

GAINMORE MUBAIWA
versus
KUDZAI MWAKUTUYA MUBAIWA (NEE CHIKUMBA)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 24, 25 26 June and December 12, 2019

Matrimonial trial

T R Hove, for plaintiff
C Ndhlovu, for defendant

CHITAKUNYE J: The plaintiff and the defendant were married in terms of the Marriage Act [*Chapter 5:11*] on the 29th September 2012. Their marriage was blessed with one minor child born on the 5th July 2013. During the subsistence of the marriage the parties acquired some movable and three immovable properties.

On the 6th October 2017 the plaintiff filed for a decree of divorce and ancillary relief on the ground that the marriage has irretrievably broken down as required by s 5 of the Matrimonial Causes Act [*Chapter 5:03*]. The plaintiff alleged that the marriage has irretrievably broken down to such an extent that there are no prospects of restoration to normal marriage relationship in that:

- a) the plaintiff has lost all love and affection for the defendant;
- b) the parties have been on separation since 20th August 2017.

The plaintiff averred that the basis for this court's jurisdiction included that he is domiciled in Zimbabwe as he was born and bred in Zimbabwe.

As a consequence of the breakdown he sought a decree of divorce, distribution of assets of the spouses, both movable and immovable, and custody of the minor child.

The defendant, in her plea and counter-claim, conceded that the marriage has irretrievably broken down and that a decree of divorce should be granted. She however contended that custody of the minor child should be awarded to her with plaintiff being granted reasonable rights of access. She further claimed for maintenance in respect of the minor child and herself in the sum of \$1000.00 per month.

The defendant disagreed with the plaintiff's suggestion on the distribution of assets of the spouses. In this regard she made a counter offer in her counter claim regarding the distribution of assets of the spouses.

At a pre-trial conference held on the 16th October 2018 the parties agreed on the following:

1. That their marriage has irretrievably broken down
2. That custody of the minor child of the marriage be awarded to defendant
3. That plaintiff shall be awarded reasonable rights of access in the following manner:
 - i) During the school term, the plaintiff is entitled to access the minor child every alternate weekend and at any other time subject to the defendant's consent. Such consent will not be unreasonably withheld.
 - ii) During the holidays, the Plaintiff is entitled to access the minor child for half of the school holidays and on alternate public holidays.
4. The parties agreed to share equally the responsibilities of maintaining their minor child including school needs. In addition plaintiff was to pay maintenance in the sum of \$ 320.00 per month beginning 30 October 2018.
5. The parties agreed on the distribution of movable properties as reflected in the joint pre-trial conference minute.
6. That the defendant be awarded 25% share of plaintiff's shares in the following companies:-
 - i) Dekar Force Security (Private)Limited
 - ii) Deu-shta (Private) Limited ; and
 - iii) SAMEC Healthcare Professionals (Private) Limited.

Issues upon which the parties could not settle and which were referred to trial included:-

1. What would be a fair and equitable distribution of immovable assets of the spouses comprising:-
 - i) Stand number 2185 Umtali Township registered in the Plaintiff's name, also known as Flat 8 Normandy Court, Mutare;
 - ii) Stand number 11368, Greenside Extension, Mutare, registered in the Plaintiff's name; and
 - iii) Stand number 10163, Greenside Extension, Mutare, purchased in the parties' joint names but not yet transferred.

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?

On the trial date the defendant abandoned her claim for a share of the money she claimed plaintiff was owed by PSMAS. She also apparently abandoned her claim for contribution to costs which claim was in the sum of \$15 000-00. In place of the contribution to costs she now asked for plaintiff to be ordered to pay costs in the event of her claims succeeding; that is costs to follow the cause.

The outstanding issue pertained to the distribution of the three immovable assets that were acquired during the subsistence of the marriage.

It is pertinent to note that before determining the above issue court must be satisfied that the marriage has irretrievably broken down as provided in s 5 of the matrimonial Causes Act [*Chapter 5:13*].

Section 5 empowers an appropriate court to dissolve a marriage where court is satisfied that the marriage has irretrievably broken down; that is that, the marriage relationship between the parties has broken down to such an extent that there is no reasonable prospect of restoration of a normal marriage relationship between the parties.

Though the Act does not define what irretrievable breakdown means, there are certain factors that court may have regard to and these include:

- a) Where parties have not lived together as husband and wife for a continuous period of at least twelve months immediately preceding the issuance of divorce summons;
- b) Where the defendant has committed adultery which the plaintiff regards as incompatible with the continuation of the marriage relationship; or
- c) Where defendant had been sentenced to a lengthy imprisonment term of at least fifteen years or has been declared a habitual criminal or sentenced to extended imprisonment as provided in s 5(2) (c) of the Act
- d) The defendant had treated the plaintiff with cruelty or has habitually subjected himself or herself to the influence of intoxicating liquor or drugs which plaintiff cannot countenance.

The above factors are not exhaustive such that any other circumstances which satisfies court that a normal marriage relationship is no longer possible between the parties would suffice. Thus, where one party or both have lost love and affection for each other and no longer wish

to continue in the relationship court would in such circumstances find that the marriage has irretrievably broken down. Further, where on the date of trial the plaintiff insists that the marriage has irretrievably broken down and they cannot live as husband and wife any more court cannot force them to continue in the marriage. Such a stance by a party would be inconsistent and incompatible with the continuation of a normal marriage relationship. *Kumirai v Kumirai* 2006(1) ZLR 134(H) and *Murada v Murada* 2008 (2) ZLR 134(H) and *Chiyangwa v Chiyangwa* HH 263-17.

In casu, the plaintiff alleged that he has lost love and affection for the defendant. In his evidence he alluded to incidents of infidelity on the part of the defendant as the cause for his loss of love and affection. He averred that he cannot condone such acts of infidelity. He also alluded to instances he would be subjected to certain discomfoting rules in the bedroom which he termed 'statutory instrument' for the bedroom. Such conduct led to his loss of love and affection for the defendant.

The defendant, whilst proffering a bald denial of acts of infidelity, admitted that the marriage has irretrievably broken down. Regarding the bedroom rules complained of by the plaintiff, the defendant seemed to concede that such was true but attributed this to the fact that she had not been married before. She was thus agreeable to the grant of a decree of divorce.

In the circumstances I am satisfied that the marriage relationship between plaintiff and defendant has irretrievably broken down and there are no reasonable prospects of restoration to normalcy. Neither party is willing to reconcile with the other. A decree of divorce will thus be granted.

The ancillary issues of custody, rights of access, maintenance of the minor child and distribution of movable property will be dealt with in terms of the parties' agreement as stated in the pre-trial conference minute.

The major issue for determination in this trial pertained to the distribution of the immovable properties.

It is common cause from the pleadings that there are three immovable properties in issue. These were all acquired during the subsistence of the marriage. They comprise:-

- a) Stand number 11368 Greenside Extension, Mutare, which is registered in the plaintiff's name and is the couple's matrimonial house (hereinafter referred to as the Matrimonial house);
- b) Stand number 2185 Umtali Township, Mutare, also known as Flat 8 Normandy Court, Mutare which is also registered in the plaintiff's name; and

c) Stand number 10163 Greenside Extension, Mutare which was purchased in the joint names of the parties and is an undeveloped piece of land.

The plaintiff's position was to the effect that he should be awarded the matrimonial house and Stand 10163 Greenside Extension, Mutare whilst the defendant is awarded Stand number 2185, Umtali Township also known as Flat 8 Normandy Court, Mutare.

The defendant's position, on the other hand, was that she should be awarded the matrimonial house whilst the plaintiff is awarded Stand number 10163 Greenside Extension, Mutare and Flat 8 Normandy Court Mutare. Alternatively, she be awarded the Flat whilst the plaintiff is awarded Stand 10163. In that event the matrimonial house should then be sold and the proceeds therefrom shared equally between the parties.

It was apparent that both parties wanted the matrimonial house. In justifying their respective claims both alluded to their respective financial contributions as the major basis for seeking an award of the matrimonial house.

The plaintiff gave evidence and called one witness, Brighton Chademuwiri. Thereafter the defendant gave evidence. A number of documentary exhibits were tendered into evidence. From the evidence adduced certain aspects were common cause. It is common cause that at the time of their marriage in September 2012 the plaintiff was in government employment as an anaesthetist nurse whilst the defendant was an apprentice with Zimbabwe Electricity Supply Authority (ZESA). She had begun her apprenticeship in 2010 before the parties met. In their respective testimonies the plaintiff and the defendant concentrated on their financial contributions towards the purchase and development of the properties in question.

The division and distribution of assets upon dissolution of a marriage is governed by s 7 of the Matrimonial Causes Act, [*Chapter 5:13*]; herein after referred to as the Act. Section 7(1) of the Act states, inter alia, that:-

- “(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.”

Subsection 4 of s 7 enjoins court to consider all the circumstances of the case in the exercise of its discretion by stating that:-

“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 or 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 and 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.”

It is important to recognize that court has very wide discretion in the exercise of the above powers. The assets upon which court has to exercise such discretion are assets of the spouses. That concept must be clearly understood. As aptly noted by MALABA JA in *Gonye v Gonye* 2009 (1) ZLR 232(S) at 237B-E

“The terms used are the “assets of the spouses” and not “matrimonial property”. it is important to bear in mind the concept used, because the adoption of the concept “matrimonial property” often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept “the assets of the spouses” is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.”

It is thus trite that court must consider assets belonging to the spouses as at the time of the dissolution of the marriage. Whether the asset is owned individually or jointly is no bar to the assets being placed on the table for consideration. It is in the process of considering how best the assets should be distributed that the manner of acquisition and ownership are taken into consideration.

The approach to adopt in such circumstances was aptly laid down by MCNALLY JA in *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC) at 106 B-E as follows:-

“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 s7 (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'."

The assets to be considered are those belonging to the spouses as at the time of the dissolution of the marriage irrespective of the period they were acquired. Such assets may have been acquired by either of the spouses in his or her name, or jointly.

In *casu*, all the three properties were acquired during the subsistence of the marriage. Two of the properties are registered in the plaintiff's name and so would qualify as 'his' assets whilst the third property bought in the name of both parties would qualify as 'theirs'.

The starting point according to the above formula would be that plaintiff would be entitled to the two properties in his name plus a 50% share in the third property. The defendant on the other hand would only be entitled to a 50% share in the third property. The overall result would be heavily skewed in favour of the plaintiff.

The next question is thus, considering all the circumstances of the case as stated in s 7, would such a distribution be fair and just and would it meet the objective of as far as is reasonable and practicable and having regard to the conduct of the parties, is just to do so, to place the spouses in the position they would have been in had a normal marriage relationship continued. The answer, *ex facie*, would be a resounding NO! Where after considering the evidence adduced court is of the view that such a distribution would not meet the objective of s 7, court is empowered in terms of s 7(1)(a) to transfer an asset of one spouse to another in order to achieve the objective of s 7. In deciding on which asset or portion thereof to transfer from one spouse to the other court is again guided by all the circumstances of the case. It is an exercise of the wide discretion reposed in the court and this must be exercised judicially and not arbitrary. see *Takafuma v Takafuma* (supra) and *Gonye v Gonye* (supra) at p 236 H to 237 B. Whilst exercising such discretion court must also be guided by the Constitutional provisions on equality of rights and obligations of spouses during marriage and at its dissolution including

the need for protection of children and spouses at the dissolution of the marriage. See section 26 of the Constitution.

In the exercise of the above noted wide discretion, court is enjoined to consider all the circumstances of each case. The weight to attach to any particular factor will obviously vary from case to case.

Thus in some cases the needs of the parties and the long duration of the marriage, with the attendant indirect contribution, have outweighed direct contributions such that where a spouse may not have made any direct contribution they have still been awarded a half share. See *Usayi v Usayi* 2003 (1) ZLR 684(S)

In other cases the short duration of the marriage has tilted the scale in favour of the need for a spouse to have made a substantial direct contribution. In *Masiwa v Masiwa* 2007(1) ZLR 167(S) where the marriage had lasted for about two and half years only, at 173F-174A GWAUNZA JA (as she then was aptly opined that:-

“In considering matters concerning direct and indirect contributions in marriage, the question of the length of time during which such contributions were made is, in my view, pertinent. This is particularly so where, as in *casu*, one party’s initial contribution far outweighed the other party’s. In this case, the appellant made no direct contribution to the deposit and mortgage repayments. From the evidence, her ability to match, both in cash and kind, the financial contribution made by the respondent, was undermined by two factors. These were, firstly, her relatively low income and, secondly and more seriously, the short duration of the marriage. Had the marriage endured longer than it did, there is no telling how much she might have been able to add to the value of her contributions. I find that these two factors significantly affect the extent of the benefit that she lost to the respondent due to his having continued to reside in the matrimonial home after separation. It would appear that the shorter the marriage, the more important it is to have made direct contributions.”

In *casu*, the marriage lasted about 5 years before plaintiff sued for divorce. That was a short period as compared to matters where marriages lasted from 22 years to 39 years as a result of which indirect contributions tilted the scale in favour a spouses who only made indirect contribution being awarded 50% shares in the contested immovable properties. It is in this regard that, whilst being cognisant of the constitutional provision for equal treatment at divorce, court should not lose sight of the parties’ respective contributions.

It was clear from the evidence adduced by both parties that plaintiff’s direct financial contributions far outweighed the defendant’s direct contributions towards the purchase of the properties and the development of the matrimonial house.

The plaintiff's evidence, in this regard, was to the effect that the first two properties were purchased between 2013 and 2014. The construction of the matrimonial house on Stand 11368 occurred from mid-2014 to 2015, starting with a cottage. The third property, Stand 10163, was acquired in 2016. He testified that he acquired the first two properties from his own resources without the defendant's contribution hence they were registered in his name. On the 3rd property defendant made a minimal contribution as this was purchased using funds they had been saving together in a bank account. He however contributed much more money into that account than the defendant.

The plaintiff's evidence as regards the sources of income was to the effect that at the time of marriage he was employed in government as a nurse anaesthetist. With that qualification he would also do locum duties and work at private surgeries. These engagements outside the normal working hours brought him substantial income. Some of this extra income would come as a lump sum. It was as a result of this extra income from locum duties and part time work at private surgeries that he was able to purchase stand 11368 Greenside Extension in 2013. He finished paying the purchase price in instalments in April 2014. From about mid-2014, through the same source of income and a loan, he began the construction of a cottage at this stand. Towards the end of 2015 the cottage was almost complete and they decided to move into the cottage as rentals for the premises they were renting were becoming unbearable. It was only after moving into the cottage that construction of the main house began. In mid-2017 the main house was almost complete. The money for the building materials and other requirements was, again, mostly from his extra work on locum duties and in private surgeries.

Due to matrimonial problems he left the matrimonial house in August 2017 to go and rent somewhere. He later came back to complete some outstanding works, albeit not staying at the house. As far as plaintiff was concerned most of the financial needs were met from his income.

The plaintiff further testified that the defendant's direct contribution was minimal. This comprised of a \$5000.00 contribution towards a fitted kitchen. He categorically denied that the defendant had made any meaningful contribution but for that \$5 000.00. As regards indirect contributions by the defendant, plaintiff contended that it was also minimal as he did most of the running around sourcing building materials and supervising the constructors as he had a flexible working schedule. The defendant was not the type of wife who took upon cooking for the family and doing laundry and other domestic chores seriously. She would leave these tasks to the maid such that at the time he took the defendant back to her parents this was one of his

complaints. To illustrate defendant's lack of contribution, the plaintiff said that defendant's sister had to come on about two occasions to wash their house curtains due to their sorry state as defendant would not even do that on her own.

When asked about defendant's income, plaintiff indicated that in the period 2012 to early 2014 defendant was still an apprentice with ZESA in receipt of an allowance. Defendant would use that allowance for her own needs and to assist her parents and her siblings. When the defendant completed her apprenticeship in 2014, and was now in receipt of a Salary, she continued with her commitments to her parents and siblings. This meant that there was not much from the defendant to contribute towards the purchase of Stand 11368 and for the construction of the matrimonial house thereon.

As regards the second property Stand 2185 (Flat 8 Normandy), the plaintiff indicated that this was acquired from the same resources as in the first property. It was thus through his locum duties and private work in surgeries that he was able to raise the purchase price. This flat was acquired in 2013 when the defendant was still on apprenticeship and in receipt of an allowance, not a Salary.

Documents comprising the Agreements of Sale and receipts for the purchase of the above two properties were tendered into evidence confirming the period of the purchase of the stands and development of the matrimonial house.

As regards the third property, Stand 10163 Greenside Extension, the plaintiff's evidence was to the effect that, in an effort to bring defendant into participating, the couple opened a bank account into which they deposited money to buy a stand. It was his evidence that due to their skewed earning capacities he contributed more into that account than the defendant. He put his contribution at about 70%. When the property was bought the names of the parties were endorsed as purchasers. The intention behind including defendant's name was so that they would be able to access funds for development of the Stand from ZESA Pension Fund.

Whilst in her pleadings the defendant had given the impression that she had made substantial direct financial contributions towards the purchase of the properties in question, this turned out not to be so from her own evidence. The defendant lamentably failed to establish any substantial direct financial contribution towards the purchase of the properties. Her attempt at contending that she made substantial financial contributions resulted in contradictions within her own evidence. For instance, she testified that she was an apprentice with ZESA from 2010 to end of March 2014. She indicated that when she married the plaintiff in September 2012 she

was still an apprentice. She, however, indicated that as an apprentice she was in receipt of an allowance and a Salary. When quizzed how a trainee on apprenticeship would receive both an allowance and a salary, defendant, despite being adamant that this was the case, was unable to explain or tender proof that she was indeed in receipt of an allowance and a salary at the same time. Later, when further cross examined she seemed to recant, and now stated that she was in fact in receipt of a Salary not an allowance. As a result of the contradictory evidence defendant was asked to produce proof of such income and its nature to which she said she had no proof as she had not considered it necessary to bring her salary pay slips or other form of proof of the nature of income she was in receipt of. It was incomprehensible how she could have thought that such evidence was unnecessary when that was the hallmark of her contention and the bedrock for her claim to a bigger share in the properties than was being offered by the plaintiff.

Another contradiction was that whilst initially the defendant denied devoting any part of her allowance or salary to her parents or siblings, she later on admitted that she would chip in with about \$300.00 per term to assist with her siblings' school fees.

As regards her earnings from the time she was now in formal employment defendant alluded to the fact that she was now earning about two and half times plaintiff's income. However, just as with earnings from apprenticeship, she had no payslip or bank statement or any documentary support. Having claimed to be earning that much she was later heard to say that her earnings at that time were a bit above plaintiff's income. This was again inconsistent with the earlier version that she earned about two and half times above plaintiff's salary. It was also her evidence that as an artisan she would be on standby duties which brought in extra income. She was, however, not able to state the quantum of such income, even on average basis.

The defendant was heard for the first time in her evidence to now allege that their financial arrangement was that after being paid they would sit down and discuss what to do with the money. She would then give her bank card to the plaintiff. According to the defendant, the plaintiff kept all the couple's bank cards as the head of the family. This was an aspect that had not been put to the plaintiff and had not even been included in defendant's pleadings. Another new aspect to emerge from defendant's evidence was that she now averred that she would, in fact, submit her salary/ income to her husband. Again this had not been put to the plaintiff and was not in defendant's plea or counter claim.

It was apparent that these pieces of new evidence were intended to buttress her contention that she made substantial contributions to the purchase of the properties.

Though the defendant had at some point stated that she earned about two and half times above plaintiff's income, and then a bit above plaintiff's income, she later conceded that the plaintiff earned much more than her as he would engage in locum duties and work in private surgeries. She indicated that plaintiff would get lump sum payments from Medical Aid Societies such as PSMAS, CIMAS and others. She further conceded that it was from these lump sum earnings that the plaintiff was able to save for the purchase of the immovable properties and households goods.

Having made such concessions the defendant was then asked how her salary would then be used to which she indicated that her salary would be used for groceries, the maid, gardener and plaintiff would keep some as cash.

It was after such admissions that defendant now conceded that the plaintiff earned much more than her; that is, after combining his salary and income from locum duties and private work at surgeries. She also indicated the manner in which the immovable properties were acquired and this confirmed the plaintiff's version in a material way. It was thus clear that it was the plaintiff who went about looking for properties to buy and bought such properties using his earnings.

On the construction of the cottage and the main house on Stand 11368 Greenside Extension, the defendant could not insist on any meaningful contribution once she conceded that her salary was expended on groceries.

When asked if she had contributed anything towards the purchase of Flat 8 Normandy defendant said it was minimal. She could, however, not state what that minimal was. As regards the third property, Stand 10163 Greenside Extension, the defendant confirmed as stated by the plaintiff that the couple decided to pull their resources together by opening a bank account into which each would deposit some money for the purchase of a stand. It is this money that was used to purchase the stand in question hence the agreement of sale is in the names of both parties. The defendant could not, however, state how much each party was contributing into the account. It is safe to accept that as her total earning per month were far below plaintiff's earnings, in total her contributions were equally much lower as argued by the plaintiff. The defendant also confirmed that the rationale behind including her name on the agreement of sale for this Stand was so that she could access ZESA Pension Funds for the development of the Stand. It was thus not because they had each contributed equally towards its purchase.

The defendant's level of contribution was also confirmed by the figures she proffered in her evidence in chief and under cross examination. Without admitting that the figures she

proffered were correct, plaintiff's counsel took defendant through the figures as she gave them out to ascertain how much she believed she had contributed towards the purchase price of the three immovable properties. After the calculation it emerged that even from her own figures her direct contribution was less than 15% of the purchase price, that is, excluding the costs for construction. Thus if her own total contributions, in the absence of evidence to the contrary is less than 15% of the purchase price, such contribution would be further reduced in percentage terms when the cost of construction is considered.

It was in view of all this that plaintiff felt justified to say that the property he was offering to defendant is of far greater value than defendant's contributions in mathematical terms.

The defendant on her own, on realising the negligible direct contribution she made, especially after a computation involving her own figures, could only insist on being awarded the matrimonial house on the basis that she is the one with custody of the minor child and since she has been staying in the house she is now attached to it- it is her dream house and so it should be awarded to her. She also contended that plaintiff is financially able to construct another house on Stand 10163 Greenside Extension whilst she would be unable due to lack of resources.

This part of defendant's contention is however not supported by the parties' current status. The plaintiff testified that his sources of extra income have virtually dried up as Medical Aid Societies are not paying and the surgeons he used to do extra work for have either retired or left the country. The defendant was unable to refute that plaintiff's financial fortunes have changed for the worse and that he is now relying on his government salary. There is thus no guarantee that plaintiff would be able to construct another house on stand 10163 Greenside Extension, Mutare, in the current economic environment.

Having found that plaintiff's direct contributions far exceeded defendant's, it is nevertheless necessary to consider other factors before deciding on an appropriate award.

On indirect contributions, it is my view that the evidence adduced did not show that there was much as the marriage was short lived. In my view the plaintiff was a more credible witness than the defendant. He testified that their marriage was not a normal one from the conduct of the defendant. It was beset with marital sanctions he termed 'statutory instrument' in the bedroom. Though short lived he came out of it bruised as he now suffers from hypertension. The defendant's excuse, for such conduct on her part, was that it was her first

time to be married. Impliedly, the defendant admitted to imposing rules that made their marriage life not enjoyable at all

It was evident that the marriage was not one where it can be said that defendant was a faithful wife who diligently performed domestic chores as was the case in *Usayi v Usayi* (*supra*). The indirect contributions that are normally found in long lasting marriages were absent in this short lived marriage. The plaintiff made it clear that within the first three years he had already sent defendant to her people over issues of infidelity and non-performance of the basic household chores he expected in a normal marriage. The defendant did not deny that she was sent to her people on issues of infidelity and failure to perform certain chores including the aspect of 'statutory instrument' in the bedroom. Instead she accused plaintiff of hacking into her 'whatsapp' and e-mail accounts after which he started accusing her of infidelity. Such a statement is not a denial of marital problems that led to her being sent to her people and led to this suit for dissolution of the marriage.

It is apparent that the counselling defendant got from her people did not lead to a lasting relationship. It was clear that even for that short period, there was not such comfort or society to be enjoyed in the marriage. The defendant's conduct affected the level of her contributions both directly and indirectly to the couple's estate.

If the distribution was to be based on the direct and indirect contributions made by each party, the defendant would not get more than 10 % of the total value of the immovable properties in question. The value of Flat number 8 would be much more than she would be entitled to.

For instance in 2017 when summons were issued the open market values of the properties were assessed as follows;

Stand 11368 the Matrimonial House – USD 185 000-00;

Flat 8 Normandy Court – USD 40 000-00; and

Stand 10163 – USD 30 000-00.

The total value was thus USD 255 000-00 whereas the contributions by defendant were nowhere near a sixth of that figure.

It is pertinent to consider other factors alluded to in s 7 of the Act. One such factor pertains to the standard of living of the parties and their child.

Both parties accepted that their standard of living was above average. They enjoyed a relatively good life and brought their child in that life style. They lived in the low density area of Mutare. The order for distribution must thus ensure that as far as is possible and practicable,

the parties maintain the standard of living they were accustomed to. Where feasible they should be afforded an opportunity to continue residing in the low density areas.

As regards the other foreseeable financial and social needs and obligations, it is clear that as they adjust to a new life after divorce and they would need to purchase some movable properties to replace those awarded to the other spouse. A cursory examination of the list of movables shows that defendant was awarded the bulk of the movables so it is plaintiff who will have the burden of acquiring more assets to replace those awarded to defendant. Upon separation the plaintiff has been living in rented accommodation whilst the defendant remained in the matrimonial house. After a distribution of the assets there will not be need for plaintiff to continue in the rented accommodation. It is only fair and just that each spouse must have accommodation of their own. The only issue is who should be awarded which property?

It is also clear that from the agreement of the parties, both have the responsibilities of maintaining their minor child in almost equal proportions. The plaintiff has the added responsibility of paying \$320-00 per month towards the maintenance of the child in addition to the provisions the parties agreed to share equally. The defendant as the custodian parent as the day to day responsibilities of looking after the child.

Upon considering all the circumstances of this case I am of the view that the defendant does not deserve the matrimonial house but should be content with the Flat. I am of the view that it would be an act of injustice to award the matrimonial home to the defendant whilst plaintiff is awarded the flat and the vacant stand. Not much was made for court to transfer the matrimonial home registered in plaintiff's name to defendant. The fact that defendant will have custody of the minor child was not good enough a cause for her to be awarded the matrimonial house. What the defendant must be provided with is accommodation enough for her and the child so that they continue with the standard of living they were accustomed to albeit now residing in a smaller house but still in the low density area. See *Munhenga v Munhenga* SC32/03. The flat offered by plaintiff will adequately cater for the defendant and the child. This is the property to be transferred from the plaintiff to the defendant.

As for the vacant stand bought in their joint names I am of the view that it is only fair and just that in be shared equally. The vacant stand will thus be distribution on a 50:50 basis with the plaintiff being given the first option to buy out defendant's share within three months of the date of receipt of a new report of evaluation. Should he fail to do so, the defendant shall be given the option to buy out plaintiff's share within three months from the date of plaintiff's failure to buy her out. Should both parties fail to exercise such option, the property shall be

sold to best advantage by an estate agent mutually appointed by the parties or one to be appointed by the Registrar at the parties' instance.

The costs of transfer in respect of the Flat from plaintiff's name to defendant's name shall be shared equally by the parties. The parties shall bear costs associated with any transfer of the vacant stand to either spouse in equal proportions.

Costs of suit.

Though initially defendant claimed for contribution for costs, she abandoned this at trial and sought that if her claim succeeded she be awarded costs of suit. It is my view that no justification has been made for an award of costs in favour of the defendant. Both parties are equally able to pay their own costs of suit.

Accordingly, it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. Custody of the minor child, namely, Makatendeka Mubaiwa (born on 5th July 2013) be and is hereby awarded to the defendant.
3. The plaintiff is hereby granted reasonable rights of access in the following manner:
 - i) During the school term, the plaintiff is entitled to access the minor child every alternate weekend and at any other time subject to the defendant's consent. Such consent will not be unreasonably withheld.
 - ii) During the holidays, the Plaintiff is entitled to access the minor child for half of the school holidays and on alternate public holidays.
4. The parties shall share and contribute equally the responsibilities of maintaining their minor child including school needs. In addition plaintiff shall pay maintenance in the sum of \$ 320.00 per month beginning 30 October 2018.

The above maintenance arrangements shall continue till the child attains the age of 18 years or becomes self-supporting whichever is earlier.

5. The plaintiff is hereby awarded the following movable properties:-
 - Mercedes Benz Kompressor motor vehicle registration number AEC 0909
 - Everything in his possession at Flat 8 Normandy Court, Mutare;
 - Half the Lounge suite as agreed by the parties; some kitchen utensils as already agreed by the parties;
 - One generator;
 - Book Shelf;

- Printer;
 - 54 inch Samsung Television set
 - One upright Fridge;
 - Bedroom suite (from the bachelor's days)
 - Some kitchen utensils as agreed by the parties
 - Some wedding photos as already agreed by the parties.
6. The defendant is hereby awarded as her sole and exclusive movable property the following:-
- Toyota Vitz motor vehicle registration number AEI 0501.
 - One queen size bed;
 - Half lounge suite as agreed by the parties;
 - Television Stand;
 - Lounge table;
 - Room Divider;
 - Two double beds;
 - Main Bedroom Suite;
 - Deep freezer;
 - All the plates
 - Portion of boxed goods as agreed by the parties;
 - One Samsung Double Door fridge;
 - Microwave;
 - Some wedding photos as already agreed by the parties;
 - Some kitchen utensils as already identified by the parties;
 - All curtains;
 - Tablet;
 - Extractor;
 - Dining suite.

The plaintiff shall sign all necessary documents for the change of ownership in respect of the Toyota Vitz motor vehicle from plaintiff's name to defendant's name within 7 days upon receipt of request. The defendant shall pay all costs associated with the aforesaid change of ownership of the vehicle.

7. The defendant is hereby awarded 25% share of plaintiff's shares in the following companies:-

- i) Dekar Force Security (Private)Limited
- ii) Deu-shta (Private) Limited ; and
- iii) SAMEC Healthcare Professionals (Private) Limited.

The plaintiff shall take necessary steps and sign all necessary papers to effect the transfer of the shares into defendant's names within 30 days upon request or within such longer period as the parties may agree. Should the defendant fail to do so within the above stipulated period, the Sheriff shall perform such function in his stead.

8. Immovable properties

8.1 The Plaintiff is hereby awarded the following as his sole and exclusive property:-

- i) Stand number 11368 Greenside Extension, Mutare;
- ii) 50 percent share in Stand number 10163 Greenside Extension, Mutare.

8.2 The defendant is awarded the following as her sole and exclusive property:-

- i) Stand number 2185 Umtali Township of Umtali Township Lands, also known as Flat No. 8 Normandy Court, Mutare; and
- ii) 50 percent share in Stand number 10163 Greenside Extension, Mutare.

8.3 The plaintiff shall sign all necessary papers to effect transfer of Flat 8 from his name into defendant's name within 30 days from date of request. The costs of transfer shall be borne by the parties in equal shares.

8.4 The parties shall within 30 days of this order appoint a mutually agreed evaluator to evaluate Stand 10163 Greenside Extension, Mutare. If parties fail to agree on an evaluator, one shall be appointed by the Registrar from his list of independent evaluators.

9. The plaintiff is hereby granted the first option to buy out defendant's share in Stand 10163 Greenside Extension, Mutare, within 3 months from the date of receipt of the evaluation report. Should plaintiff fail to exercise the option within the stipulated period or such longer time as the parties may agree, the defendant shall have the option to buy out plaintiff's share within 3 months from the date of plaintiff's failure.

9.1 In the event of both parties failing to buy each other's share the property shall be sold to best advantage by an estate agent mutually appointed by the parties, or one

appointed by the Registrar, as the case maybe, and the net proceeds shall be distributed equally between the parties.

9.2 Should either of the parties fail to attend to any obligations in respect of signing necessary documents to effect change of ownership or transfer in respect of any of the above properties, the Sheriff is hereby directed to sign all such necessary papers to effect the change of names or transfer, as the case maybe, upon request.

10. Each party shall bear their own costs of suit

Hove and Associates, plaintiff's legal practitioners
Gonese and Ndhlovu, defendant's legal practitioners.