

**DISTRIBUTABLE** (17)

**KUDZAI MWAKUTUYA MUBAIWA (nee CHIKUMBA)**  
**v**  
**GAINMORE MUBAIWA**

**SUPREME COURT OF ZIMBABWE**  
**GWAUNZA DCJ, HLATSHWAYO JA & MAKONI JA**  
**HARARE: 21 MAY 2020**

*F. Chinwawadzimba*, for the appellant

*T.R. Hove*, for the respondent

**MAKONI JA:** This is an appeal against part of the judgment of the High Court granting a decree of divorce and ancillary relief to the appellant and the respondent. The part being appealed against relates to the court's distribution of the parties' immovable properties.

After hearing counsel in the matter, we dismissed the appeal with costs and indicated that our reasons would follow in due course. Below are the reasons for judgment.

**FACTUAL BACKGROUND**

The appellant and respondent were married on 29 September 2012 in terms of the Marriages Act [Chapter 5:11]. Their union was blessed with a minor child, Makatendeka Mubaiwa, born on 5 July 2013. On 16 October 2017, the respondent instituted divorce proceedings in the court *a quo* alleging irretrievable breakdown of their union. As such, he sought a decree of divorce and ancillary relief.

The appellant filed a plea and counterclaim wherein, whilst accepting that their union had irretrievably broken down, she proposed different terms of what she deemed equitable distribution of the parties' various properties, fair and reasonable terms of custody and maintenance.

At the pre-trial conference, the parties resolved all the other issues except for the manner of distribution of the three immovable properties they acquired during the subsistence of the marriage and the appellant's counterclaim for a portion of the respondent's income from the amount he was owed by Premier Service Medical Aid Society (PSMAS) and costs of suit.

Of the three properties, two are registered in the respondent's name namely Stand Number 2185, Umtali Township also known as Flat 8 Normandy Court, Mutare (the flat) and Stand Number 11368 Greenside Extension, Mutare (the matrimonial property). The remaining property, Stand Number 10163 Greenside Extension, Mutare (the vacant stand), is not yet registered but was purchased in the joint names of the parties.

At trial, the issues before the court *a quo* were as follows:

- “1. How the immovable property set out below which forms the matrimonial Estate will be shared:-
  - 1.1 Stand Number 2185, Umtali Township registered in the Plaintiff's name, also known as Flat 8 Normandy Court, Mutare.
  - 1.1 Stand Number 11368, Greenside Extension, Mutare, registered in the Plaintiff's name and
  - 1.2 Stand Number 10163, Greenside Extension, Mutare, purchased in the Parties name but not yet registered.
2. Whether or not the Defendant is entitled to a share of Plaintiff's income from money he is owed by Premier Service Medical Aid Society (PSMAS) and if so, what is the amount?
3. What award should be made as regards costs?”

At the trial, the appellant withdrew her claim to the monies owed to the respondent by PSMAS and her claim of contribution towards her costs, leaving the court with the sole issue, namely the distribution of the three immovable assets that were acquired during the subsistence of the marriage. The court heard evidence from the respondent, one Brighton Chademuwiri (who was the parties' gardener during the subsistence of the marriage) and the appellant.

### **DETERMINATION OF THE COURT *A QUO***

After assessing the evidence led before it, the court *a quo* granted the decree of divorce, having found that the marriage relationship between the parties had irretrievably broken down with no prospects of restoration. The court also granted the ancillary relief as stated in the pre-trial conference minute relating to custody, access, maintenance of the minor child and distribution of the parties' movable property.

Regarding the distribution of the immovable properties, the court concluded that all the properties formed part of the matrimonial estate. The court was aware of the parameters of the law on the distribution of property as laid out in s (7) the Matrimonial Causes Act [Chapter 5:03] (the 'Act') and the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (S). Having found that the "his", "hers and "theirs" principle would not meet the justice of the case, the court had regard to factors stated in s 7(4) of the Act.

The court considered the parties' financial contributions towards the purchase and development of the immovable properties and concluded that the respondent's contributions outweighed the appellant's in respect of all three properties. It had regard to the respondent's documentary evidence and believed his testimony. To the contrary, it found that the appellant

did not contribute much to the construction of the matrimonial house and the flat. The court *a quo* also found that whatever contributions she made to the vacant stand were lower than the respondent's. The court further found that the appellant's contributions towards the purchase price of the three properties were less than fifteen per cent of the total estate excluding costs of construction.

The court *a quo* held that the appellant's testimony was inconsistent concerning her income between the period when the matrimonial house and the flat were purchased. It remarked that the appellant's failure to produce her salary payslips or other forms of proof of income to substantiate her claim to a bigger share in the properties were fatal to her case. It was the position of the court that the appellant sought to introduce new issues of how she would give the respondent all her salary and how he would keep the bank cards and control the finances for the family yet these averments were never pleaded in the appellant's papers or put to the respondent to answer to. Further, it found that the appellant had conceded during cross-examination that the respondent earned much more than she.

The court *a quo* also noted that there was not much to consider in respect of the appellant's indirect contributions during the subsistence of the marriage as the marriage was short-lived. Accordingly, it concluded that the appellant's indirect and direct contributions were not more than 10 percent of the parties' matrimonial estate.

After considering the standard of living, foreseeable financial and social needs and obligations of the parties, the court *a quo* found that the defendant does not deserve to be awarded the matrimonial home. To that end, it found the respondent more deserving to be awarded the matrimonial house and that the flat offered by the respondent to the appellant

adequately catered for the appellant and the minor child. The court found it fair for the vacant stand, bought in their joint names, to be shared equally. In the result, the court awarded the respondent the matrimonial home and a fifty per cent share in the vacant stand. It awarded the flat and the remaining fifty per cent of the vacant stand to the appellant.

It is this decision that the appellant appeals against based on the following grounds:

### **GROUNDS OF APPEAL**

- “1. The Trial Court erred and misdirected itself at law by misapplying Section 7(4) of the Matrimonial Causes Act [*Chapter 5:11*].
2. The Trial Court erred and misdirected itself by lavishly and injudiciously giving credit to the Respondent for his direct contributions to the acquisition and construction of the parties properties and at the expense of other factors envisaged by the law.
3. The Trial Court erred and misdirected itself at law by awarding the Respondent a huge disproportionate and lion’s share of the parties’ properties against the rights of women and of the Appellant in particular.”

The appellant seeks an order setting aside the distribution made by the court *a quo* and its substitution with an order re-distributing the parties’ immovable property in the following manner:

- i) Awarding the appellant as her exclusive property Stand Number 11368 Greenside Extension Mutare and the respondent being awarded Flat 8 Normandy Court and Stand No. 10168 Greenside Mutare or
- ii) Alternatively that the appellant be awarded Flat No. 8 Normandy and respondent awarded Stand No 10163 Greenside Mutare while Stand No 11368 Greenside Mutare be evaluated and sold for the highest advantage and the proceeds of the sale be shared equally between the parties.

## SUBMISSIONS IN THIS COURT

Ms *Chinwawadzimba*, for the appellant, submitted that she would abide by the heads of argument filed of record and will not make any oral submissions. On being engaged by the court on whether the appellant had established the threshold required for this Court to interfere with the decision of the court *a quo* she submitted that she had no other instructions other than to motivate the appeal.

In the appellant's Heads of Argument, Ms *Chinwawadzimba* contended that it is just that the appellant be awarded the matrimonial property since she is the one who has been living in that property and is the custodian of the minor child whose life must be maintained as it was before the divorce. She also argued that the appellant made significant direct and indirect contributions to the acquisition of the property.

The direct contributions were evidenced by the fact that she had a consistent salary, had connected electricity to the matrimonial home, paid all the electricity bills and acquired furniture for the home. Further, the fact that the respondent accepted that he would get assistance from the appellant indicates that the parties pooled resources together. Similarly, the fact that the appellant was consulted in the building of the matrimonial home points to the fact that she made financial contributions to the acquisition of the property. Regarding indirect contributions, the appellant carried out her motherly duties during the respondent's absence including managing home affairs.

Ms *Chinwawadzimba* also contended that the court must take into account the fact that the respondent purposefully downplayed the appellant's contributions to get more than what he was entitled to. She argued that the respondent can build another house on the vacant

stand. She also contended that the appellant must not be deprived of the matrimonial home since she invested in it and it has become of sentimental value to her. In summing up, counsel submitted that the order made by the court *a quo* did not achieve equity as it had the resultant effect of enriching the respondent at the expense of the appellant.

Ms *Hove*, for the respondent, argued that the court *a quo* properly exercised its discretion in distributing the parties' immovable properties in accordance with s 7 of the Act and relevant case law. The factors include the method set out in the *Takafuma case, supra*, the duration of the marriage, the parties' direct and indirect contributions, future responsibilities and the standard of living. She submitted that the appellant has not shown the specific examples of misapplication of the law or how she was treated unequally in terms of the Constitution.

Ms *Hove* further argued that the appellant's contention that she must be awarded the matrimonial property as the custodian of the minor child cannot be a basis upon which the respondent's real rights in the property can be interfered with. She also contended that the court *a quo* correctly found that the appellant failed to substantiate her claim for a bigger share in the properties. Her testimony was riddled with inconsistencies and insufficient evidence to found evidence of direct contribution. Counsel averred that the appellant had also unwittingly conceded under cross-examination that the respondent contributed more to the acquisition of the properties.

Ms *Hove* also emphasised the fact that it could not be said that the appellant made significant indirect contributions considering that the marriage was short-lived. As such, she did not fall under the category of wives who have been awarded a share in the matrimonial home as a result of their indirect contributions.

Ms *Hove* also put across the point that the court *a quo*'s order cannot be assailed as it was based on rational considerations. The court took into account the fact that the respondent's financial circumstances did not allow him to build a property on the vacant stand. She also argued that the order made ensures that both parties live in affluent low-density suburbs to which they are accustomed. Ms *Hove* also contended that the order does not take away the respondent's obligation to ensure that the minor child has accommodation in a low-density suburb and to maintain the child's standard of living.

### ISSUE FOR DETERMINATION

The appellant's grounds of appeal raised one issue for determination which is whether or not the court *a quo* misdirected itself in the manner in which it distributed the parties' immoveable matrimonial property and in so doing failed to achieve equitable distribution as envisaged by s 7 of the Act.

### THE LAW

The statutory provision which governs the distribution of properties in a matrimonial estate by a court following a decree of divorce is s 7(1) of the Act which provides:

**“Division of assets and maintenance orders**

7(1) 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;
- (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”(My emphasis)

In exercising these powers, the court must ensure a balanced division of assets. To achieve that purpose, it is guided by the following factors set out in s 7(4) of the Act:

“(4) 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 was being educated or trained or expected to be educated or trained;
- (d) the age and physical and mental condition of each spouse and child;
- (e) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
- (g) the duration of the marriage;

and in so doing the court shall 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.” (Emphasis added)

It is an established position of law that s 7(1) of the Act confers upon a trial court wide discretion which an appellate court is slow to interfere with unless it is shown that the discretion was not exercised judiciously. In *Gonye v Gonye* 2009 (1) ZLR 232, at 236H-237B, MALABA JA (as he then was) remarked:

“It is important to note that a court has an extremely wide discretion regarding the granting of an order for the division, apportionment or division of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an order with regard to the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other. The rights claimed by the spouses under s 7(1) are dependent upon the exercise by the court of the broad discretion”. (My emphasis)

In its exercise of the wide discretion conferred upon it, a court is enjoined to look at the factors under subs (4) cumulatively. Selective consideration of these factors falls short of the objective of s 7, which is to achieve equitable distribution of property. This was stated in *Muzongondi v Muzongondi* SC 66/17, where the court remarked thus at p 5 of the judgment:

“It is appropriate to have regard at this stage to the *dicta* in *Gonye’s* case (*supra*). The discretion enjoyed by an appropriate court under s 7 is extremely wide and a court should be loath to fetter that discretion. In such exercise, every factor referred to in s 7(4) is important in the determination of the disposition of the matrimonial estate. That is to say, that weight should be placed on all the factors such that the exercise of discretion should not appear to be based on any one factor to the exclusion of others.” (Emphasis added)

It further stated at p 6 that:

“In the exercise of the discretion referred to in the above provisions, it is important that an appropriate court does not lose sight of the overriding principle enshrined in the provisions, that at the end of the day the court is enjoined to ensure that in its disposition of the matter, it is bound to achieve equity between the parties. As a result a lot of authorities, in construing the provisions of s 7 as a whole, refer to the need to achieve an equitable distribution of the assets of the spouse’s (*sic*) consequent upon the grant of a decree of divorce.”

In the famous case of *Takafuma v Takafuma, supra*, at 106 B-E: the court found the following to be a fair way of achieving equitable distribution of property:

“The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out as fair as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term ‘his’, ‘hers’, and ‘theirs’. Then it will concentrate on the third lot marked ‘theirs’. It will apportion this lot using the criteria set out in s 7 (3) of the Act. Then it will allocate to the husband the items marked ‘his’, plus the appropriate share of the items marked ‘theirs’. And the same to the wife. That is the first stage.

Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, “as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses.... in the position they would have been in had a normal marriage relationship continued....

Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually ‘his’ or ‘hers’.”

In *Denhere v Denhere* SC 51/17, the court qualified the approach in the *Takafuma* case, *supra*, stating that it is not law but a formula which seeks to achieve equitable distribution.

The approach itself is based on the factors stipulated in s 7. The court held that:

“...the court in Takafuma’s case (*supra*) was setting out an approach on the correct way of achieving an equitable distribution. The factors that a court had to take into account in the distribution are set out in the Act. The principle itself is found in the Act. The appellant fails to appreciate that what Takafuma prescribes is a formula and it is not one that is applicable in every situation. It is erroneous, in my view, to suggest that the court *a quo* should have strictly followed the formula as set out by McNally JA.”

From the above-cited authorities, it can be noted that an appellate court will only interfere with a court’s exercise of discretion under s 7(1) in limited circumstances. The grounds of interference were stated in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62F-63A and can be summarized as follows. Where the court acts upon a wrong principle, allows extraneous or irrelevant matters to guide or affect it, mistakes the facts or does not take into account some relevant consideration.

The desired objective of s 7 is to place the parties as near as practicable in the position they would have been had the marriage continued. (See *Shenje v Shenje* 2001 (2) ZLR 160 (H))

## **APPLICATION OF THE LAW TO THE FACTS**

The appellant contends that the court erred in applying the provisions of s 7 (4) of the Act in that it gave more weight to the respondent’s contributions at the expense of other factors. However, a closer look at the decision of the court *a quo* shows that the learned judge was alive to the factors set out in s 7(4), cumulatively, in arriving at what he considered equitable distribution of property.

The court’s distribution of the matrimonial assets commenced by the step by step exercise stipulated in the *Takafuma* case, *supra*. Having established that distributing the properties by registration of titles would result in a ‘heavily skewed’ distribution in favour of

the respondent, the court concluded that the justice of the case required it to order the transfer of property from one party and award it to the other. Accordingly, the court had regard to the factors in s 7(4), starting with the parties' direct and indirect contributions to the acquisition of the properties. It also considered the duration of the marriage, the needs and standard of living of the parties and their child and the financial needs, obligations and responsibilities which each spouse and the child were likely to have in the foreseeable future. The appellant has failed to demonstrate the alleged misapplication of the law.

The appellant criticizes the court *a quo* for distributing property inequitably. She seeks to be awarded the matrimonial home as the custodian of the minor child whose life must be maintained as it was before the divorce and on the basis that she has been living in that property which has become of sentimental value to her. It begs the question of whether these contentions may justify the relief sought. In the *Denhere* case, *supra*, the court quoted with approval the principle stated in *Lafontant v Kennedy* 2000 (2) ZLR 280 (S), that an order for the transfer of property from one spouse to another must have a basis in law. It stated:

“Nevertheless, the principle as set out in *Lafontant* that a court cannot give away A's property to B on the mere grounds that it would be fair and reasonable, or just and equitable to do so cannot be disputed. A court should only do so where there is a solid foundation in law to do so.”

The appellant has not advanced any law to the effect that the custodian parent must be awarded the matrimonial property. There is no reason why the respondent should be deprived of the matrimonial property on that basis.

This leaves one area for consideration which is the court *a quo*'s findings regarding the parties' direct and indirect contributions. Before I consider these, I must mention that the court exercised its jurisdiction based on the factual findings it made. These can only be set

aside on the basis of gross unreasonableness. (See *ZINWA v Mwoyounotsva* SC 28/15). The court's order was also premised on an assessment of the credibility of both parties' testimonies. Issues of credibility are the preserve of the trial court and an appellate court is generally reluctant to interfere with such findings unless they cannot be supported. See *Mthinkhulu v Nkiwane & Anor* S-136/01.

The appellant portrays the picture of a person who made substantial direct and indirect contributions towards the purchase and improvement/construction of the immovable properties. The appellant argues that the court *a quo* misdirected itself in relying on the testimony of the respondent, who downplayed her contributions. Such an allegation falls in the face of the evidence on record and the factual findings made by the court *a quo*, one of which was that the respondent contributed more to the acquisition of the properties than the appellant. This finding was based on the court's assessment of the evidence placed before it.

The court *a quo* believed the respondent's testimony that the properties were purchased mostly through his direct financial contributions. He submitted invoices and receipts of purchases of the building material used in the construction of the matrimonial home and receipts of payments of the purchase price of the flat. He summarized his income flow from the time the first property was acquired to the building of the matrimonial home. This evidence, led by the respondent to show his income, was not disputed by the appellant and thus was accepted as true. This is consistent with the settled rule of law that what is not denied in affidavits or evidence must be taken to be admitted. (See *Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (S)). Simply put, the respondent's case was backed by evidence.

To the contrary, the appellant failed to establish any substantial direct financial contribution to the acquisition and development of the properties. The court noted contradictions in her evidence relating to her income. She averred that she contributed from her allowances as an apprentice and her salary after she had been formally employed but did not substantiate these contentions by any documentary evidence. The appellant failed to adduce any evidence in the form of bank statements or salary slips to show how she received her monthly salaries and annual bonuses or evidence that she had income flowing directly into the development of the matrimonial property. Thus, her assertions remained bald assertions contrary to the established position that he who alleges must prove. (See *Nyahondo v Hokonya & Ors* 1997 (2) ZLR 457 (S) at 459). The court also found that the appellant conceded under cross-examination that the respondent earned more than she did. That concession still stands and is binding.

The court also highlighted that to advance her case, the appellant sought to introduce new arrangements of how she would give the respondent all her salary and how the respondent would keep the bank cards and control the finances of the family. However, these averments were never pleaded in the appellant's papers and were never put to the respondent to answer. The appellant herself conceded that the averments were never disclosed in her papers. It is settled law that the purpose of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the attention of the other party to one issue and then, at the trial, attempt to canvass another. (See *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179 (D) at 182). In light of this, I associate myself with the court *a quo*'s finding that it was the respondent who bought the properties using his earnings.

I now turn to consider the appellant's indirect contributions to the marriage. The appellant avers that she carried out her motherly duties during the respondent's absence including managing the home affairs. The duration of the marriage is an important factor to be taken into consideration in analysing the direct and indirect contributions of the parties. In *Masiwa v Masiwa* SC 74/06, this Court held that "it would appear that the shorter the marriage, the more important it is to have made direct contributions." In the recent case of *Mhora v Mhora* SC 89/20, the court stated that;

"...the longer the duration of the marriage, the lesser the weight to be attached to direct contributions as the value of indirect contributions increases as the duration of the marriage increases."

In the present case, the court *a quo* correctly found that the parties' marriage was not of long duration as the parties had only been married for 5 years. Thus, the duration does not justify that the parties automatically be given an equal share to the matrimonial property. A comparison should be drawn from the case of *Usayi v Usayi* 2003 (1) ZLR 684 (S), where the court upheld an award of 50 percent to a housewife of 35 years who had not been in formal employment. It follows that the appellant had to prove the extent of her direct contributions to the acquisition of the properties, which she failed to do.

Everything considered, the court *a quo*'s distribution of property was just, fair and practical. The findings of the court *a quo* do not warrant this Court's interference as they are based on a proper appreciation and evaluation of the evidence adduced before it and the relevant statutory framework governing property distribution in divorce proceedings. I find it just and fair for the respondent to retain the matrimonial home as it is proportionate to his contributions. Taking away the matrimonial house from the respondent would be to disadvantage the respondent from his contributions during the subsistence of the marriage.

The court *a quo*'s order granting the appellant the flat as her sole and exclusive property cannot be assailed for several reasons. Firstly, the appellant did not refute the respondent's testimony that the flat is well habitable by a person with a child. It is also located in a low-density area and is adequate for the appellant and the child to continue living within the standard they were accustomed to in the matrimonial home. It is, therefore, a suitable dwelling for their accommodation. Secondly, since the respondent has access to take the child, the child can still enjoy the comfort of the house if the respondent keeps the matrimonial house. Thirdly, the order the appellant seeks in the alternative in itself shows that the appellant has no problem with staying in the flat with the child. She is very much amenable to having the matrimonial home sold and the proceeds shared equally amongst the parties while she retains the flat and the respondent retains the undeveloped stand. The appellant has failed to establish a basis for the redistribution of the property.

I comment in passing that the appellant has dismally failed to show that the court *a quo*'s award violated her rights as a woman as the award was clearly on the basis of established authorities and the Act. To that end, it is unnecessary to consider whether the appellant's constitutional rights were violated.

In light of the above, the court *a quo* cannot be faulted for holding that the respondent's contribution justified that he retain the matrimonial home and that the appellant be awarded the flat and that proceeds from the jointly acquired stand be shared equally between the parties.

In the circumstances, it is fair that the respondent gets the matrimonial home, the major property in the parties' matrimonial estate, and the appellant, having contributed lesser to the matrimonial estate, receives the flat, which is comfortable for her and the minor child.

It was for these reasons that we dismissed the appeal.

**GWAUNZA DCJ:** I agree

**HLATHSWAYO JA:** I agree

*Gonese and Ndlovu*, appellant's legal practitioners

*Hove and Associates*, respondent's legal practitioners