IN THE HIGH COURT FOR ZAMBIA **2019/HP/A026**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL APPELLATE JURISDICTION)

BETWEEN:

JULIUS SIBANDA **APPELLANT**

AND

FLAT MOOYO **RESPONDENT**

Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Appellant: Mr. C. Ngoma and Mr. W. Kayope, of Messrs Simeza, Sangwa & Associates.

For the Respondent: Mrs. P. K. Chibwe, National Legal Aid Clinic for Women.

J U D G M E N T

Cases referred to:

1. ***Emmanuel Mponda v Mutale Chisanga Mponda (SCZ Appeal No. 199 of 2015).***
2. ***Lizzy Musauka v Mpasi Solomon Dube (SCZ Judgment No. 64 of 2017).***
3. ***Anne Scott v Oliver Scott (2007) Z.R. 17.***
4. ***Meamui Georgina Kongwa v Kekelwa Samuel Kongwa (CAZ Appeal No. 3 of 2016).***
5. ***Naomi Imasiku v Tendai Mwamba Chaiwila (2019/HPF/D.248)*** *unreported.*
6. ***Wachtel v Wachtel [1973] 1 ALL E.R. 829 at 838.***
7. ***Violet Kambole Tembo v Lastone Tembo (SCZ No. 8 of 2004).***
8. ***Sanikonda Phiri v Elestina Zulu (2012) 3 Z.R. 441 at 443.***

9. ***Fabian Ponde v Charity Bwalya (SCZ Appeal No. 51 of 2011).***
10. ***Chibwe v Chibwe (2001) Z.R. 1.***
11. ***Attorney General v Marcus Kampumba Achiume (1983) Z.R.1.***
12. ***Calder Bank v Calder Bank [1975] 3 ALL E.R. 333.***
13. ***Nkhata v Nkhata (SCZ Appeal No. 60/2015).***

Legislation & other Materials referred to:

1. ***The High Court Rules Chapter 27 of the Laws of Zambia.***
2. ***The Constitution of Zambia (Amendment) Act No. 2 of 2016.***
3. ***The Local Courts Act Chapter 29 of the Laws of Zambia.***
4. ***The Subordinate Courts Act Chapter 28 of the Laws of Zambia***
5. ***The Children's Code Act No. 12 of 2022.***

1.0 INTRODCUTION

1.1 This judgment concerns an appeal by Julius Sibanda, the Appellant, against the decision of the Subordinate Court presided over by the Resident Magistrate sitting at Lusaka. The matter emanated from Chelstone Local Court in which the Appellant appeared as the Defendant and the Respondent, Flat Mooyo, appeared as the Plaintiff.

1.2 The Respondent took out a matter in the Local Court for dissolution of the marriage thought to have been contracted under African customary law namely, Ndebele customary law. The marriage was dissolved on December 22, 2017.

1.3 In respect of custody, the Local Court ordered that the Appellant was to have custody of the first and second born children, and the Respondent was to have custody of the youngest child.

1.4 And as regards maintenance, the Appellant was ordered to provide maintenance for the youngest child in the sum of K250.00 per month, while the Respondent was entitled to a lump sum of K25,000.00.

1.5 Regarding property settlement, the Local Court without much certainty and particularity adjudged as follows:

> ***Plaintiff to have a farm in Chisamba, [and] plot on title.... Defendant to remain with the house and the car, parties to share the cattle equally.***

1.6 The Respondent was in part dissatisfied with the judgment of the Local Court and appealed to the Subordinate Court. Equally, the Appellant appealed, challenging all the orders made in favour of the Respondent. Essentially, arguing that the Respondent was not entitled whatsoever to custody, maintenance, and property settlement under Ndebele customary law.

1.7 The presiding Magistrate heard the matter *de novo* and rendered her judgment dated August 24, 2019, resolving as follows:

> ***In this case therefore it is clear that the properties were acquired whilst in marriage. It is proper that each one gets a share. However, I note that the two houses are on one plot and will be difficult to be shared between the parties. For this reason I order that the two houses on one plot to be valued by an independent evaluator. Thereafter, a party with capacity to buy of the other by giving the other half***

the amount of the evaluation within 3 months from the date of this judgment. If nothing will materialize after three months I order that the said property be sold by the Clerk of Court and proceeds to be shared equally. Further, I order that the Tenants in the two houses to be paying their rentals into Court and the same to be shared equally between the Appellant and Respondent by the Clerk of Court effective September, 2018 until such a time that the property will be sold.

I further order that the Respondent *[Julius Sibanda]* ***gets farm Plot No. CHIBO/144179, a RAV 4 Vehicle and 4 x animals. While the Appellant*** *[Flat Mooyo]* ***gets a plot in Kapopo area, a plot in 10 Miles and 4 animals.***

Secondly, coming to compensation....For compensation I will interfere with the Local Court's order and reduce it to K15, 000.00 to be paid in monthly instalments as ordered by the lower Court.

Thirdly for maintenance of the Appellant [Flat Mooyo], I note that the parties are divorced and there is no reason as to why the Respondent *[Julius Sibanda]* ***must maintain the Appellant. fourthly on custody of children, ... In this case I note that the two children aged 9 and 7 years are children of tender years who still need the care of the mother. Further, that one of them is physically challenged. The Respondent and his witness told Court that the Respondent is a truck driver and most of the times the children are looked after by DW2. Further it is clear that the Appellant who is the mother is still alive. It is a reality that DW2*** *(new wife)* ***cannot be compared to the Appellant in terms of care for the Children .... The custody of all the three children to the Appellant. Further I order maintenance of K300.00 per child per month effective month end September, 2018 and to be paid into Court.***

1.8 It is the above decision which the Appellant, Julius Sibanda, now assails on the following grounds of appeal.

1. ***That the lower Court erred in law and fact when it held that the Respondent should have custody of all the three children of the family.***
2. ***That the lower court erred in law and fact when it held that the two houses being the matrimonial house and the house on rent, built on one plot, be valued and thereafter the party with capacity buys off the other by giving them half its value.***
3. ***That the lower Court erred in law and fact when it held that the Respondent gets Plot No. CHIBO/144179, Chibombo together with the plot in 10 miles.***
4. ***That the lower Court erred in law and fact when it held that the parties share 4 cattle each in total disregard of the evidence on record.***

2.0 THE HEARING

2.1 The record of appeal upon which the appeal was constituted was settled in terms of Order LXVII of the ***High Court Rules Chapter 27 of the Laws of Zambia***. And in terms of Order LXVII rule 18, which allows production of fresh evidence, by consensus of the parties and approval of the Court, the parties were allowed to adduce fresh evidence as summarized here-below.

3.0 THE APPELLANT'S CASE

3.1 The Appellant, Julius Sibanda testified as Appellant Witness number one (AW1). He stated that he was a truck driver and father of three with the Respondent: John Sibanda aged thirteen (13) years, Joe Sibanda aged twelve (12) and Juliet Sibanda aged seven (7).

3.2 He said post the judgment of the court below, his eldest son, who was living with the Respondent relocated from the mother to live with him and was still in his custody. He said the other two remained with the Respondent. He complained that he was denied access to the other two. He said the only time he had access to Joel, a child with special needs (deaf), was when taking him to school. He said he was aggrieved by the fact that the other two children were in the custody of their mother. He said he felt unease with the said arrangement, because most of the time, the children were left alone at home, and the Respondent would only return at night from her business.

3.3 Regarding financial obligation to the children, he said he was solely responsible for the all the children's school needs. He added that he was spending K280.00 on transport on a daily basis to take Joel to and from school in Buseko. He wondered how he was to fulfil this obligation, now that the children and their mother had relocated to 10 miles. He said he paid school fees for Juliet, the youngest in the sum of K3, 600.00.

3.4 He asserted that, the foregoing placed him in a better position to have custody of all the three children. He opined that, the growth of children without the father was invariably defective.

3.5 And in respect of property settlement/adjustment, he made reference to properties the subject of contention. Firstly, he said Lot No. 24602/M (Zani Muone) was in his name, and he exhibited the Certificate of Title dated June 27 2012. He said the property at Zani Muone has three houses, and one was previously used as the matrimonial home with the Respondent,

and two flats put on rent. He said rentals realized from the said properties was: the main house K2, 500.00 per month, and K2, 400.00, from the two flats. He said total rent received was K4, 900.00, per month, of which K1, 200.00 was given to the Respondent, in compliance with the directive of the court below.

3.6 Secondly, he said the bare plot at 10 miles bearing Lot No. Chibo/1449179 granted to the Respondent belonged to him, and he exhibited the Certificate of Title in his name dated June 28, 2017.

3.7 Thirdly, he said in Kapopo, he and his sister Judith Sibanda acquired a property in 2008. He made reference to a letter of sale between Vincent Ndalama (vendor) and Julius and Judith Sibanda (buyers) dated 26/09/16. He said the property was acquired after his sister was chased from her matrimonial home.

3.8 He denied the alleged existence of a farm in Chisamba.

3.9 He said he and the Respondent were married under Ndebele customary law. He said he was charged seven cattle by his in-laws, and paid a cow at the time of marrying. He added that, as time went by, he bought three cattle from his in-laws, which later reproduced and the number accumulated to eight. He explained that from the eight, he gave six to his in-laws to complete the bride price/lobola, and the remainder two (2), one got injured and was sold, and the other was given to a herder at his instruction, but his in-laws kept it in trust for the grandchildren.

3.10 According to him, he was not indebted to his in-laws in terms of bride price/lobola. He said this state of affairs traditionally justified his claims to have absolute custody of the children and exclusive ownership of his properties registered in his name.

3.11 He explained that under Ndebele customary law, *lobola*/bride price was only paid when children were born. And that even after divorce, children are considered to be his. He said it was for this reason bride price was paid. He added that after divorce a woman only left her matrimonial home with her personal clothes and kitchen utensils.

3.12 He said he was better placed to have custody of the children than the Respondent, because the Respondent was more at her business at the market, than at home. And in his case, he admitted that he was an international truck driver, and usually away from home.

3.13 He said his current wife, a first cousin to the Respondent, was not in good terms with the Respondent.

3.14 He also stated that, there was another property at 13 Miles, acquired in 2020, where he built a house together with his current wife, Prisca Khutamisa (AW4).

3.15 AW2 was Vincent Peter Mooyo, the elder brother to the Appellant. He said the parties hereto were his younger siblings. He said the two were married under Ndebele customary law, and that when *lobola* is paid, it meant that the children belong to the man. He said under Ndebele customary law, there is no divorce, unless by death or one commits adultery.

3.16 He said since divorce was not allowed, an individual that files for divorce would get nothing in terms of property settlement, irrespective of gender. According to him, their custom was unchangeable, and the Respondent was not entitled to a share in the family assets, even though the lower court did not agree with the said culture/custom.

3.17 AW3 was Prisca Khutamisa, the current wife to the Appellant and cousin to the Respondent. She said she got married to the Appellant on August 7, 2019, with one child named Joy Sibanda, aged 2 years 8 months. Her testimony was basically to support the Appellant's desire that he should have custody of the children.

3.18 She said, the Respondent and she, have not been in good terms since she got married to the Appellant. And the first incidence she made reference to, among others, was when Joel got burnt on the back in 2020. And the second one was a fight they had at a kitchen party in 2022 over custody of the children, where the Respondent asserted her right that she could not be stopped by her from visiting her son, John Sibanda.

3.19 AW4 was John Sibanda, a child witness, the first born son to the Appellant and the Respondent. Before he testified, there was debate at the court's own motion whether it was in the interest of the child to testify against one of his parents. The calling party (the Appellant) strongly felt that he should testify, and he was allowed to testify. In any case, it was unavoidable to hear his opinion regarding his preferences.

3.20 The full testimony of AW4 recorded verbatim is on the record. In the interest of confidentiality aimed at protecting the best interest of the child, I will not labour to summarize the same in this judgment, suffice to state that, the child was more desirous to be with the father than the mother. And for the avoidance of doubt, my determination will be based on the totality of the evidence, and the entire record of appeal.

4.0 THE RESPONDENT'S CASE

4.1 The Respondent testified and called no witnesses. She said she got married to the Appellant in 2008 in Matero and they divorced in 2017. She said during the subsistence of the marriage, she used to cultivate popcorn at her father's farm in Chipembi area. And the money realized from the farm was used to buy plots and cattle. She said proof to justify her contribution was the fact that, she was in marriage with the Appellant at the time the properties were acquired.

4.2 She said they acquired the property in Zani Muone in 2011-2012 in the name of the Appellant. She said on that property, they built a three bed roomed house and two flats secured by a wall fence.

4.3 She said they also acquired the plot on title at 10 miles purchased around 2013 – 2015.

4.4 She said they also acquired the plot in Kapopo, not on title, but purchased around 2014-2015. She added that in 2012, they acquired traditional land in Chisamba District. She said she heard that this farm was sold post judgment.

4.5 She said they had a motor vehicle RAV 4 registration mark ABK 5206 acquired in 2014, including eight cows. According to her, the Appellant got four cattle, and gave them to her father as bride price; got two which belonged to her and sold them; one he gave to someone, and reserved one for the children. She said she complained to her father not to interfere with the cattle because of the court pending 'documents', but her father did not heed to her advice.

4.6 Regarding distribution of properties, she proposed that, the Zani Muone property, be sold and the proceeds thereof shared equally. The property at 10 miles and the one in Kapopo should be given to her, while the Appellants retains the motor vehicle and the Chisamba farm. And that for properties already sold by the Appellant his share be discounted from the remainder.

4.7 And as regards custody of the children, she resisted granting custody of all the children to the Appellant, but argued that she should continue to have custody of the two younger children, while the Appellant may have custody of the first born, given the interim wishes of her first son. She said the Appellant ill advised the children, in particular her first born to resist her instructions whenever assigned certain chores. She said, she was never reluctant to whip the first born, John as a way of repairing his flaws.

4.8 She added that, the Appellant was never at home to have custody of the children, and that she was not in good terms with the Appellant's wife. She said, she was hurt by the fact that the

Appellant married her 'sibling'. She considered this to be abnormal.

4.9 She said the financial support from the Appellant was not adequate. She said since she was generating income, she was managing to meet certain needs of the children, such as buying school uniforms and adding up on the shortfall of school transport cost. She added that, as for the special needs child, she was "doing all the school things". She explained that she had two restaurants generating total income of K21, 000.00 per month.

5.0 THE APPELLANT'S SUBMISSIONS

5.1 The Appellant's Counsel argued the appeal ground by ground, and I will equally follow that order in my summary.

5.2 In relation to ground one, concerning custody of the children. It was acknowledged that, at the core of this appeal was whether the court below objectively determined the issue in line with the interest of the children. Citing authorities, in particular the case of ***Emmanuel Mponda v Mutale Chisanga Mponda***[1] it was argued that, in making an order for custody, the best interest of the child was of foremost consideration. And that the Court must guard against breaking the established bonds a child has grown accustomed to. That coupled with the Ndebele customary law, the Appellant should be granted custody.

5.3 Alleged cons militating against the grant of custody to the Respondent were listed in the submissions, e.g.: that the Respondent was moody and had no family time with the children of the family; and that the Respondent was without a

maid, and the children were left unattended to, while she was at her restaurant business.

5.4 And pros supposedly favoring the Appellant were also stated: that the Appellant provides for the children's needs, and that he was living with people to adequately take care of the children. It was argued that, an order of custody to the Appellant, would secure the best interest of the children by returning them to a familiar environment, and restore the life they enjoyed prior to the divorce. And that there will be more resources available to the children.

5.5 In ground two, the Appellant challenged the lower court's order for the sale of the Zani Muone houses and to share the proceeds thereof. It was argued that, the lower court erred in law and fact, by making an order only favourable to the Respondent, and disregarded the best interest of the children of the family. The case of ***Lizzy Musauka v Mpasi Solomon Dube***[2] was vouched, wherein it was held:

> ***The primary consideration on property settlement after dissolution of the marriage, whether statutory or customary , is that the settlement must take into account all the circumstances of the case in order to meet the justice of the situation without apportioning blame or misconduct on either party.***

5.6 And the Court went on to guide that:

> ***As long as the property qualifies to be family property, the actual legal title in the capital asset is not a material consideration. Whether the house is registered in the wife's name is not a determinative factor any more that it would if the house was registered in the husband's name. What the Court***

looks at is the totality of the family assets. As stated in the case of *Chibwe v Chibwe (2001) Z.R.1,* ***items acquired by one or the other or both parties in a marriage with intention that these should continuing provision for them and the children during their joint lives should be for the benefit of the family as a whole.***

In this case, there are four children of the family which appear to have been completely sidelined in the settlement that was ordered by the Court below. As we have stated above, upon sale of the houses these children will have no claim to any house and in the event their parents squander the proceeds from the sale of the houses, they could be rendered destitute. In any property settlement after divorce, whether in a customary of statutory marriage, the interest of the children of the family must be considered.

5.7 It was, therefore, argued that the order for sale of the Zani Muone property or houses would be contra to protecting the best interest of the children in terms of lifeline support, and make it practically difficult for the Appellant to support his children from his meagre salary of K5, 000.00 per month. Additionally, it was submitted that, Ndebele customary law was favourable to the Appellant, in the sense that, the Appellant was entitled to all the properties after divorce, because the Respondent is the one that petitioned for divorce.

5.8 In relation to ground three, it was submitted that, the trial court erred in law and fact when it awarded Plot No. CHIBO/144179, to the Respondent. According to Counsel, the court below failed to take into consideration an established and rebuttable presumption that property purchased by a spouse with his or her own money, is solely for that spouse to the exclusion of the

other spouse. The case of ***Anne Scott v Oliver Scott***[3], was cited wherein the Supreme Court held:

> ***The respondent has consistently asserted that he bought the Olympia Park stand for his son, Jerome, which fact he says was well known to the appellant. We shall give him the benefit of doubt on the principle that, any property purchased by one spouse with his or her own money will presumptively belong exclusively to the purchaser (per Bromley's Law, 5th Edition, at page 447). We order that the Olympia Park stand shall continue to be property of the respondent for the benefits of his son, Jerome. Our considered view is that the presumption that the stand was bought for Jerome has not been rebutted to our satisfaction.***

5.9 And Counsel observed that the above principle was cited with approval in the case of ***Meamui Georgina Kongwa v Kekelwa Samuel Kongwa***[4] where the Court of Appeal held:

> ***In casu, the Kalundu house was registered in the Appellant's name after an outright purchase. She is therefore the legal owner of the Kalundu house. The Respondent has to rebut the presumption that the house belongs exclusively to the Appellant to the Court's satisfaction in order to have a beneficial entitlement....***

5.10 I was urged to hold that the subject plot presumptively belongs to the Appellant, to the exclusion of the Respondent. And that the Respondent failed to adduce evidence to prove that she financially contributed to the acquisition of the property apart from mere marital status. The same argument was extended to the Kapopo farm, and it was contended that the property was for the Appellant and his sister Judith Sibanda.

5.11 In relation to ground four, it was argued that the trial Court erred in law and fact when it held that the parties share four (4) cattle each. It was contended that the order was not supported by evidence, because the evidence on the record showed that, the cattle was no longer the property of the Appellant, but the Respondent's relatives.

6.0 **THE RESPONDENT'S SUBMISSIONS**

6.1 On the issue of custody of the children, Counsel for the Respondent, Mrs. Chibwe, equally citing the case of ***Emmanuel Mponda***[1] argued that the respective best interest of the children was of primary consideration. In addition, the case of ***Naomi Imasiku v Tendai Mwamba Chaiwila***[5] was cited wherein the Court held:

> ***In considering the custody of children, be mindful that its welfare is paramount importance, a Court must consider the child's happiness and wellbeing, their social and educational influences, their psychological and physical material surroundings all of which go towards their true welfare. These must be considered along with the conduct of parents as they are influential in the life of the child and their welfare. However, the welfare of the child is the chief consideration. All these other considerations are subordinate.***

6.2 It was observed that the children were still young and needed motherly care, and that it was not in the best interest of the children to be left in the custody of the Appellant, coupled with the fact that, the Appellant was a frequent traveler, whereas the Respondent was a domiciled business woman.

6.3 It was further noted that, the children have been in the custody of the Respondent since the marriage was dissolved, and given their ages, they have bonded well with the Respondent.

6.4 And in relation to property settlement/adjustment, and as to what constitute the meaning of family assets, the case of ***Wachtel v Wachtel***[6] was cited, in which family assets were defined to mean:

> ***Items acquired by one or the other of the parties married with the intention that these (items acquired) should be continuing provision for them and the children during their joint lives and should be for the use or benefit of the family as a whole.***
>
> ***The family property includes those capital assets such as matrimonial home, furniture, and income generating assets such as commercial properties. Under this section a party to divorce proceedings, provided he/she has contributed either directly or in kind (that is looking after the house) has a right to financial provision. The percentage is left in the court's discretion. In exercise of that power the court is statutorily duty bound to take into account all circumstances of that case.***

6.5 It was argued that the properties in issue were all acquired during the subsistence of the marriage. According to Counsel, income used by the Appellant to acquire the properties was meant for the welfare of the family, with the intention of bettering the livelihood of the family as a whole.

6.6 It was submitted that the meaning of "intention" with regard to property settlement was given context in the case of ***Violet Kambole Tembo v Lastone Tembo***[7] wherein it was held:

The court looks at the intention of the parties and their contributions to the acquisition of the matrimonial property before a settlement is made. If their intention cannot be ascertained by way of an agreement, then the court must make a finding as to what was going on in their minds at the time of the acquisition of the property.

6.7 And the case of ***Sanikonda Phiri v Elestina Zulu***[8] was also cited, where it was held:

That in matrimonial cases, assets have to be allocated by the Court to the parties upon dissolution of a marriage. It is in this regard that the revenue producing assets also have to be allocated to both parties upon dissolution.

6.10 After citing the above cases, it was submitted that all the properties listed herein were acquired during the subsistence of the marriage and must be shared equally.

7.0 THE APPELLANT'S ARGUMENTS IN REPLY

7.1 In reply, the Appellant's Counsel contended that, not all the properties mentioned herein were amenable to property settlement. According to Counsel, the only properties amenable to adjudication on appeal were: the Zani Muone property, the bare land in Chibombo at 10 miles, the land in Kapopo and the sharing of cattle. The Appellant's Counsel, basically reiterated their earlier submissions, and urged me to allow the appeal.

8.0 DETERMINATION

8.1 I have carefully considered the fresh evidence adduced by the parties, the record of appeal, and the arguments for and against the appeal.

8.2 The parties were married pursuant to their Ndebele customary law in 2008. And during the subsistence of their marriage, three children were born namely, John Sibanda (male), Joel Sibanda (male) and Juliet Sibanda (female).

8.3 And following some irreconcilable differences between the parties, the Respondent successfully petitioned for dissolution of the marriage in the Local Court, and on, February 7, 2017, the marriage was dissolved. The ground informing the decision of the Local Court to dissolve the marriage was and has never been in contention in the two tier appeal progression. The appeal from the decision of the Subordinate Court relates to custody and property settlement/adjustment.

8.4 An argument was advanced that under Ndebele customary law, the Respondent is not entitled to anything acquired during the marriage, be it custody of the children or a share in the family assets excerpt her personal apparels and kitchen utensil. The literal and perhaps uneven handed enforcement of this culture, tradition or custom as postulated by the Appellant and AW2, would entail that the Respondent would literally walk out of the broken marriage a destitute, probably more indigent than she entered into the marriage.

8.5 Enforcement of the said custom which wholesomely deprives a spouse of any entitlement to custody of the children or/and property sharing after divorce must be tested against the provisions of Article 1(1) of the ***Constitution (Amendment) Act No. 2 of 2016***, which provides:

This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.

8.6 The Constitution under the sacrosanct Bill of Rights confers on the Respondent constitutional freedoms, liberties, and rights, in particular, protection from discrimination on account of gender, and gender bigotry. Protection in this regard was *ab initio* rooted from the court of first instance up to the apex of the judicial hierarchical system. Section 12(1) of the ***Local Courts Act Chapter 29 of the Laws of Zambia*** provides:

> ***Subject to the provisions of this Act, a local court shall administer:***
>
> > ***(a)the African customary law applicable to any matter before it in so far as such is not repugnant to natural justice or morality or incompatible with the provisions of any written law;***

8.7 Similar provisions are to be found in section 16 of the ***Subordinate Court Act Chapter 16 of the Laws of Zambia***, which provides:

> ***Subject as hereinafter in this section provided, nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia. Such African customary law shall, save where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in civil causes and matters***

where the parties thereto are Africans, and particularly, but without derogating from their application in other cases, in civil causes and matters relating to marriage under African customary law, and to the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in civil causes and matters between Africans and non-Africans, where it shall appear to a Subordinate Court that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than African customary law:

8.8 It was, therefore, unfounded for the Appellant and his likeminded witness, AW2 to register disquiet that the Local Court and the Subordinate Court disregard the parties' culture by granting the Respondent some measurable relief out of the divorce proceedings contra to Ndebele customary law.

8.9 I reckon with a hint of conventional wisdom, when African customary law asserts that payment of bride price implies that children belong to the father in a patriarchal society, I do not think that after divorce, enforcement of such a custom or culture is meant to unwisely or completely obliterate a mother's natural rights, duties or access to a child. But, in my considered opinion, that should be taken as a seal of family headship and a mark of unflinching responsibility to the family. Assuming a child is an infant, in need of motherly care, I shudder to think the 'wisdom' of egoistically taking such a child away from the mother, into the hands of a helpless man, simply in the name of culture.

8.10 And in my determination here-below, I will to the permissible extent disregard the supposed repugnant culture, custom and

tradition, but determine the case on the basis of meeting the ends of justice as the circumstances of each issue will dictate. It is for this reason, the Supreme Court in dealing with a divorce borne out of an African customary law marriage in ***Chibwe v Chibwe***[10] lucidly guided as follows:

> ***In making property adjustment or awarding maintenance after divorce, the court is guided by the need to do justice taking into account the circumstances of the case.***

8.11 I must mention that given the quantum of fresh evidence adduced, to an extent of hearing the appeal almost *de novo*, I will not be restricted by the purview of the grounds of appeal, but decidedly deal with all issues in controversy for purposes of complete adjudication. And with the wholesome production of fresh evidence on appeal, the appellate Court is thus entitled to make its own finding of facts, capable of confirming or reversing findings of facts made by the court below. I think this is an unavoidable exception to the rule in ***Attorney General v Marcus Kampumba Achiume***[11] that an appellate court will generally not reverse findings of facts made by a trial court.

8.12 **Ground One:** *That the lower Court erred in law and fact when it held that the Respondent should have custody of all the three children of the family.*

8.13 It is clear that that both parties irreconcilably seek exclusive custody of the children of the family. However, it is the court's judicious exercise of discretion that counts, inspired and informed by the need to uphold the best interest of each child.

8.14 As earlier noted, a culture, custom or tradition that denies custody to a biological mother of her children after divorce, manifestly on account of chauvinism, is repulsive. Especially, when coupled with a cultural demonization against her freedom of choice to take a step to divorce her husband in order to unshackle herself from her husband's matrimonial misfeasance and abuses. Such a custom, or tradition is repugnant to the letter and spirit of the Bill of Rights, in so far as it seeks to diminish her human dignity.

8.15 Likewise, a man's cultural right whatever the culture, which unconscionably overrates him, and he seeks to rely on it to deprive his divorced spouse the right to custody, on account that payment of *lobola* or bride price divested her of whatever claim or natural guarantees of access to her own children is inhumane and non-justifiable.

8.16 A custom that places more or absolute premium on the man's cultural right to custody, than the consideration of the best interest of the child is in direct conflict with the ***Children Code Act***. Commoditization of children through *lobola* to vindicate custody in favour of a husband, in order to deny the mother custody of a child is unconscionable

8.17 And regarding the status of the parties in property settlement/adjustment, Scarmen L.J in ***Calder Bank v Calder Bank***[12] wisely stated that:

> ***At the end of the day a very careful judgment, the Judge came to a fair and sensible judgment and***

speaking for myself, I rejoice that it should be made abundantly plain that husbands and wives come to the judgment seat in matters of money and property on a basis of complete equality. That complete equality may, and often will, have to give way to the particular circumstances of their married life.

8.18 In the light of the above, in particular regarding the debate on custody, it is compelling to cite section 3 of the ***Children Code Act No. 12 of 2022***, which provides:

> ***1.(1) A child's best interest is the primary consideration in a matter or action concerning the child, whether undertaken by a public or private body.***

8.19 The embodiment of this principle is clearly evident in the authorities cited by the parties. And in making a determination thereof, to grant custody of the three children to the Respondent, the trial court made an assessment and came to the conclusion that the Respondent was at the material time better placed to have custody of the children. I find no fault on the part of the trial court to reach this conclusion.

8.20 However, given the change of circumstances, which occurred during the pendency of this appeal, that is to say, the eldest child moved from his mother's residence and joined the father, and the child is willing to be under the custody of his father, and the fact that the Respondent is no longer averse to the father having custody of the child, the order of the lower court is accordingly varied.

8.21 The variation of the order of custody by the lower court is to the extent that the Appellant shall have custody of the eldest child,

John Sibanda, while the Respondent shall have reasonable access. The order of custody in favor of the two younger children namely, Joel Sibanda and Juliet Sibanda is upheld, together with its attendant order for maintenance. The interest of these two children, Joel, who is a special needs child, and Juliet, a very young child will best be promoted in the custody of their mother. A change of environment is more likely to destabilize them. Once again, it is not the personal wishes of parents or their financial muscle that matters, but the best interest of the child.

8.22 And given the animosity between the Respondent and the Appellant's wife, compounded by the fact that, the Appellant is an international truck driver, usually ever on the road and ordinarily erratic at home, it is in the best interest of the two children to continue living with the Respondent.

8.23 **Ground two, three and four:** these are related, I will deal with them simultaneously. They relate to property settlement in respect of the two properties that were given to the Respondent and an order for sharing of cattle.

8.24 Again the argument advanced by the Appellant to settle the appeal generally based on Ndebele customary law is untenable for the reasons aforesaid. And for the avoidance of doubt, this does not mean that the notion of equality in property settlement advanced by the Respondent automatically prevails. As earlier noted in ***Calder Bank***[12]: *the notion of complete equality may, and often will, have to give way to the particular circumstances*

of their married life. And the litany of case law above stated attests to this.

8.25 The properties in terms of land amenable for adjudication under this appeal are: (i) Lot No. CHIBO/144179, bare land located at 10 miles(ii), Lot No. 24602/M otherwise called the Zani Muone property(iii), Kapopo Farm, and (iv) the alleged Chisamba Farm.

8.26 Firstly, with the Zani Muone property, it is clear that it was acquired during the subsistence of the marriage, housing the main house and two other flats. The property was acquired in the name of the Appellant, and the Certificate of Title attests to that fact.

8.27 I am mindful of the principle advanced by the Appellant proffered to deny the Respondent any claim over the said properties; stating that, any property purchased by one spouse using his own money exclusively belongs to the one who purchased it. The effect of this principle/presumption is that, where it is proved that the property was exclusively purchased by a spouse using his or her own money, the property belongs to that spouse, and it is excluded from property settlement/adjustment.

8.28 And for the exclusion of the other party to be put into effect. The party asserting exclusivity must prove something to justify the presumption. And in making a determination thereof, regard must also be had to the intention of the parties at a time the property was acquired. Intention is relevant because it may reinforce the presumption or rebut it. In the case of ***Violet***

Kambole Tembo v. David Lastone[7] at page 80, the Supreme Court held:

> ***The court examines the intentions of the parties and their contribution to the acquisition of the matrimonial property. If their intentions cannot be ascertained by way of an agreement, then the court must make a finding as to what was intended at the time of the acquisition.***

8.29 The Respondent alleges that she financially contributed towards purchase of this property. There is no evidence adduced by the Appellant either in the court below or in this Court that he purchased this property using his own money. In the absence of that proof, it is probable that the Respondent contributed from her popcorn farming business. And given her seemingly forte in business activities, her narrative is not far-fetched; evident from her current businesses. No matter the paltry contribution, the Respondent made, what is material is that, with that contribution, the intention of the parties was that, the property should be treated as family property, notwithstanding the acquisition was solely in the name of one spouse.

8.30 In any case, the Appellant claims his income was meagre, how then did he acquire the properties without support from his wife who at the material was in business. Interestingly, with the current wife, the Appellant was forthright and did not shy away to say that, he and his current wife built a house at their new location at 13 miles, whereas in the case of the Respondent, he was adamant.

8.31 Therefore, the presumption of exclusivity against the Respondent is not tenable.

And to fortify the above holding, I should add that in ***Nkhata v Nkhata***[13] The Supreme Court eruditely guided that courts should not take a narrow opinion in determining contribution of a spouse towards acquisition of family property. The Supreme Court stated that: *Non-financial contribution by spouse in form of, tending to the house, providing for various family needs and thus relieving the other spouse of some domestic and financial burden,* is of material consideration. It is, therefore, unsurprising when the Respondent said that by virtue of the marriage and her contribution, she should be considered for property adjustment.

8.32 The Supreme Court went on to advisedly state that:

> ***If the basis for sharing family property is that both spouses contributed to its purchase or creation. It should follow that where it can be demonstrated that one spouse invested nothing (neither financially or in kind) in the acquisition of the property, they should technically not be entitled to a share of what was in fact an investment by the one spouse on the basis only that they entered into a marriage.... Although indeed parties to a marriage are recognized as equal, equality and fairness implies that when their love life is over, the parties to a marriage should each walk out with a share of what they contributed....Our view is that property settlement should be undertaken on the basis of fairness and conscience.***

8.33 The trial magistrate was not ill-conceived to treat the Zani Muone property available for property settlement. However, with the consideration of fresh evidence adduced by the parties,

the order and its attendant order is amenable to variation, because, as rightly argued by the Appellant's Counsel, certain considerations were not taken into account. In the case of ***Lizzy Musauka v Mpasi Solomon Dube***[2] (supra) the Supreme Court guided as follows:

> ***In any property settlement after divorce whether customary or statutory marriage, the interest of the children must be considered.***

8.34 The Zani Muone property is not a mere ordinary property, but is a source of income that not only sustains the parties, but the parties' children as well. The Appellant said, meeting the financial needs of the children is his sole responsibility, and that he cannot fulfill this responsibility solely based on his meagre salary.

8.35 It should be noted that in property settlement/adjustment, it is not the business of the court to financially cripple a party, especially, if such a party bears the largest financial responsibility to look after the children of the family, notwithstanding the divorce. Therefore, the Zani Muone property is granted to the Appellant in trust for the children namely: John Sibanda, Joel Sibanda and Juliet Sibanda.

8.36 My findings on the Zani Muone property *mutatis mutandis* are applicable to Plot No. CHIBO/144179 (10 miles). Although it seems in the court below, Plot No. CHIBO/144179 was made to appear distinct from what was referred to as bare land at 10 miles, I reckon from the evidence adduced here, they are one and the same. The property is equally amenable to property settlement. Having granted the Zani Muone property to the

Appellant, it is only fair to award this to the Respondent, who currently is staying at a rented property in the same location.

8.37 As regards the alleged Chisamba property, apart from the Respondent's word, there is no documentary evidence to support the assertion that, the Chisamba farm was acquired as a family asset, either by the Petitioner or the Respondent or by both. The lack of particularity and certainty should react against the Respondent. In ***Chibwe v Chibwe***[10] it was stated that:

> ***The Court can only make a decision based on the evidence on record.***

8.37 And in the case of the Kapopo farm, there is satisfactory documentary proof that the property is jointly owned by the Respondent and his sister, Judith Sibanda. And there is no proof to state otherwise, that the letter of sale relied on by the Appellant is a forgery. This property is not amenable to property settlement.

8.38 Turning to the issue of cattle, I am mindful of what was stated in ***Chibwe v Chibwe***[10] to the effect that:

> ***The Court is not precluded from making an award even after matrimonial property is sold in order to defeat the course of justice.***

8.39 However, from the fresh evidence adduced, it is certain that the *status quo* is that there are no animals amenable for distribution, rendering the order of the trial court in this regard inconsequential for further intervention on appeal.

3.40 Additionally, I find it probable that six animals were given to the Respondent's father by the Appellant to complete payment of *lobola*/bridal price, and one was sold by the Respondent's father after it was injured, and the proceeds thereof given to the Appellant. And one was reserved for the children. Animals paid in consideration of *lobola* cannot be the subject of property settlement or adjustment in the sense argued by the Respondent.

9.0 CONCLUSION

9.1 In the light of the foregoing, the appeal partly succeeds and partly fails, and orders issued by the trial court, not varied by this judgment remain in force.

9.2 For the avoidance of doubt, in relation to custody, ground one partly succeeds and partly fails. The Respondent shall have custody of Joel and Juliet, while the Appellant shall have reasonable access to the said children.

9.3 The Appellant shall have custody of John, while the Respondent shall have reasonable access to the said child. The order of the trial court is accordingly varied.

9.4 As regards property settlement/adjustment, again the appeal in grounds 2,3 and 4 partly fails, and partly succeeds. Lot No. 24602/M otherwise called the Zani Moune property is wholly granted to the Appellant to be held in trust for the benefit of the three children, John, Joel and Juliet. The Respondent is granted Lot No. CHIBO/144179, bare land located at 10 miles

Chibombo District. And the appeal in respect of cattle distribution is allowed.

9.5 The appeal having partly succeeded and partly failed, I make no order as to costs.

9.6 Leave to appeal granted.

DATED THE 30TH DAY OF APRIL, 2024.

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THE HON. MR. JUSTICE CHARLES ZULU