REPORTABLE (77)

GOVATI MHORA
v
EMMACULATA MHORA

SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, BHUNU JA & UCHENA JA
HARARE, NOVEMBER 15, 2019, FEBRUARY 14, 2020 & JUNE 29, 2020

J. Majome assisted by *F. Siyawareva*, for the appellant

C. Damiso, for the respondent

UCHENA JA: This is an appeal against part of the judgment of the High Court, upholding the respondent's claim of a 50 per cent share of an immoveable property registered in the appellant's name pursuant to the distribution of property upon divorce.

THE FACTS

The appellant and respondent were married in 1970, in terms of an unregistered customary law union. In 1971 they solemnised their marriage in terms of the African Marriages Act [*Chapter 105*]. On 27 May 2005 they upgraded their marriage by solemnising it in terms of the Marriage Act [*Chapter 5:11*]. The union was blessed with four children who are now adults. Sometime in 2010, the respondent issued summons for divorce in the High Court seeking the following order:

a) "A decree of divorce
b) Maintenance for the plaintiff

c) Distribution of property as listed in paragraphs 10 and 11 of the papers
d) That each party bears his/her own costs."

The respondent claimed that the marriage had irretrievably broken down and there were no prospects of the restoration of a normal marriage relationship. She alleged that the appellant was involved in adulterous affairs with other women and bore children out of wedlock whom he brought to the matrimonial home to be taken care of by her among other factors.

The appellant conceded that the marriage had indeed irretrievably broken down. He argued that it was the respondent who was in fact involved in adulterous affairs with other men and denied ever committing adultery. The appellant admitted that he acquired house, number 114 Lomagundi Road, Harare (hereinafter referred to as "the immoveable property") during the subsistence of the marriage but submitted that he did so without the respondent's direct contribution. He, therefore, argued that there was no basis for the proposed equal sharing of the immovable property.

At the pre-trial conference the parties agreed that the following 2 issues be referred to trial:

1. "Whether or not the immovable property is matrimonial property?
2. If it is matrimonial property, what is the equitable distribution thereof?"

At the trial before the court *a quo*, the respondent gave evidence to the following effect. That during the subsistence of the marriage the parties acquired movable and immovable property through joint and complementary efforts in that although she was not gainfully employed, she took care of the family as well as the children born out of wedlock by the

appellant. She told the court *a quo* that she used to sew clothes and chair backs to raise income which she handed over to the appellant.

She told the court *a quo* that they started off in Goromonzi where the appellant was employed as a police officer. Thereafter, they moved to Ruware Park in Marondera upon the appellant's promotion to the Criminal Investigation Department. The appellant was again promoted and they moved back to Harare and acquired a house in Cranbone.

In 1982 the appellant took a second wife with whom they stayed together at the Cranbone house before moving to the Lomagundi House. The second wife bore three children to the appellant but divorced him after 22 years. After the second wife left, the respondent took care of her three children and two others born out of wedlock over and above her four children with the appellant. Although she accepts having been assisted by maids at various stages in her life, she asserts that she remained the primary caregiver in the family. She stood by the appellant when he was dismissed from employment, in 1985 fending for the family in the best way she could until the appellant got a job at Sandawana in 1996. The second wife would buy groceries but she divorced the appellant between 1990 and 1991 leaving the respondent to stand with the appellant until he was employed by Sandawana in 1996.

The respondent told the court *a quo* that she was 65 years old.

The appellant's former second wife, Viola Nyasha Nemaunga testified on behalf of the respondent supporting the evidence she gave in the court *a quo*.

The appellant did not contest most of the evidence given by and for the respondent save to say that the respondent was not entitled to a share in the immovable property. He submitted that the respondent did not contribute financially towards the acquisition of any of his immovable properties. He insisted that since his marriage to the respondent was out of community of property, he had no obligation to tell her what his intentions were with his monies and this justified why he did not tell her about the properties he bought during the subsistence of the marriage. He disputed that the respondent took care of the children and contributed towards the welfare of the family in any material respects as he hired a maid to take care of the children when he was not at home.

The appellant further testified that although the respondent did a cake making and sewing course, no income was realised from those ventures as he stopped her from pursuing them. His evidence was contradicted by his former second wife who told the court *a quo* that the respondent's ventures raised income which she surrendered to the appellant.

The appellant told the court *a quo* that although he stays elsewhere, he still has interest in the immovable property and produced several receipts before the court *a quo* to prove that he was responsible for the maintenance of that property.

After hearing the testimonies of the parties and listening to submissions by counsel, the court *a quo* held that taking into account the provisions of the Constitution of Zimbabwe, 2013, s 7(4) of the Matrimonial Causes Act [*Chapter 5:13*] and international law the respondent was entitled to a 50 per cent share of the Lomagundi house.

It held that the interpretation of the Matrimonial Causes Act should be in conformity with the Constitutional provisions on gender equality. The court *a quo* also took into consideration the fact that the respondent was now 65 years old and had passed her prime age with no income. It held that the respondent looked after nine children including five who were not her own and had to endure the humiliation of having another wife brought into the marriage.

The court *a quo* held that although the appellant was 73 years old he was still receiving his pension. It also took into consideration the fact that the respondent's evidence on the indirect contributions she made remained unchallenged. It was on the basis of these findings that the respondent was awarded a 50 per cent share in the immovable property.

Aggrieved by the decision of the court *a quo*, the appellant appealed to this court on the following grounds:

1. "The court *a quo* erred in failing to find that the appellant was entitled to 100 per cent or at least 70 per cent share of the immovable property taking into account his direct and indirect contribution in the acquisition and maintenance of the immovable property.
2. The court *a quo* erred and grossly misdirected itself at law and fact in finding that respondent was entitled to a 50% share in the immovable property without giving due weight to the evidence placed before it.
3. The court *a quo* misdirected itself by proceeding as if it was determining a gender equality issue when the only issue before it was about the distribution of the matrimonial asset purely on the weight of each party's contribution."

The appeal raises one issue for determination:

Whether or not, the court *a quo* erred in awarding the respondent a 50 per cent share, of the immovable property.

DECREE OF DIVORCE.

In spite of the parties' not having contested the granting of a decree of divorce the court *a quo* inadvertently omitted to grant such order. Its order reads as follows:

> "Accordingly, it is ordered as follows;
> 1. The plaintiff be and is hereby awarded a 50 percent share of the immovable property namely 114 Lomagundi Road Harare held under Deed of Transfer 5772/83 in the name of Govati Mhora.
> 2. The defendant is awarded a 50 percent share in the said immovable property.
> 3. The immovable property shall be valued by an independent Valuator appointed by the Registrar of the High Court from the list of Valuators within 30 days of the date of this order.
> 4. The parties shall meet the costs of valuation in equal proportions.
> 5. Each party is hereby granted the option to buy out the other's share in the immovable property within three months from the date of receipt of the valuation report.
> 6. In the event that the plaintiff fails to buy out the defendant or the defendant fails to buy out the plaintiff within the three months or such longer time as the parties may agree on in writing, the property shall be sold to best advantage by an Estate Agent mutually agreed to by the parties and in the event that they fail to agree, by one appointed by the Registrar of the High Court.
> 7. The net proceeds, after deducting the Real Estate Agents fees and other attendant costs shall be deposited into the Trust Account of Jessie Majome and Company Legal Practitioners or their successors in title and thereafter shared between the parties in the ratio set out above.
> 8. The movable property is awarded as per the joint pre-trial conference minute date stamped 13 October 2017.
> 9. Each party shall bear their own costs."

Contrary to the provisions of s 7 (1) of The Matrimonial Causes Act [*Chapter 5:13*], the order omitted to grant a decree of divorce before distributing the parties' matrimonial property. Section 7 (1) provides as follows:

> "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;"

The omission though not the basis of the appeal affected the validity of the order granted by the court *a quo*. The order deals with the distribution of the parties' property without a decree of divorce. Distribution of property is a consequence of divorce. A court cannot

therefore distribute the divorcing spouses' property without first granting them a decree of divorce.

The issue of the omission not having been canvassed at the hearing of the appeal the court agreed that the parties be given an opportunity to make submissions on it. Counsel for both parties, in the presence of their clients were on 14 February 2020 given an opportunity to make submissions on the court *a quo* 's failure to grant a decree of divorce before distributing matrimonial property. They agreed that the court *a quo* 's failure to grant a decree of divorce was a serious omission which has to be attended to, or that the court *a quo*'s order be set aside and the matter be remitted to the court *a quo* for it to decide on whether or not to correct the omission and grant a decree of divorce and attendant relief.

I agree that the order granted by the court *a quo* has to be attended to, but do not agree that it has to be set aside and the matter be remitted to the court *a quo*. Setting aside the order and remitting the matter to the court a quo will have the effect of removing this appeal from this Court as an appeal cannot be based on an order which has been set aside. It means another appeal will have to be noted if the court *a quo* corrects its order by granting a decree of divorce. The setting aside of the court a quo's order and remittal is not consistent with the provisions of s 22 (1) (a) and (b) (ix) of the Supreme Court Act (*Chapter 7:13*), which provides as follows:

> **"22** (1) Subject to any other enactment, on the hearing of a civil appeal the Supreme Court—
>
> *(a)* shall have power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require;
>
> *(b)* may, if it thinks it necessary or expedient in the interests of justice—
>
> (i) ----;
> (ii)----;
> (iii)---;
> (iv)---;
> (v)----;

(vi) ---;
(vii)---;
(ix) take any other course which may lead to the just, speedy and inexpensive settlement of the case;;" (emphasis added)

Section 22 (1) (a) empowers this Court to, on the hearing of an appeal, vary or amend, the judgment appealed against or give such judgment as the case may require. Section 22 (1) (b) (ix) empowers this Court to take any other course which may lead to the just, speedy and inexpensive settlement of the case. Section 22 (1) (b) (ix)gives this court a wide discretion to take any other course to justly speedily and inexpensively resolve issues which the court has to deal with on appeal. Section 22 (1) (b) (ix) was commented on and relied on by this court in the cases of *Eastern Highlands Electrical (Pvt) Ltd v Gibson Investments (Pvt) Ltd* SC 26/02 at page 7 - 8, *Kambuzuma and Others v Athol Evans Hospital Home Complex* SC 118/04 at page 9 - 10, and *Hwange Colliery Company Ltd v Tendai Mukute & Another* SC 46/16 at page 10). See also the case of *H Jordan v The Bloemfontein Transitional Local Authority & Another Supreme Court of Appeal of South Africa* Case No 248/2002 at pages 5 - 6, where the South African Supreme Court commented on the meaning of the words "take any other course which may lead to the just, speedy and as much as may be inexpensive settlement of the case"

In this case, the respondent instituted proceedings for divorce. The appellant conceded that the marriage had irretrievable broken down. The court by proceeding to distribute the parties' matrimonial property can be assumed to have believed that it had granted a decree of divorce. Setting aside the court *a quo's* order and remitting the matter to the court *a quo* is not in the interest of justice as it will delay the finalisation of the dispute between the parties and increase the expenses they have to incur in the hearing before the court *a quo* on remittal and the noting of and hearing of a fresh appeal if the court *a quo* on remittal grants a decree of divorce and the order it had previously granted.

In my view a correction of the court *a quo*'s order by adding a decree of divorce to it will result in a just, speedy and inexpensive resolution of the court *a quo*'s inadvertent omission, to grant a decree of divorce. Accordingly the court *a quo*'s order is corrected by prefixing it with the words:

"A decree of divorce be and is hereby granted"

SUBMISSIONS ON APPEAL.

Ms *Majome* for the appellant submitted that the court *a quo* erred in awarding the respondent a 50 per cent share of the immovable property. She argued that the respondent had not contributed anything in the acquisition of the property hence the court *a quo* erred in not awarding the appellant 100 per cent or at least a 70 per cent share in the property. Ms *Majome* contended that the court *a quo* diverted its attention to gender equality issues which were not before the court. She submitted that the court *a quo* adopted the notion of equality narrowly and with bias as it based its judgment on s 46 (1) of the Bill of Rights in the Constitution.

Counsel for the appellant further submitted that the value and principle of justice outweighs equality but the court *a quo*'s view was otherwise thus it erred in that regard. She further contended that the court *a quo* ought to have considered other founding values and principles of the Constitution particularly the rule of law and the nation's diverse cultural, religious and traditional values and not only focus on gender equality.

Ms *Majome* submitted that the net effect of the court *a quo*'s judgment was to disregard the decision reached in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) to the effect that in distribution of property upon divorce, a party is entitled to get what is his/hers first before getting a share in jointly acquired property. She further argued that the immovable property

was acquired by the appellant and that had the court *a quo* exercised its discretion judiciously, it would have made a finding to that effect.

Counsel for the appellant submitted that the court *a quo*'s construction of the conduct of parties with regard to s 7(4) of the Act was against the "no-fault" concept in divorce matters and in the distribution of property which was laid to rest in *Ncube v Ncube* 1993 (1) ZLR 39 (S). She submitted that the court *a quo* had considered the conduct of the appellant in the distribution of property. Consequently, she prayed that the judgment of the court *a quo* be set aside as it had failed to use its discretion judiciously in the distribution of property.

Ms *Damiso* for the respondent, submitted that the court *a quo* judiciously exercised its discretion in terms of s 7 of the Matrimonial Causes Act. She argued that a court's discretion can only be interfered with if it is shown that it was grossly unreasonable which *in casu*, the appellant failed to prove. Counsel for the respondent contended that in exercising its discretion in interpreting s 7 of the Act, the court *a quo* had to be guided not only by precedent but also by the Constitution.

Ms *Damiso* further submitted that the case of *Shenje v Shenje* 2001 (1) ZLR 160 (H) outlined the principle which is applied in the distribution of property. She stressed that the needs of the parties is the primary consideration not their respective contributions. She submitted that the court *a quo* applied this principle as it considered that the respondent was 65 years old and had passed the prime of her life and was, unlikely to remarry, that the appellant was receiving a pension, that the respondent was sick and that the appellant had alternative accommodation. Counsel for the respondent submitted that in terms of s 7 of the Act, a court

can take into account the conduct of parties in the distribution of property and this was not necessarily a resuscitation of the "no-fault" principle.

In relation to the issue of gender equality, Ms *Damiso* submitted that the court *a quo* took into account real and substantial considerations which point to gender as a crucial factor in determining the needs and contributions of the parties. She argued that taking into consideration all these factors cumulatively justifies the awarding of a 50 per cent share of the immovable property hence the court *a quo* cannot be faulted for exercising its discretion in that regard.

DETERMINATION OF THE APPEAL

Section 26 (c) and (d) of the Constitution provides that the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution and in the event of dissolution, whether through death or divorce, provision must be made for the necessary protection of spouses. Article 16 (1) of the Universal Declaration of Human Rights (1948) provides that men and women of full age are entitled to equal rights as to marriage, during marriage and at its dissolution. This means there must be a fair and equitable division and distribution of property at the dissolution of marriage.

The importance of gender equality in this era cannot be overemphasized. The appellant's counsel can therefore not be correct when she alleges that the court *a quo* turned this matter into a gender issue. The court *a quo* merely took into account gender equality as a crucial factor in determining the needs and contributions of the parties as shall more fully appear in the foregoing.

The division and distribution of assets of the spouses at divorce are governed by s 7 of the Act. It is trite that in matters involving the distribution of property, the court has to exercise its discretion in deciding what is a just and equitable distribution of the parties property. 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 spouses consequent upon the grant of a decree of divorce. This Court's view on the discretion of the trial court on the distribution of assets of the parties was aptly stated in the *Ncube* case, *supra*, at p 41A where the court said:

> "The determination of the strict property rights of each spouse in such circumstances, involving, as it may, factors that are not easily quantifiable in terms of money, is invariably a theoretical exercise for which the courts are indubitably imbued with a wide discretion." (my emphasis)

The trial court's discretion was also commented on in *Gonye v Gonye* 2009 (1) ZLR 232, at 236H-237B, where MALABA JA (as he then was) said:

> "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".

The exercise of discretion by an appropriate court as required in terms of s 7 of the Act has been the subject of scrutiny by the courts within this jurisdiction. It is trite that in giving effect to the broad discretion bestowed on it by s 7 (1) of the Act, the court must have regard to the factors set out in s 7 (4) which are:

(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." (my emphasis)

It is trite that in matters involving the exercise of discretion by a lower court the appellate court cannot interfere unless the trial court misdirects itself, acts on a wrong principle, allows itself to make its decision on extraneous or irrelevant matters or does not take into account some relevant consideration. It can only do so in extraordinary circumstances where there is evidence of gross misdirection, unreasonableness and illogicality. The position was clarified in the case of *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A, where the court said:

> "These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it does not take into account some relevant consideration then, its determination should be reviewed and the appellate court may exercise its own discretion in substitution provided always it has the materials for doing so. In short, this court is not imbued with the same broad discretion as enjoyed by the Trial Court." See also *The Civil Practice of the Supreme Court of South Africa (Herbstain and van Winsen)* 4th ed by L Van Winson, AC Cilliers and C Loots at pages 918-9, ***Tjospomie Boedey (Pvt) Ltd v Drakensberg Bottliers (Pvt) Ltd & Anor*** *1989 (4)SA 31(T) at 40A-J* and ***Ex-parte Neethling & Anor*** *1951(4)SA 331A.*

In *casu*, the appellant did not properly challenge the decision of the court *a quo* in that regard as no gross misdirection, illogicality and unreasonableness has been alleged in the

appellant's grounds of appeal. It is not enough for the appellant to seek to impugn the decision of the lower court on an exercise of discretion without showing that such discretion was not exercised judiciously.

The nub of the matter is whether or not the court *a quo* erred in distributing the immovable property equally between the parties. The appellant alleges that the court *a quo* did not take into consideration the fact that the immovable property was acquired by the appellant without any direct contribution from the respondent. On the other hand, the respondent did not dispute that she did not contribute financially towards the acquisition of the immovable property. She however gave evidence on how she looked after and brought up the appellant's three children with his second wife and two born out of wedlock over and above their four children. That in my view is outstanding indirect contribution which entitles her to a share higher than that deserved by a wife of longstanding who contributed through looking after her husband and their own children.

In the case of *Shenje supra*, GILLESPIE J at pages 163G to 164A commenting on what should be considered in the division and distribution of property in terms of s 7 (4) of the Act upon divorce said:

> "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 duties. 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." (my emphasis)

The needs of the parties are an important consideration because s 7 (4) ends by requiring the court to after taking all factors into consideration place the spouses and children

in the position they would have been in had a normal marriage relationship continued between the spouses. The normal family life the court should use as a standard does not depend on contributions but provision for the family out of parental and spousal love and care. The actual words used by the Legislature are:

> "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." (my emphasis)

The use of the words "shall endeavour" means the court must in balancing the seven factors of s 7 (4) ask its self whether its decision will put the divorcing spouses and their children in a position they would have been in if a normal marriage had continued. The use of the words "shall endeavour" also means the court must try very hard to come up with a decision which places the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses. Such an endeavour calls upon the court to search beyond mere contributions in arriving at a decision which places the spouses and their children in the position they would have been in had a normal marriage relationship continued. It requires the court to look into the family's standard of life and needs after which the court's orders must be made with a view to maintaining that standard of life and meeting the divorcing spouses' family's needs.

Further, the approach which a court should adopt in apportioning the assets of parties following the dissolution of a marriage was set out in the famous case of *Takafuma v Takafuma* 1994(2) ZLR 103(S). In that case, the court at p 106 B-E said:

> "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 in as fair a way 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. This 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 had a normal 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"." See also ***Masiwa v Masiwa*** 2006 (1) ZLR 167 (S). **(emphasis added)**

The appellant's main argument was that the respondent was not entitled to a 50 per cent share of the property but 30 per cent as he had acquired it by himself without a direct financial contribution from the respondent. That a wife's indirect contribution to the family cannot be disregarded is beyond question as illustrated by GOWORA JA in *Muzongondi v Muzongondi* SC 66/17. It is evident that the court *a quo* was aware of the weight to be placed on such contribution in considering the apportionment of the assets of the parties. The court had regard to the *dicta* by ZIYAMBI JA in *Usayi v Usayi* 2003 (1) ZLR 684 (S), wherein at 688A-D, she said:

> "The Act speaks of direct and indirect contributions how can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as wife, mother, counsellor, domestic worker, house keeper, day and night nurse **for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy?** How can one measure in monetary terms the creation of a home and therein an atmosphere from which both husband and children can function to the best of their ability? In the light of these many and various duties how can one say as is often remarked: "throughout the marriage she was a housewife. She never worked? In my judgment, it is precisely because no monetary value can be placed on the performance of these duties that the Act speaks of 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. A fair approach is that set out by Professor Ncube in his book *Family Law in Zimbabwe*. At p 178 he said: -
> 'Our courts, when formulating a legal approach to the re-allocation of property on divorce, should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife.'" (my emphasis)

This case establishes the factors which constitutes indirect contributions. Indirect contributions encompasses much more than the performance of domestic duties. It encompasses all aspects of a spouse's role in the life of the other spouse and their children in the day to day running of a family.

In this case the court *a quo* considered the respondent's indirect contributions and came to the conclusion that she should be awarded a 50 per cent share of the immovable property. In my view the court *a quo* properly exercised its wide discretion on such matters. The ambit of the Act as a whole is to leave the parties in a position they would have been in had a normal marriage relationship continued. The court *a quo* took into consideration the indirect contribution made by the respondent in taking care of the family and the household through the non-financial means for a period of close to 5 decades. It also took into consideration the fact that the respondent also took care of three children of the appellant and the other wife and two of the appellant's children born out of wedlock. The court considered the 47 years of marriage and the indirect contributions and expectations flowing from such a long marriage. It also took into account the age of the respondent (65 years) and that she was past her prime age and there was no possibility of remarriage. It also factored in the various ailments that the respondent is suffering from and the attendant needs arising from such ailments. Her evidence on such ailments was not challenged by the appellant. The court *a quo* also considered that although the appellant was 73 years old, he was receiving his pension and had alternative accommodation at a house he said belonged to his former employer Sandawana.

In my view, taking into consideration all these circumstances, the court *a quo* correctly awarded the respondent a 50 per cent share of Number 114 Lomagundi Road. The respondent deserved a share which is commensurate with the duration of the marriage of close

to five (5) decades and her indirect contributions which included looking after the appellant's three children from the second marriage and two born out of wedlock over and above their four children.

The court *a quo* considered all factors upon which such an enquiry should be made. It therefore properly exercised its discretion.

The court *a quo* also took into consideration the conduct of the appellant in the distribution of property as provided under s 7(4) of the Act. The appellant took issue with that approach and alleged that it was a resuscitation of the fault principle in divorce matters which was laid to rest in the *Ncube* case, *supra*. Section 7 (4) of the Act provides that in the distribution of property upon divorce, the court shall endeavour as far as is reasonable and practicable and, having regard to "their conduct".

The appellant mistook this conduct to be that which leads to the breakdown of the marriage. A contextual reading of s 7 (4) makes it clear that this is not the conduct envisaged in the Act but that which has a bearing on the distribution of property. I am of the view that the conduct envisaged in s 7 (4) of the Act is that which seeks to hinder or frustrate a proper consideration of what consequential orders can be made upon divorce. The repercussions of such conduct are aptly illustrated in the *Shenje* case, *supra*, at 163A – C where GILLESPIE J had this to say:

> "The task of assessing a fair division of property can be difficult enough when appropriate evidence is led of the wealth, assets and means of the parties. It is potentially much more difficult when a party seeks to conceal his circumstances. The various suggested approaches to a division ("a one-third rule" or a "his, hers, theirs" approach) are rendered useless where one does not have any clear idea of what is available for distribution." (my emphasis)

In *casu*, the appellant confessed that he used to conceal information about properties he acquired during the subsistence of the marriage from the respondent. He lied to the respondent that they were renting the house in Marondera which he had bought. Apart from the Marondera house, the appellant also owned another house in Highfield which he disposed of when the respondent was not aware of its existence. There is therefore a possibility that the appellant may have other properties the respondent did not claim due to ignorance of their existence as information on such properties was being deliberately concealed from her.

The appellant's contention is that he acquired these properties on his own and the respondent was not entitled to them and/or any knowledge about them. This is, however, not correct in view of the importance of indirect contributions in marriage as reiterated in the *Usayi* case, *supra*. The appellant's inclination towards hiding information about properties was a bid to frustrate a proper distribution of the same, which conduct the Act requires to be taken into consideration.

Such conduct must be held against the perpetrator in the distribution of property. I am of the view that the court *a quo* correctly deliberated on such conduct in this context which amongst other factors, consequently justified its decision of a 50 per cent share of the property to the respondent. In the *Shenje* case, *supra*, at 167A – B the court had this to say in making a determination on the distribution of property:

> "In this case, I find merit and justice to be heavily weighed on the defendant's side. Although there is no clear indication that the plaintiff at this minute has the means to afford it, I propose to order in her favour a substantial capital settlement and maintenance for a limited period until that settlement is paid in full. The justification for doing so is that the plaintiff has, until relatively recently, had access to funds sufficient to meet the amount. It is, moreover, my conviction that he retains these funds hidden elsewhere than in the amounts disclosed." (my emphasis)

For these reasons I do not agree with the appellant's Counsel's construction of s 7(4) of the Act in relation to conduct. It does not relate to conduct which led to the breakdown of the marriage as I have alluded to above. I respectfully agree with the court *a quo*'s construction and approach of the same in this regard.

Courts have, over the years, awarded considerable shares in immovable property to spouses who did not make a direct contribution to their acquisition. However, it must be noted that each case is dealt with according to its circumstances and merit.

In *Mufunani v Mufunani HH 32/16* a case which is almost on all fours with this case a wife who was not formally employed but contributed indirectly to the needs of the family and had been a devoted housewife for over forty years was awarded a 50 per cent share of the immovable property. The court took into consideration all the factors under s 7 of the Act and also highlighted that "The fact that the plaintiff may not have made a direct financial contribution is outweighed by the indirect contribution she made over the four decades of marriage."

In *Mutizhe v Mutizhe* HH 483/18, a wife who had no formal training for any job and had been a housewife for over 20 years was awarded a 35 per cent share of the immovable property to which she had made no direct financial contribution.

In *Sithole v Sithole & Anor* HB 14/94 the court held that even if a wife made only indirect contributions she cannot leave empty-handed merely because she did not contribute financially towards the acquisition and development of the matrimonial home. The indirect

contributions in the long marriage of 10 years could not be overlooked. The wife in that case was awarded a 40 per cent share of the immovable property.

In the *Usayi* case, *supra,* this Court upheld a High Court decision to award a 50 per cent share to a non-working 60 year old housewife of 35 years giving weight to her indirect contribution to the family for over 3 decades.

In *Muteke v Muteke* SC 88/94 the wife made no direct financial contribution except as a housewife but the court awarded her a house in Kambuzuma, a house in Chitungwiza and $23 000-00 being her share of the sale of a house in Southerton. Her contribution had been through looking after the household, her husband and a child. The marriage had lasted for 32 years. The court in that case mainly considered her indirect contributions, needs, and expectations which is what the court *a quo* did *in casu*.

After a careful analysis of the cases referred to above, I am of the view that the longer the duration of the marriage, the lesser the weight to be attached to direct contributions as the value of indirect contribution increases as the duration of the marriage increases.

However, it must be borne in mind that each case must be dealt with according to its own circumstances and merit. I am of the view that the circumstances of this case justify the awarding of a 50 per cent share of the immovable property to the respondent.

COSTS

There is no reason why the award of costs in this case should not follow the result of the appeal.

DISPOSITION

The order of the court *a quo* should be amended by prefixing it with an order granting a decree of divorce.

After considering the evidence led before the court *a quo* and the law applicable in the distribution of the assets of the parties on divorce, I find that the appellant's appeal has no merit.

In the result, it is ordered as follows:

1. The order granted by the court *a quo* is amended by prefixing it with the following"

   "A decree of divorce be and is hereby granted".

2. The appeal is dismissed with costs.

HLATSHWAYO JA: I agree

BHUNU JA: I agree

Jesse Majome & Co, appellant's legal practitioners

Zimbabwe Women Lawyers Association, respondent's legal practitioners