

TIMOTHY TEMBA SIMBA
versus
FUNGAI CATHRINE SIMBA (NEE JONGA)

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 2-3 March and 25 June 2020

Divorce Action

T. W Nyamakura, for the plaintiff
T Pfigu and A Ingwani, for the defendant

CHITAKUNYE J. The plaintiff married the defendant in terms of the Marriage Act [*Chapter 5:11*] on the 1st October 1983 at Harare. The marriage ceremony was accompanied by pomp as each spouse vowed to cling to each other in the marriage- in health and in sickness, in riches and in poverty- and to be separated only by death. At that time they were only 25 and 23 years old respectively hence full of promise for the future in each other's company. Their marriage was blessed with two children of whom one is now late having died on the 23rd August 2017.

The parties were both in formal employment and have largely been in formal employment for most of their married life.

After about 17 years of living together as husband and wife the plaintiff deserted the matrimonial home in either November 1999, as per his assertion, or in September 2000, as stated by the defendant. Since that period parties have not stayed together as husband and wife. In about February 2001 the plaintiff issued summons out of this court for a decree of divorce and ancillary relief in HC 1347/01 which action the defendant contested and filed a counter claim. It would appear that the plaintiff developed cold feet and did not pursue that matter to its logical conclusion. The defendant also did not pursue her counter claim to its logical conclusion. In September 2013 the plaintiff issued second summons from this court for the dissolution of the marriage and ancillary relief in HC 8057/2013. The defendant raised a special plea contending that the matter in HC 1347/2001 was still pending. As a consequence on the 5th August 2014 the plaintiff withdrew the matter. It would appear that the matter in HC 1357/01 was later withdrawn as noted from a request for payments of costs in respect of the two aborted matters by letter dated 23rd August 2016 from the defendant's legal practitioners

to the plaintiff's legal practitioners. I have made reference to these previous proceedings to show that the issue of divorce and ancillary issues had been in the contemplation of the parties since 2001 when the initial summons was issued.

On the 31st August 2016 the plaintiff filed the present suit seeking a decree of divorce and ancillary relief. The plaintiff alleged that the marriage relationship has irretrievably broken down to an extent that there are no reasonable prospects of restoration to a normal marriage relationship in that:-

- a) During the subsistence of the marriage the plaintiff and the defendant failed to maintain and develop common interests and have argued to excess;
- b) They have lost love and affection for each other;
- c) they no longer cohabit together as the Plaintiff left the matrimonial home and the parties have no intention of resuming cohabitation and so wish to be divorced; and
- d) The parties have not lived together as husband and wife for a continuous period of at least 12 months immediately preceding the date of commencement of this action.

In the circumstances he prayed for a decree of divorce to be granted.

On ancillary issues, the plaintiff alleged that there was only one immovable property currently owned by the parties namely Stand 271 Mandara Township of Lot 3A Mandara held under Deed of transfer number 7963/87 dated 12 November 1987, also known as number 58 Shaneragh Road, Mandara. He proposed that this property be distributed equally between the parties. He suggested that the defendant be given the 1st option to buyout plaintiff's 50% share within 6 months of the date of grant of the decree of divorce failing which the plaintiff will be granted the option to buy out the defendant's share within the succeeding 6 months. If both parties fail to exercise the above option then the property be sold and the net proceeds be distributed in equal proportions between the parties.

On movable properties the plaintiff proposed that each party retains movable properties in their respective control or possession or that is registered in their name.

The defendant, whilst conceding that the marriage relationship has irretrievably broken down, contended that the reasons for the breakdown were not as stated by the plaintiff. She also disputed the distribution of assets as suggested by the plaintiff'.

The defendant made a counter claim for the dissolution of the marriage and her own proposal on how the assets ought to be distributed. In this regard she alleged that the marriage relationship has irretrievably broken down in that:-

- a) The Plaintiff had frequently associated improperly with a number of women;
- b) The plaintiff has infected the defendant with a sexually transmitted disease including the incurable herpes;
- c) The plaintiff spent large amounts of money on his mistresses while his family went unprovided for;
- d) The plaintiff deserted the defendant and the then minor children at a time when the defendant had been hospitalised following a road traffic accident and when she was completely immobile;
- e) The plaintiff has been verbally abusive and cruel to the defendant throughout the marriage to the extent of making telephone calls to his mistresses in her presence; and
- f) The plaintiff abandoned his responsibilities for school fees and maintenance for the minor children leaving the defendant to put them through school on her own.

It was as a result of the above factors that the defendant prayed for a decree of divorce. On ancillary issues, the defendant stated that at the time the plaintiff deserted the matrimonial home there were two immovable properties, namely:-

- a) Stand number 271 Mandara Township of Lot 3A Mandara registered under deed of transfer number 7963/87 dated 12 November 1987 also known as 58 Shaneragh Road Mandara (the Matrimonial home) and
- b) Stand 854 Mandara Township of Lot 13 Mandara, Harare.

This latter property was, however, sold by the plaintiff and he kept all the proceeds to himself. She thus conceded that as at the time of institution of these proceedings there was only one immovable property, which is the matrimonial home.

The defendant proposed that stand 271 Mandara Township also known as number 58 Shaneragh Road be awarded to her as her sole and exclusive property.

The defendant was not averse to the plaintiff's proposal as regards the movable property.

From the pleadings filed of record it was apparent that the only issue for determination was on the distribution of the matrimonial home. The plaintiff asked for an equal share whilst

the defendant contended that it must be awarded to her with no share for the plaintiff as the plaintiff had solely benefited from the disposal of stand 854 to her exclusion.

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

“Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to-

a) The division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to another.”

The basic factors to consider in determining a just and equitable distribution of the assets of the spouses are encapsulated in s 7 (4) as follows:-

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

- (a) The income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future.
- (b) The financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future.
- (c) The standard of living of the family, including the manner in which any child has been educated or trained or expected to be educated or trained.
- (d) The age, physical and mental condition of each spouse and child.
- (e) The direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties.
- (f) The value to either of the spouse or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage.
- (g) Duration of the marriage;

and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.”

These factors are not exhaustive thus court may consider other factors or circumstances established by the evidence adduced. In *Shenje v Shenje* 2001(1) ZLR 160 (H) at 163E – 164

A GILLESPIE J aptly noted that:-

“In deciding what is reasonable, practical and just in any division, the court is enjoined to have regard to all the circumstances of the case. A number of the more important, and more usual, circumstances are listed in the subsection. The list is not complete. It is not possible to give a complete list of all the possible relevant factors. The decision as to a property division order is an exercise of judicial discretion, based on all relevant factors, aimed at achieving a reasonable, practical and just division which secures for each party the advantage they can fairly expect from having been married to one another, and avoids the disadvantage, to the extent they are not inevitable, of becoming divorced.

The factors listed in the subsection deserve fresh comment. One might form the impression from the decisions of the courts that the crucial consideration is that of the respective contributions of the parties. That would be an error. The matter of the contributions made to the family is the fifth listed of seven considerations. The first four listed considerations all

address the needs of the parties rather than their dues. Perhaps it is time to recognise that the legislative intent, and the objective of the courts, is more weighted in favour of ensuring that the parties' needs are met rather than that their contributions are recouped." See also *Gonye v Gonye* 2009 (1) ZLR 232(S)

What emerges from the case authorities is that all the circumstances of each case must be considered. The direct contributions, whilst important in the acquisition of properties, may in some cases not override other factors. As aptly noted by GILLESPIE J in the above case the legislative intent and the objective of the courts is more weighed in favour of ensuring that the needs of the parties as they part ways are met, rather than that their direct contributions are recouped. This is true especially where the marriage has subsisted for long and each party played their role as husband or wife during that duration. The Act provides for recognition of the indirect contributions, the needs and expectations (both financial and nonfinancial) of the spouses and the duration of the marriage. The longer the duration of the marriage the more important the indirect contributions, the needs and expectations become.

It is imperative to bear in mind that assets to be considered are all the assets belonging to the spouses as at the time of dissolution of the marriage. This includes assets that may have been acquired before marriage, during marriage and even whilst on separation. It is thus imperative for spouses to disclose all assets irrespective of the period they were acquired if the objective of the exercise is to be achieved. Once all the assets have been disclosed the approach to the distribution, including the exclusion of some assets in terms of s 7 (3) of the Act, can then be properly undertaken without the accusations of concealing of assets.

In *Takafuma v Takafuma* 1994 (2) ZLR 103(S) MCNALLY JA set out the approach that a court should adopt in apportioning the assets of the spouses. That approach has been adopted in a number of cases as a guide to achieving a just solution. The approach involves firstly sorting out the assets into three lots namely 'hers', 'his' and 'theirs'. 'Hers' and 'his' would comprise assets in the individual names of the spouses whilst 'theirs' comprises essentially assets registered in the joint names of the spouse. Court will then concentrate on the lot marked 'theirs' and apportion these using the criteria in s 7(4) of the Act. Secondly court will look at the result and consider whether the objective of ensuring spouses are placed in the position they would have been in had a normal marriage relationship continued has been achieved. Where the apportionment of the lot marked theirs does not lead to a just and equitable distribution of the assets so as to meet the objective, court will then consider transferring one spouse's asset or share to the other.

In *casu*, as already alluded to the only immovable property in dispute is registered in the joint names of the parties. It is thus in the category of 'theirs'.

As a jointly owned property each spouse owns a 50% share in that property. The question that arises is whether awarding each spouse a 50% share as advocated for by the plaintiff and as presumed from joint ownership would achieve the objective of '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 relationship continued...'

For instance, does the apportionment secure for each spouse the advantage they can fairly expect from having been married to one another, and avoids the disadvantages to the extent they are not inevitable of becoming divorced; or is this a case where the justice of the case requires that a spouse's share be awarded to the other? If so, how much of that share?

It is with this in mind that the evidence by the parties will be analysed.

The plaintiff gave evidence and tendered documentary evidence after which the defendant gave evidence and tendered documentary evidence in support of her case.

From the evidence adduced certain facts are common cause. It is common cause that both parties were employed for most of their married life. The plaintiff was employed as an executive and the defendant as a secretary. The only period the defendant was not in formal employment was from 1992 to 1995 when, at plaintiff's behest, she joined him in Botswana where he had moved to. Both parties were agreed that besides income from employment they engaged in other income generating activities such as buying and selling of various wares including motor vehicles to augment their income. They further agreed that in all this they cooperated and there is no dispute that each contributed to the marital wealth to the best of their abilities whilst they stayed together for the first 17 years of marriage.

In those 17 years they acquired a house in Cotswold Hills by mortgage bond which they later sold in 1985 in order to acquire number 58 Shaneragh Road, Mandara property. This second property was acquired through a mortgage bond in which their respective incomes were considered in assessing their ability to repay the loan. It was common cause that they acquired another property, namely stand number 854 Mandara. This stand was acquired as an undeveloped piece of land in June 1999. The plaintiff purchased it in his name. The defendant contended that their intention was to acquire it as an investment for their children. In that regard it was to be registered in the name of a company yet to be incorporated. Though the plaintiff disputed this assertion the agreement of sale at page 66 of exhibit 4 cited the purchaser as 'Timothy Temba Simba (Representing a company to be formed)'. This was clearly indicative

of the couple's desire to have the property in the name of a yet to be formed company. There is, therefore, merit in the defendant's contention that the property was never intended to be solely owned by the plaintiff but to be owned by a company for the benefit of their children. That intention was however defeated by the plaintiff when he obtained title deeds in his sole name and proceeded to deal with the property as his exclusive property.

It was also common cause that as at the time the plaintiff deserted the matrimonial home the two immovable properties were available as assets of the spouses. It was common cause that the mortgage bond on the matrimonial home was still outstanding and the defendant is the one who subsequently paid it off.

It was not seriously disputed that Stand 854 Mandara was subsequently sold by the plaintiff without informing or consulting the defendant. The use to which the proceeds from the sale of this property were put was disputed.

Having agreed as to the manner in which their family finances were raised and utilised during the period the two lived happily together, the area of disputation pertained to events after separation. It is in this light that each party's evidence will be analysed.

The plaintiff's evidence was to the effect that after some marital dispute he left home and never returned to this date. He confirmed that at the time he left the bond on the matrimonial home had not been paid up. He averred that upon separation he continued providing finance for the family in that he would send money to the defendant and meet some of the children's needs.

In as far as income earning capacities of the parties was concerned it was his evidence that by virtue of his better job he earned more than the defendant who was a secretary. In that way he argued that he was the major contributor of finance to the family.

The plaintiff further testified that after separation he went to Uganda where he worked for Telecel International. Whilst in Uganda he would send money home. Later when he went to Canada he continued sending money for the children's needs. The plaintiff referred to some documents in exhibit 2- his bundle of documents – as proof that he was sending money for family needs. A careful perusal of that bundle shows that it contains very few documents on the sending of money for the children's needs. The plaintiff himself admitted that these were scant documents when compared to the long period that lapsed since he left home. It is pertinent to note that most of the documents, few as they are, pertained to college fees for Shinga Simba for the year 2005. The payments were sent at the time the plaintiff was in Canada and were being sent directly to the college in South Africa. There was no evidence that he had sent any

money during the time he was in Uganda or even that during the entire duration of his absence he had ever sent any money to the defendant for family needs.

In his evidence the plaintiff conceded that since he left in 1999 it was the defendant who was taking care of the property including the servicing of the bond. Though he claimed to have been sending money to the defendant he failed to prove that he had sent any money towards the payment of the bond. It is thus safe to conclude that he never sent any money for payment of the mortgage bond, this was left to the defendant.

The defendant thereafter gave evidence. The defendant's evidence was to the effect that when the plaintiff deserted the matrimonial home he also abandoned the family. She was thus left to deal with family needs and the payment of mortgage bond from her limited income. She testified that she contributed to the purchase of all the immovable properties acquired during the subsistence of the marriage. It was her evidence that the Cotswold Hills property was acquired using wedding gifts and their respective contributions which included a loan. After about 3 years they sold that property in order to deposit for number 58 Shaneragh Road, Mandara. They then got a mortgage loan from CABS. In order to qualify for the loan both their salaries were considered hence her name was also included on the bond. In this regard the defendant referred to pages 58 and 59 of her bundle of documents which confirm that the first bond was in the names of both parties and not in plaintiff's sole name as the plaintiff had been portraying. These documents relate to a second bond that plaintiff obtained from his employer. The Deed of Transfer in respect of 58 Shaneragh Road, at page 80 of the aforesaid bundle, confirms that this property is registered in the joint names of the parties.

As regards Stand 854 Mandara the defendant indicated that as a couple they decided to invest in a property for the benefit of their children. They used their joint resources to acquire the property. Their intention was that they would form a company which would own the property for the benefit of the children. However, in disregard of this noble intention, the plaintiff registered the property in his sole name. Later when he had left home and was now working in Uganda the plaintiff sold the property through his brother without her knowledge. She only discovered that the Stand was being sold when she was filing some legal documents unrelated to their issues, with a certain law firm. She was not sure as to whether by the time of her discovery the property was still on the market or had already been sold as the advert she saw was not current. The defendant testified that when the plaintiff came from Uganda she confronted him about the sale and the plaintiff's explanation was that he needed the money. The defendant contended that she never got any proceeds from the sale of this property. She

categorically refuted the plaintiff's argument that his brother had given her some of the money which she used to pay off the bond. As far as she was concerned this brother had confessed ignorance of the sale when she first asked him about the sale. She only realised that the brother had lied to her when she discovered that he was the one who had been given the power of attorney to sell the property. The defendant contended that she was short changed by the plaintiff and she was of the view that the plaintiff should retain the proceeds of the sale of that stand as his share whilst she retained the matrimonial home.

The defendant's claim for a 100% of the matrimonial home was also premised on the fact that after desertion the plaintiff never looked back. She remained saddled with heavy responsibilities of taking care of their two minor children, the property and the bond repayments. The children were at private schools which were expensive and she had to meet their school fees and other school requirements without the plaintiff's assistance. As a consequence of the burden she was left with she had to get assistance from her relatives and had to obtain loans from her employer. It was her evidence that when the bond fell into arrear threats to foreclose were made and she had to borrow money to pay the arrears as the plaintiff was not sending her any money. She thus took over payment of the bond from 2000 when the plaintiff left to 2005 when she cleared the mortgage bond. In this regard she tendered a document at p 84 of her bundle of documents as proof of her paying off the bond. As far as she was concerned, therefore, had she not taken over the bond repayments and borrowed money to clear the bond, there would have been no number 58 Shaneragh Road to distribute as CABS would have foreclosed on the property. The defendant contended that she had to use most of her income to pay off the bond to an extent whereby she did not have any money to save.

The defendant also indicated that as number 58 Shaneragh Road has been her only home since they moved there and she has spent most of her earnings on it she has sentimental attachment to it. She thus cannot relocate.

She further testified that during their marriage the plaintiff had been engaging in extra marital affairs with other women as a result of which he infected her with a sexually transmitted disease which led to a secondary incurable disease which she still suffers from to this date. Her health has thus been compromised. In the circumstances she may not be able to remarry especially at her age of 59, turning 60 later this year. She thus needed the property as her sole and exclusive property. The plaintiff as a high flying executive can always find other properties if he does not already have any. As between the two it was clear that the defendant was in

greater need of the house as a place of abode than the plaintiff who seemed settled and well established outside the country.

A careful analysis of the evidence adduced and the manner it was adduced shows that whilst both parties were agreed that during their early years they worked together and acquired the properties in question, it is the events after the separation that they could not agree on as to how they should affect the distribution of the immovable property.

It was not disputed that both parties made direct contributions towards the purchase of the immovable properties in question. After separation the defendant remained with the task of making further direct and indirect contributions towards the repayment of the bond, maintenance of the matrimonial home and the family. Her contributions in that regard were immense. Without such contributions the matrimonial home could have been foreclosed by the bank or, at the very least, could have fallen into dilapidation. Thus for 20 years the defendant maintained the property on her own.

The defendant also played a key role in providing for the children. Whilst her assertion that she paid school fees was not true as school fees were paid by her employer as part of her employment benefit, she nevertheless met other school needs and requirements. She also ensured that the children remained focused in their education and upbringing. This type of contribution cannot be underestimated. This happened for the 20 years when the plaintiff was virtually out of the family picture and was busy making progress in his career without much attention to the needs of the family. From his resume I got the impression that he has been doing very well yet found no time or resources for his family.

It was also apparent that the plaintiff was not candid with court as to what he has been doing with the income he earned over the last 20 years. He was not forthcoming on any assets he acquired during that period of separation or even investments he may have made. It is not easy to accept that whilst for the 17 years the couple were able to acquire three immovable properties, for the 20 years on separation the plaintiff despite advancement in his career was not able to acquire any immovable property. The lack of full and frank disclosure cannot work in his favour.

It is trite that in matrimonial matters spouses ought to be candid with court by disclosing all assets belonging to them including investments they hold as at the time of dissolution of the marriage. Such assets include those acquired before marriage, during marriage and whilst on separation.

In *Denhere v Denhere* SC51/17 at pp 12-13 of the cyclostyled judgement, in commenting on the consequences that may befall a spouse who has not been candid with court, GOWORA JA stated as follows:-

“The court clearly had in mind when distributing the assets, the fact that the appellant had not only tried to hide his assets he had also misled the court in the manner in which he had pleaded. He had stated that the Rivonia property was rented. In relation to 29A Dover Rd, the appellant initially denied its existence only to later claim that it was jointly owned with a friend residing in the United Kingdom. In *Beckford v Beckford* 2009 (1) ZLR 271(S), this court stated:

“Having rejected Mr Beckford’s evidence in respect of the proprietary rights of the parties, the learned trial judge said the following at pp 81-82 of the cyclostyled judgment:

‘I however, find that the plaintiff did not disclose all his assets especially after he instituted these proceedings. The consequences of his attitude are summed up in the English Court of Appeal by BUTLER-SLOSS LJ, in *Baker v Baker* ([1995]2 FLR 829(CA)) at page 835, in these words:

‘Mr Posnansky pointed to an utterly false case and asked us to consider why the husband was lying and what did he have to hide. If the cupboard was bare, it was in his interests to open it and display its meager contents. But on the contrary, the husband, despite his protestations to the contrary, continued to live the life of an affluent man. **I agree with the submissions from Mr Posnansky that if a court finds that the husband has lied about his means, and failed to give full and frank disclosure, it is open to the court to find that beneath the false presentation, and the reasons for it, are undisclosed assets.**

I will use this fact against him in distributing the assets that he disclosed. It is fair, just and equitable that I award to the defendant all the money that is held in the joint account of their respective English solicitors. I have agonized over the appropriate order to make concerning the distribution of the immovable properties that the plaintiff disclosed which are registered in England.

In making the order that I have come to, **I have been influenced in great measure by the plaintiff’s failure to make full and frank disclosure, the size of the business** transactions that were carried out by Coralsands and the concomitant income that must have accrued to him, the benefit that accrued to him from the disposal of 7A Granville Road to Nicky Morris on 10 November 2005, the concerted program that he undertook in asset stripping the matrimonial estate to his benefit and to the impoverishment of the defendant of which the registration of a charge in favour of his parents for £67 000 against 390 Sutton Common Road was part of, his financial acumen and resourcefulness and his apparent disdain for the integrity of the legal process. I will order that the two disclosed properties be transferred into the defendant’s name while the plaintiff shall remain responsible for the discharge of all the encumbrances, such as the mortgages and restrictions registered against them.

The issue which now arises is whether there is any basis for interfering with the proprietary awards made by the learned trial judge in favour of Mrs Beckford in terms of paras 16 to 19 of the order. I do not think there is.

In *Baker v Baker* supra OTTON LJ, who concurred with BUTLER-SLOSS LJ who prepared the main judgment, said the following at 837:

‘accordingly, the husband cannot complain if the judge following authority explored what was before him and drew inferences which may turn out to be less fortunate than they might have been had he been more frank and disclosed his affairs more fully. Such inferences must be properly drawn and reasonable. On appeal it may be possible for either party to show that the inferences or the award were unreasonable in the sense that no judge faced with the information before him could have drawn the inferences or awarded the figures that he did. I am satisfied that the appellant has not succeeded in demonstrating that the figures WARD J awarded were in any regard unreasonable or unjustified.’

In the present case, I am not prepared to say that no Judge could have drawn the inferences or made the awards made by the learned trial judge. There is, therefore, no basis for interfering with the awards made.” (emphasis in bold is mine)

It is clear from the above that disclosure is critical as it assists court in the exercise of its wide discretion. Disclosure does not necessarily lead to that asset being awarded to the other spouse but provides court with solid evidence in determining the spouses’ circumstances as they divorce and their needs for the foreseeable future. It is thus improper to fail to disclose any assets owned on the pretext that it was acquired after separation.

In *casu*, the plaintiff, both in his pleadings and his evidence, did not make a full and frank disclosure of properties he acquired after separation. The plaintiff admitted under cross examination that he had indeed acquired other properties but refused to give particulars of such properties. The plaintiff failed to answer questions on a property known as Stand 3078 Irene Farm in South Africa despite being advised that the defendant was alleging he owned it or at the very least had interests in that property. Besides this, the plaintiff was not forthcoming on any other properties he could have acquired. He seemed to be of the view that such properties were not subject of consideration as they were acquired after separation. This was obviously wrong as the assets to be considered include assets acquired whilst on separation. An inference may rightly be drawn that he indeed has other properties to his name. As aptly put in *Baker v Baker* (*supra*) if his cupboard has nothing why not open it. Refusal to open leads to an inference that there is something in it he wishes to hide from the court.

It is common cause that for 17 years the parties stayed together. After those 17 years they have lived and led virtually separate lives. The defendant and the children who were still minors remained at the property in question. The plaintiff on the other had proceeded to Uganda for a few years then to Canada from 2001 to 2005. Currently he said he is based in South Africa where he is running his own company. It was apparent that he is very successful in his company. He indicated that he is also a non-executive director with FBC Building society and so he occasionally comes to Zimbabwe for meetings. His resume gives the impression he would

not have had any problems of acquiring other properties in the 20 years he has not been living at the matrimonial home. Despite all this plaintiff was not forthcoming in disclosing assets that he owns or has interests in. He has no one to blame if adverse inference is drawn from the non-disclosure.

Another factor to consider is that the fact that the plaintiff sold Stand 854 Mandara at about or during the time he commenced divorce proceedings in HC 1357/01 without informing or consulting the defendant points to a desire on his part to distance this property from distribution and thus prejudice defendant's claim for a share in that property. As already noted the plaintiff failed to account for the proceeds of that sale such that the only logical conclusion is that he utilised it for his own benefit. The insinuation that the \$800 000-00 paid by the defendant to CABS towards the bond repayment was from the proceeds of that sale was not credible at all. The sale in question took place within a short period after separation and, apparently, when the plaintiff was about or had just commenced the first divorce process. This could have been the period 2000 to 2001 yet the \$800 000-00 was only paid by defendant in 2005. It was never the plaintiff's evidence that he kept that money for all that period. The plaintiff's brother who sold the property on his behalf was never called to testify on what he did with the proceeds of the sale. The plaintiff's assertion in this regard was clearly clutching at straws.

Before concluding it is imperative to apply the evidence adduced to the broad factors alluded to in s 7 of the Act.

- (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.

A careful consideration of the spouse's respective income-earning capacities, assets and other financial resources shows that the plaintiff will continue earning more income than the defendant. In his evidence the plaintiff alluded to the fact that he has his own company in South Africa and he also sits on some boards of companies including FBC Building Society where he receives some income. He expects to be active in these positions for the next 10 to 15 years. It was apparent that he will continue receiving substantial income and the dissolution of the marriage will not affect such income at all. Though he did not disclose the assets he acquired since separation in 1999 it was apparent that he has not just been sitting and doing nothing. This lack of full and frank disclosure of assets acquired since separation should not work in his favour. As noted in *Denhere v Denhere (supra)* full and frank disclosure is very important in matrimonial matters.

It may also be noted that the plaintiff's claim for a 50% share in the disputed property was not based on his need for it but on his contributions in the acquisition of the property during the time the parties were living together some 20+ years ago. I did not hear him to suggest that he really needed the house for use or share thereof to acquire another property.

The defendant, on the other hand, gave the impression that she is desperately in need of the house not only as a property whose acquisition she contributed to but as the only home she has known since its acquisition in 1985. She has also invested in retaining the property at a time it could have been foreclosed.

In terms of income earning capacity, the defendant indicated that due to her age of 59 years; she is due to retire in September 2020. That retirements will bring to an end the main source of income she has known all her married life. Post-divorce she will struggle to secure another employment due to her age and the obtaining economic environment. It is thus clear that a loss of the house will have devastating consequences on the defendant and not so much on the plaintiff.

- (b) The financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future.

It was apparent from the evidence that as the parties divorce the plaintiff is in a much healthier financial position than the defendant such that he will hardly feel the impact of the divorce. Since separation he has not maintained the family as would have been expected. Upon divorce no obligations will arise as a result of the divorce. No maintenance has been claimed against him. He will virtually continue as he has been doing for the past 20 years. In fact it maybe said that neither spouse will be saddled with any extra obligation or responsibility outside what they have already been handling since the separation in 1999 or 2000. This is so because since that period none has made provisions for the other.

- (c) The standard of living of the family, including the manner in which any child has been educated or trained or expected to be educated or trained.

In respect of this factor I am of the view that the plaintiffs' standard of living will not be affected at all. It is the defendant's standard of living that will be affected from the fact that she will soon be out of employment hence her sources of income will be diminished. As the only surviving child is a major neither party is obliged to maintain that child. It is my view that for the defendant to maintain a semblance of the standard of living she was used to during the marriage she certainly requires accommodation. She cannot afford comparable accommodation of her own after dissolution of the marriage as she will be financially incapacitated. It is thus

just that she be considered favourably in the distribution of the only immovable asset available to ensure that she does not become destitute but maintains a standard of living reminiscent of a wife of a successful executive.

(d) The age, physical and mental condition of each spouse and child.

The issue of age, physical and mental condition of each spouse is another factor to consider. The plaintiff though 62 years old indicated that he is in good health and was expecting to continue working for the next 10 to 15 years. The defendant, on the other hand, is 59 years and due to retire later this year. She alluded to the fact that she still suffers from the effects of the road traffic accident she was involved in in 1998 and that she also suffers from a disease as a result of an infection by the plaintiff. When asked about the defendant's health condition the plaintiff virtually said he did not know. There is thus nothing to refute the defendant's contention on her health. It would of course have been much better had the defendant tendered medical reports on her health condition.

(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.

This is an aspect on which the bulky of the evidence was premised on and as already noted both parties made contributions to the best of their abilities and nothing should separate them in this regard. Though the plaintiff argued that he contributed about 70% towards the acquisition of the properties as he earned more than the defendant, this must be weighed against the defendant's direct contributions which he admitted she made and the indirect contributions to the family estate since marriage to this date as she is still taking care of the home. It is my view that the deciding factors should really be on the needs and expectations of the spouses.

(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.

Neither spouses alluded to any benefit or pension they were expecting to get from the other and which they will now lose as a consequence of the dissolution of the marriage. The defendant as a spouse to a high earning spouse would have been expected to consider her loss but this was not so due to the long period of separation. She apparently does not see herself as benefitting under this factor for the reason that for the past 20+ years the plaintiff has not provided for her. She has had to fend for herself as if she was already divorced. In a nutshell she has been living a divorcee's life for the past 20 years.

(g) Duration of the marriage.

The parties having married in 1983 lived together for 17 years up to 2000 when the defendant deserted home. To date the marriage has subsisted for about 37 years of which 17 were under the same roof and 20 on separation. The duration of the marriage is such that the key determining factors should be the needs of the parties. In this regard it was clear that the defendant is in greater need of the property than the plaintiff. In fact, as already alluded to, the plaintiff did not give the impression that he was in need of the property. His desire was to simply recoup what he contributed principally because the property is jointly owned. The objective of the Act is not for a spouse to recoup his or her financial contributions especially after a marriage of almost four decades but for the parties to as far as is possible part ways with the benefits of having been married to each other for that long. The needs and expectations of the parties are pivotal in determining the distribution order in such circumstances.

I am of the view that upon a careful consideration of all the circumstances of the case, this is a case where in terms of s 7(1) (a) of the Act, the plaintiff's share must be transferred to the defendant. The only reasonable and practicable manner of distribution that would leave the parties in a position they would have been had a normal marriage relationship continued is for the defendant to be awarded plaintiff's 50 % share. The plaintiff can easily acquire another property if he has not already done so from the resources available to him.

Accordingly it is hereby ordered that:

1. A decree of divorce be and is hereby granted.
2. Each party is awarded the movable properties in their custody or possession as at the date of this order.
3. The defendant is hereby awarded Stand number 271 Mandara Township Lot 3A Mandara held under Deed of Transfer number 7963/87 dated 12 November 1987, also known as number 58 Shaneragh Road, Mandara, Harare as her sole and exclusive property.
4. The plaintiff shall sign all the necessary documents to enable transfer of his 50% share as joint owner to the defendant within 30 days from the date of request.
5. Should the plaintiff fail, refuse or neglect to do so within the stated period the Sheriff is hereby directed to sign all such documents as are necessary to effect the transfer in plaintiff's stead.
6. The defendant shall bear the attendant costs of transfer.
7. Each party shall bear their own costs of suit.

Coghlan, Welsh and Guest, plaintiff's legal practitioners
T. Pfigu Attorneys, defendant's legal practitioners.