asked him to find a place for the child at a school in Harare. The defendant did not dispute this when she gave her evidence. It was only after she had been cross examined and re-examined that the court asked her to confirm this statement by the plaintiff. She then for the first time denied having asked the plaintiff to look for a place for the eldest child in a school in Harare. The plaintiff was not challenged on that issue when he was cross examined. As stated above, the defendant did not controvert it in her evidence only seeking to do so at the very late stage when the court asked her about it. It appears to me that if the plaintiff was not being truthful on this issue, it is highly unlikely that this evidence would not have been vehemently challenged, especially bearing in mind the respective parties’ apparently entrenched positions that the other is not suitable to be the custodian parent of the minor children. As it turns out this is the same child whom the defendant alleges is being manipulated or used by the plaintiff, in his alleged desire to turn the children against her, to spy on her. I am inclined to find that the plaintiff must have been telling the truth when he said that the defendant asked him to find a place for the child in a school in Harare. The defendant did not express any aversion to the idea.

In *Marimba* v *Marimba* 1999 (1) ZLR 87 at 93A – B GILLESPIE J stated:

“... the alleged misconduct of one or other party might be advanced in support of the proposition that that party is not fit to be a custodian of minors. Reluctant as the courts are to delve into the general issue of marital misconduct, they will not shrink from the task if it will assist in determining the best interests of the children.”

When faced with the task of determining the question of custody, the courts are guided by the best interests of the children which interests are, as stated in many case authorities, paramount. In *S* v *W & Anor* 1998 (2) ZLR 1 it was said at 8C by CHINHENGO J in that

“the interests of minor children must be viewed dispassionately and separately from the interests of the parents.”

In *casu,* the three minor children have all been in the custody of the defendant since the defendant moved out of the matrimonial home in January 2008. It is common cause that the Juvenile Court gave the custody of the children to the defendant with the plaintiff being accorded unlimited access to them. It however appears that the plaintiff has not always been afforded such access by the defendant resulting in the pre trial judge intervening at some stage to ensure that the plaintiff was afforded access. During the period after the reservation of judgment there has been correspondence between the parties and copied to this court emanating from the plaintiff’s failure to exercise his rights of access due to alleged frustration thereof by the defendant. At this juncture I might comment that this conduct is frowned upon by the court as it is not conducive to the maintenance of law and order and is also likely to have a negative impact on the children who must be spared any further trauma than they must have already suffered. There seems to be bitter acrimony between the parties. This tended, at various times, to permeate through their respective testimonies and is undoubtedly bound to have an effect on the minor children.

The children have been in the defendant’s custody since 2008 and have been living with her presumably in Marondera for the longer part of the period. They are attending schools in Marondera. The plaintiff lives in Harare. He is likely to move on with his life. In the event of him establishing another relationship or marriage with another woman, the children will have to adjust and establish a relationship with her after having been wrenched from an established set up in which they have been living with their biological mother and with their father exercising rights of access to them. Thus for the children to be now placed into the custody of the plaintiff would entail another major upheaval in their lives at a time when they are already in an established routine that ensued after the earlier pattern of their lives that prevailed before the separation but was also later upset by their parents’ separation. They would have to change schools and leave the schools where they are already settled in, make new friends and adapt to a new environment. The allegations of misconduct on the defendant’s part do not *per se* indicate that the best interests of the children would best be served by placing the children in the plaintiff’s custody. The Social Welfare reports, albeit one being said to be the main report, are unfortunately not in accord on the issue of the parent in whose custody the minor children’s interests would best be realised. Both parents have been found to be suitable depending on which of the two reports one has regard to. As it turned out, the Social Welfare or Probation officers who compiled the respective reports each prepared their report after interviewing persons at and visiting the home of the one party and not the other as well. In my view neither report can be exclusively relied upon. Yet neither report can, nor should be discarded completely.

The defendant’s unexplained failure to respond specifically to the various issues and incidents on which the plaintiff gave clear, specific and on the face of it damning evidence against her and which were alleged to have occurred whilst the parties were still living together in the matrimonial home, might be viewed as tending to lend credence to the plaintiff’s “damning” allegations and to place her in bad light. It gives an impression of a party who is not being candid with the court on all material issues. Among the numerous “damning” allegations made against her by the plaintiff was the allegation that during the period when the plaintiff’s employment base was in Bulawayo, the defendant would reportedly leave the children at the matrimonial home for days, as soon as the plaintiff left for Bulawayo after the weekend at home. Another related to an alleged 11 weeks pregnancy of the defendant, knowledge of whose existence the plaintiff stumbled upon in the form of an ultrasound scan of the pelvis report on an examination done on the defendant on 2 November 2005. A further report of an ultra sound scan of the pelvis done on 18 November 2005 indicated that the uterus was bulky with retained products of conception, apparently an indication that the pregnancy had later aborted. The plaintiff also produced a birth certificate which he said was proof that the defendant had given birth to a child from the adulterous affair during the intervening period spanning from the postponement of the trial in 2010 to its resumption in 2012. The defendant’s explanation was that although she was recorded as the mother of the child on the birth certificate, the child was in fact borne of her brother with a woman who is currently in the United Kingdom. She did not however explain why the biological mother of the child was not properly recorded as such. She did not explain why the birth certificate was blank on the space provided for the child’s father’s name yet her evidence was that the said father was known and was in fact her brother. It is not intended to enumerate all the allegations made against her. The fact remains however that the defendant has not favoured the court with any meaningful or substantive responses in relation to each and every such allegation and for many of which the plaintiff produced documentary evidence. Where explanations have been purported to be given she has given rather scanty information in circumstances where a full explanation would be expected and she has not convinced the court that she was being fully candid with it. In light of the defendant’s silence and or lack of candour, the plaintiff’s contention that due to the extent of her marital misconduct the defendant ought not to be made a custodian parent is understandable. The law however, enjoins the court to be guided by the interests of minor children. In my view it would however only be proper or justified for the court to accede to the plaintiff’s claim in this regard if there is proof that the alleged marital misconduct is negatively impacting on the welfare of the minor children. Both Social Welfare reports do not reveal such a situation. My analysis given earlier in this judgment is to the effect that the best interests of the children do not favour the disruption of the *status quo* insofar as their custody is concerned.

The plaintiff has also contended that the fact that the eldest child is now reportedly a rude child is all due to the defendant’s misconduct. It remains a contention. There is no clear indication that that is so. It may very well be that as the eldest child he, more than the other two, would have been more exposed to the effects of the marital disharmony that is evident from the evidence of the respective parties. In her plea the defendant averred that the cause of the breakdown of the marriage was that the plaintiff was abusive to her and to the minor children. In her evidence she gave details of the abuse towards herself and also some detail mostly insofar as it related to the eldest child rather than to the other two. There is no evidence that the help that the eldest child might need would necessarily be realised by placing him into the plaintiff’s custody. It is however trite that in the determination of the question of custody of minor children, it is the interests of the children that are paramount. I have not perceived any indication in any of the Social Welfare reports that the children’s interests have been or are being compromised by their being in the custody of the defendant. The placement of the eldest child in a boarding school in Harare which the parties have already mooted would appear to me to be a viable additional option in the circumstances.

It remains my view that for the reasons that I have indicated or discussed above it would be detrimental and prejudicial to the children’s interests for their custody to be interfered with and now be awarded to the father. It is my finding that the interests of the children would be best served by their custody being awarded to the defendant. This will prevent unnecessary disruption of the children’s lives and routines. I am mindful of the undesirability of separating children. See the *Marimba* case (*supra)* at 94E*.* I therefore wish to clarify that while the eldest child may be placed in a boarding school in Harare, he will however remain in the custody of the defendant, as the two younger siblings. The plaintiff is entitled to reasonable access. He will be afforded and granted right of access to the minor children for half of every school holiday and every alternate major public holiday as well as every alternate exeat or fixture free weekend.

Regarding maintenance the defendant’s stance was that if the court awarded custody to her, it would be just for the plaintiff to be ordered to continue paying the children’s educational and tuition fees, purchase all their uniform requirements and also to pay a sum of US$100 per child per month for eventualities including school functions at which the children are required to pay various amounts of money. The plaintiff on the other hand contends that in the event that custody is awarded to the defendant, it would be just and equitable that he be ordered to continue paying the children’s school fees and other school related extra mural activities at primary, secondary and tertiary levels whilst she is ordered to be responsible for the children’s food and groceries only. He also contended that there would be no basis for the court to order him to pay the claimed amounts of US$100 per child per month as the defendant who is also gainfully employed, did not furnish the court with any list of expenses in support of the claimed amounts.

Both parents in this matter are gainfully employed. They each have a duty to maintain their minor children. The plaintiff has in my view made a very reasonable proposal as to how their joint responsibility of maintaining the children may be divided between them. I take note at this juncture that after the defendant moved out of the matrimonial home with the children, for several months, seven as the plaintiff said, the plaintiff had no idea where she had taken the children to. She managed on her own and only surfaced in court, after the plaintiff had, pursuant to obtaining the leave of the court, published a notice of set down on the unopposed roll for the court to grant him an order of divorce and other ancillary relief. She then appeared in court and subsequently contested the plaintiff’s claims. The plaintiff has not shown any reluctance to provide for the children. I have already found to be reasonable the proposal made in his closing submissions. I have no hesitation in acceding to it. It appears to me that it would be just and equitable that the plaintiff be made responsible, as he has proposed for the children’s educational and tuition fees at primary, secondary and tertiary levels while the defendant would be responsible for the children’s food and groceries. She should also in my view, continue to be responsible for the replacement of lost uniforms; she testified that she has always been the one so responsible.

With regard to division of the matrimonial home, the plaintiff contends that due to the extent of the defendant’s marital misconduct, an award of a 50% share to her would not be justified. He contends that the court should award him sole ownership of the immovable property, Stand 1790 Mainway Meadows, Prospect, Waterfalls. The defendant on the other hand counterclaimed for a 50% share in the immovable property. The plaintiff alleges that he bought and developed the stand solely from his resources and without any contribution by the defendant. The defendant on the other hand alleges that the stand was purchased with the money that was given to the two of them as wedding gifts. She alleges that she also accessed loans from the Metropolitan Bank which monies were used to finance finishing touches to the property. She further alleges that in any event whilst the plaintiff’s salary was mainly focused on building, her salary was used to meet family needs like groceries, clothes and paying for domestic help. She said that she would also supervise and check on the building project.

The first aspect that presents is that the immovable property is registered in the names of both the plaintiff and the defendant. They are co owners. In *Takafuma* v *Takafuma* 1994 (2) ZLR 103 at 107, KORSAH JA’s statement in *Ncube* v *Ncube* S 6/93 at pp 9-12 of the judgment was cited with approval to the following effect:

“It is incorrect to say that the appellant as a registered joint owner is not entitled to a half share of the value of the ... property because she did not contribute money or money’s worth towards the acquisition of the property. As a registered joint owner she is in law entitled to a half share of the value of that property.”

In the *Marimba case* (*supra*) GILLESPIE J stated at 94B-C:

“The principle may thus be stated: in its overall effort to order a fair division of assets or of maintenance, the court may permit considerations of the conduct of the parties to affect the final order to the extent to which that would be just. What is just in any case is left to the judicial discretion of the court, it may generally be said, however, that it is never just to penalise a person for an unhappy marriage. Only serious cases of predominantly one-sided misbehaviour will be permitted to influence the order that would otherwise have been based on considerations excluding the question of misconduct.”

 The Matrimonial Causes Act, [*Cap 5:13*] provides the following in s 4 regarding the order that a court may give in the division, apportionment or distribution of the assets of spouses:

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

1. the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
2. the financial needs, obligations and responsibilities which each spouse and

child has or is likely to have in the foreseeable future;

1. 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;

1. 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 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.”

In *casu,* the parties are both gainfully employed. Their children are still of school going age. Presumably, they will still be in school at various levels for many years to follow. The plaintiff is thus likely to continue to bear the heavier financial brunt of the burden of maintaining them for as long. The burden should eventually and gradually lessen at different intervals as the individual children become of age or self supporting. The defendant’s contribution to the maintenance of the children, though equally important is not as financially exacting as that of the plaintiff. The plaintiff proceeded to singularly make further developments on the matrimonial home after the defendant’s departure. The parties settled the division of the movable assets before this trial. I am thus not in a position to make any comment thereon regarding any possible effect that might have had on the proper division of the immovable property. I am of the view that I can properly take judicial notice of the fact that residential properties are more expensive in Harare than they are in Marondera. At law, the defendant as a registered joint owner is entitled to a half share of the immovable property. Whilst the immovable property must be shared between the two spouses, it appears to me that *in* *casu* the preponderance of factors indicating that a larger share ought to be justly and equitably awarded to the plaintiff is undeniable. This is so especially in consideration of the court’s endeavour as far as is reasonable and practicable and, having regard to their conduct, to the extent that it 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. In addition, by reason of her lack of candour with the court coupled with the recognition of the defendant bearing the greater financial burden for a considerable period in the future, I find that this a proper case for the court to take away from the defendant a substantial portion of her 50% share and award it to the plaintiff. I am also inclined this way, in view of the evidence adduced by the plaintiff relating to the defendant’s behaviour which was so blatantly inconsistent with any desire on her part for continuation of a marital relationship, to deduct a substantial portion of her 50% which will be awarded to the plaintiff. In my view 25% of the defendant’s 50% share in the matrimonial home may justly and equitably be awarded to the defendant. Such a distribution would meet the justice of this case.

In the result:

It is ordered:

1. THAT a decree of divorce shall issue.
2. THAT custody of the minor children E, M and N be and is hereby awarded to the defendant.
3. THAT the plaintiff shall be entitled to access to the minor children as set out below:
	1. the plaintiff may have the minor children stay with him
		1. for half of every school holiday
		2. every alternate major public holiday
		3. every alternate fixture-free weekend
4. THAT the plaintiff shall contribute to the maintenance of the minor children:
	1. by paying all school fees at primary, secondary and tertiary levels
	2. by purchasing all the uniform requirements for the minor children
	3. by paying for the minor children’s medical and dental requirements as and when necessary.
5. THAT the defendant is hereby awarded 25% while the plaintiff is awarded 75% of the net value of the immovable property situated at Stand 1790 Mainway Meadows, Prospect, Waterfalls, Harare.
	1. if the parties cannot, within 10 days of the date of this order agree on a valuator, the Registrar shall appoint a valuator.
	2. The valuator shall as soon as possible value the property and if there are any outstanding obligations, shall indicate the value thereof
	3. The costs of valuation shall be borne by both parties with the defendant paying 25% thereof and the plaintiff the other 75%.
	4. The plaintiff shall pay to the defendant within twelve (12) months of the date of this order 25% of the net value of the property.
	5. If the plaintiff fails to comply with para 5 d above, the property shall be sold to best advantage on the open market and the parties shall share the proceeds according to the percentages awarded to them above.

*Debwe & Partners*, plaintiff’s legal practitioners

*Mabuye Zvarevashe*, defendant’s legal practitioners