REPORTABLE (83)

SHONGWE MICHAEL NDORO
v
(1) STAR PRECIOUS NDORO (nee JENAMI) **(2) TUNIKAI PHAENAH MKAHANANA (3) LESEDI VIMBAYINASHE NDORO (4) DAKARAI SHONGWE JUNIOR NDORO**

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, MATHONSI JA & CHATUKUTA JA
HARARE: 13 &14 JUNE 2024 & 9 SEPTEMBER 2024

L. Uriri with *F. Murisi*, for the appellant.

T. W. Nyamakura, for the first respondent

No appearance for the second, third and fourth respondents

MATHONSI JA: The appellant and the first respondent are former husband and wife, their marriage having been dissolved by a decree of divorce issued on 26 November 2019. Their proprietary rights were determined subsequently by judgment of the High Court ("the court *a quo*") delivered on 24 July 2023. In that judgment, the court *a quo* distributed their property, including a farm known as Randhurst Grange Estate situate in the district of Goromonzi measuring 926.5930 hectares ("Machipisa farm") and a business known as Zororo Energy Private Limited ("Zororo Energy"), which properties form the basis of this appeal, the appellant having appealed against the whole judgment of the court *a quo*.

THE FACTS

The appellant and the first respondent were married to each other on 11 December 1992 and amid allegations of infidelity, the first respondent instituted divorce proceedings out of the court *a quo* on 18 October 2018 in case number HC 9611/18. As she was being accused of committing adultery with the appellant and damages were being sought against her for bringing the marriage relationship to its knees, the second respondent was cited in the suit. The claim for adultery damages was settled out of court through a deed of settlement signed by the parties on 26 November 2019. That way the second respondent ceased to be involved in the proceedings.

The decree of divorce issued by the court *a quo*, per CHINAMORA J, parked the issue of the apportionment and distribution of the matrimonial assets to a later date. Out of caution, the court *a quo* also interdicted the parties from selling, dissipating, or disposing of assets pending the final determination of the dispute.

During the subsistence of the marriage, the appellant set up what was called the Serai Dale Trust ("the Trust"), with himself and first respondent as trustees, whilst their children, the third and fourth respondents, were beneficiaries. The parties registered a number of companies, mainly investment vehicles through which they held their vast empire, in which they were directors. The shares in those companies were held by the Trust. As litigation simmered, how the matrimonial property held through shares belonging to the trust was to be distributed became a source of bother to them. Proceedings were instituted which culminated in the joinder of their children in the main action by a court order granted by the court *a quo*, per CHIRAWU-MUGOMBA J, on 4 January 2021. It will be recalled that the children are the beneficiaries of the trust.

The matter for trial before the court *a quo,* which gave rise to the present appeal, related to the distribution of the assets of the parties acquired during the subsistence of their marriage, it having been deferred at the time they divorced.

The third and fourth respondents, the children of the marriage, exhibiting a reluctance to be choked by the dust of their parents' conflict, entered a consent to judgment as claimed by the first respondent. They therefore did not participate in the trial. The spirit of a settlement also engulfed the parents, albeit to a lesser extent. In the heat of the legal battle, they resolved most of the issues and signed a consent order on 21 March 2023, culminating in the court *a quo* promptly granting the order by consent.

The following issues remained unresolved and formed the basis of the trial *a quo*:

"1. What portion of the assets in Mosspatch Investments (Private) Limited (Mosspatch Investments) constitute an asset of the parties and what is the equitable distribution of either shares or the land namely Randhurst Grange Estate the Machipisa Farm) situated in the District of Goromonzi measuring 926.5639 hectares under Deed of Transfer No. 4129/10 dated September 2010 registered in the name of Mosspatch Investments (Private) Limited.

2. Whether shares in Zororo Energy Company Limited (Zororo Energy) constitute an asset of the parties? What is the appropriate distribution thereof?

3. Whether the plaintiff misappropriated USD 2, 3 million dollars from Interfruit (Private) Limited and failed to account for same."

PROCEEDINGS BEFORE THE COURT *A QUO*

The Appellant's case

The appellant's case was that he single-handedly registered several companies through which properties acquired mainly by himself were held. In so doing he appointed the first respondent as one of the directors. While acknowledging the first respondent's indirect

contribution to the acquisition of the assets, the appellant maintained that he was the main contributor in the acquisition of the matrimonial assets.

The appellant contended that the first respondent had misappropriated US$2.3 million from Interfruit (Private) Limited, a food packaging business which was run by the first respondent. He entreated the court *a quo* to take the alleged misappropriation of funds into account in distributing the assets. By so doing, the appellant was trying to make a case for him to be awarded the whole of Machipisa farm to the exclusion of the first respondent.

The appellant's contention was that because the first respondent asset-stripped the matrimonial estate for her personal gain, she had already benefitted at his expense. He further contended that he already held a 34% shareholding in the company that owned Machipisa farm. The remaining 66% was donated to Serai Dale Trust. The appellant further supported his claim for the whole of Machipisa farm by asserting that he had cleared historical debts which should have been for the joint account of both of them. He sought to discredit the Homelux Estate Agents' valuation report placed before the court *a quo* by suggesting that the valuers had been influenced to inflate the values in order to support the parties' loan application. The farm's value was far less than what is shown in the valuation report.

The appellant strongly objected to the first respondent's claim that she be awarded 777 hectares of Machipisa farm, a remaining extent measuring 926 hectares, and that he be awarded the remaining 149 hectares, as being demonstrably inequitable especially regard being had to the fact that he was the only one in the family who had a passion for farming while the first respondent was never interested in it. According to the appellant, even after divorce he maintained

a presence at the farm while the first respondent lived at the former matrimonial home in Umwinsidale, Harare. He downplayed the first respondent's story that she required the farm in order to relocate the food processing factory from the Utopian farm allocated to the appellant, insisting that the factory currently sits on about 1000 square meters of Utopian farm. It can even be constructed at the Umwinsidale home in Harare in his view.

Regarding the first respondent's claim to the business known as Zororo Energy, the appellant contended that the company was not owned by the parties in equal shares and that he did not register it with the first respondent. As such, so it was argued, the company was not an asset of the spouses which fell for distribution having been registered after the parties had separated on 17 September 2018 but before he received divorce summons. He maintained that the true set of documents reflecting the registration of Zororo Energy were those that had the second respondent and himself as the directors and shareholders. While acknowledging that a commission of inquiry to investigate the anomalies in the registration of the company at the Companies Office had been set up following a complaint made by the first respondent, the appellant expressed ignorance on the outcome. Accordingly, he craved the dismissal of the first respondent's claim for a share of Zororo Energy.

The first respondent's case

The first respondent moved the court *a quo* to order the subdivision of Machipisa farm into two portions and that she be awarded 777 hectares of that with the balance being awarded to the appellant. She also urged the court *a quo* to divide the equity in Zororo Energy, which is a Solar Energy generating concern located at what the parties sometimes referred to as Zororo Farm in Melfort along Mutare Road, at the ratio of 50% to each of them.

In support of her claim, the first respondent insisted that she worked on Zororo Energy from inception in 2018 when the two of them registered the company as the two directors with equal shareholding. She stated that they pooled resources from their respective businesses to obtain an operating license for the business. It was only after the appellant had deserted the matrimonial home that he started concealing information from her regarding the company's progress. She only found out through a Herald Newspaper advertisement that the appellant had made an application to ZERA and a check with ZERA confirmed that indeed herself and the appellant appeared in the papers submitted therein as the two directors and shareholders of the company. The first respondent maintained that the appellant and the second respondent later tried to forge the company papers to reflect themselves as the directors and equal shareholders of the company.

The first respondent relied heavily on a report of a commission set up in terms of s 41 of the Companies and Other Business Entities Act [*Chapter 24:31*] by the Registrar of Companies which concluded that the appellant's girlfriend, the second respondent, was fraudulently added as a joint shareholder and director of the company.

The first respondent made short thrift of the appellant's allegations that she misappropriated $2.3 million from a company she was running on behalf of the family. Her view was that the audit report generated by a company engaged by the appellant was so contrived that the so-called audit was conducted and concluded without attempting to involve her even though she is the one who operated the business and was the signatory to its accounts. According to the first respondent, nothing turned on the evidence of her withdrawal of money from the company

account as she is the one who operated the account to run the business, cover the family expenses and to pay the foreign University fees of the children.

The Court *a quo's* determination

I have already stated that as the trial loomed large, the parties settled most of the issues dividing their assets between them regardless of whether such property was registered in the names of their companies in which the family trust held the shareholding or not. The resolution of most of the issues in this way liberated the court *a quo* to deal only with three outstanding issues for trial. Effectively therefore, what had been a sticking issue, that is, whether the property registered in the names of companies wholly owned by the trust should be apportioned by the court at divorce, ceased to be an issue for determination by the court *a quo*.

What remained for resolution by the court at the trial was how the Machipisa farm and Zororo Energy should devolve, as well as whether or not the first respondent misappropriated US $ 2.3 million from Interfruit (Private) Limited. If she did, how that should affect the apportionment of Machipisa farm.

Regarding the issue of the shareholding in Zororo Energy, the court *a quo* found that a Commission of Inquiry had been set up in terms of s 41 of the Companies and Other Business Entities Act [*Chapter 24:31*], to investigate the question of who the authentic directors and shareholders of the company were. Making reference to the Commission's report, which resolved that the records at the Companies Office showed that both the appellant and the first respondent were the "directors and shareholders", the court *a quo* concluded that the company was owned in equal and undivided shares by the appellant and the first respondent.

On the question whether or not the first respondent misappropriated funds belonging to Interfruit (Private) Limited, the court *a quo* found that the appellant and the first respondent signed an interim arrangement on 16 October 2018 in terms of which they unequivocally agreed to separately run two companies. In terms thereof the first respondent would run Interfruit (Private) Limited whilst the appellant would run Utopia Farm (Private) Limited.

Assessing the evidence before it in greater detail, the court *a quo* observed that the appellant had filed a report to the police in April 2019 accusing the first respondent of misappropriation or theft of US$2.3 million from the company shortly after the first respondent had preferred assault charges against him on 25 March 2019. Prior to that, a protection order had been granted against the appellant on 8 March 2019, again at the instance of the first respondent.

In the court *a quo's* view, the circumstances suggested that the appellant was retaliating against the first respondent by preferring trumped up charges against her due to the vicious fall out between them. Accordingly, the court *a quo* dismissed the appellant's counterclaim based on the alleged misappropriation of US$2.3 million. It found that the appellant failed to prove in what way the respondent misappropriated the funds holding that in the absence of a forensic audit report, the mere withdrawal of large amounts from the account did not point to misappropriation of funds.

Turning to the issue of the equitable distribution of the Machipisa farm, which was registered in the name of Mosspatch Investments (Private) Limited, a company in which the family trust held the shareholding, the court *a quo* noted that the appellant and the first respondent were beneficial owners of the 66% shares held by the trust. It took the view that the assets registered in

the name of that company were assets of the former spouses to be distributed at divorce. The court *a quo* found the evidence of the appellant riddled with untruths especially in respect of the Homelux valuation report and the indivisibility of the Machipisa farm.

Making reference to the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*] ('the Matrimonial Causes Act') regulating the division and apportionment of assets of spouses upon divorce, the court *a quo* considered that the bulk of the assets had already been distributed through the consent order signed by the parties. In that regard it set about trying to achieve a fair and equitable distribution of the remaining properties, namely Machipisa farm and Zororo Energy.

Placing reliance on the Homelux Valuation report which provided a valuation of the properties owned by the parties, the court *a quo* concluded that what was given to the appellant at that stage far outweighed what was given to the first respondent as her property. It found that the appellant, who wanted to continue with his farming business had already been awarded Utopia farm which is adjacent to Machipisa farm. The court *a quo* held that the first respondent required land to resuscitate her Interfruit factory business which had been located at the Utopia farm given to the appellant. In its view, equity would be attained through a subdivision of Machipisa Farm which would give the first respondent the lion's share of it.

Discussing the question of the direct and indirect contributions of the parties used by the appellant to clamor for a 100% share of Machipisa farm over and above Utopia farm because he had contributed more towards the acquisition of the assets, the court *a quo* examined the authorities, *inter alia*, *Usayi* v *Usayi* 2003 (1) ZLR 684 (S) where this Court upheld awards of

50% to women who had made indirect contributions to the acquisition of assets. It then concluded that the first respondent was entitled to an equal share of the assets.

In the result the court *a quo* ordered that Machipisa farm be subdivided into two portions with the first respondent being awarded 777 hectares and the balance of 149 hectares being awarded to the appellant. They were each awarded a 50% equity in Zororo Energy with the appellant's counterclaim in respect of the alleged misappropriation of US $ 2.3 million by the first respondent being dismissed.

PROCEEDINGS BEFORE THIS COURT

The appellant was disgruntled by the judgment of the court *a quo* and filed the present appeal on the following grounds:

"GROUNDS OF APPEAL

1. The court *a quo* erred in law in proceeding to distribute assets in the name of Serai - Dale Trust as assets of the appellant and the first respondent without making an order for the winding up or for the dissolution of the trust nor making an order declaring the trust an alter ego of the appellant.

2. The court *a quo* erred in law in proceeding to determine the matrimonial assets distribution on the basis of the joinder of the appellant in his official capacity as a trustee of Serai-Dale Trust and also the joinder of the third and fourth respondents which joinder was unlawful rendering everything that happened after the joinder a legal nullity.

3. The court *a quo* erred in law in proceeding to deal with case under HC9611/23 to the exclusion of the appellant and first respondent in their official capacities as trustees of Serai-Dale Trust as they had been joined by the order of Mugomba J in case number HC 1859/20 rendering the whole judgment a nullity.

4. The court *a quo* erred in fact and in law in the distribution of Machipisa Farm in failing to take into account the personal financial needs of the parties, the evidence that the farm had been solely acquired by the appellant who held 34%shares with 66% shares held by Serai-Dale Trust and the fact that the first respondent had pleaded having no interest in the farm rendering the distribution not just and equitable.

5. The court *a quo* erred in fact and in law and misdirected itself by allowing itself to be influenced by extraneous factors when it took into account values of property in the consent order and valuations of property which were done in 2018, in justifying the award of property when it granted to the first respondent.

6. The court *a quo* erred in fact and in law in the distribution of shares in Zororo Energy (Private) Limited by considering the first respondent as a director when evidence showed and demonstrated that the appellant and the second respondent were the Directors of the Company and not the first respondent and that the Company was just a shelf company during the subsistence of the marriage between the appellant and the first respondent.

7. The court *a quo* erred in fact and in law in failing to make a finding that the appellant was entitled to receive more in the distribution of assets, due consideration being given

to his contribution towards the acquisition of the spousal assets and that he had cleared the parties' debts in United States Dollars.

8. The court *a quo* erred in fact in dismissing the appellant's counter claim that the first respondent had misappropriation of USD2,3 million dollars when it was common cause that the first respondent made the said withdrawals and had not explained how the money was used at company level".

In his notice of appeal, the appellant prays that the whole of Machipisa farm be awarded to himself or, alternatively, that it be subdivided with him getting an 83% share with the first respondent getting a 17% share. He also prays that the second respondent and himself be awarded 100% share equity in Zororo Energy in equal shares with the first respondent getting nothing. Lastly, he prays that his counterclaim in respect of the alleged misappropriation of US$ 2.3 million by the first respondent be granted.

From the grounds of appeal, this appeal is confined to a determination by this Court only of how the appellant and the first respondent should share the remaining two properties, namely; Zororo Energy and Machipisa farm as well as whether the Court *a quo* erred in dismissing the appellant's claim based on the alleged misappropriation of $2.3 million from the company account.

At the commencement of the hearing on 13 June 2024, and following an intense engagement with counsel, it became apparent that, to the extent that the parties themselves had

gone ahead and shared assets they claimed to belong to Serai-Dale Trust, they had abandoned the line of argument pursued in grounds numbers 1, 2, 3, and 4. That notwithstanding, Mr *Uriri* who appeared for the appellant, was prepared to, and did abandon, only ground 2. Thereafter the parties requested a deferment of the matter to the following day for them to make a last-ditch attempt to settle the dispute.

The court obliged and rolled the matter over to the following day. Nothing fruitful came out of their efforts and when the hearing resumed on 14 June 2024, counsel made submissions on how the two properties should be shared. As already stated, that is the crisp issue commending itself for determination in this appeal.

The appellant's submissions

Mr. *Uriri* for the appellant, submitted that the devolution of the remainder of the property was neither just nor equitable in that, instead of relying on the current values of the properties, as recommended in the case of *Coumbis* v *Coumbis & Anor* SC 130/21, the court *a quo* relied on the Homelux valuation reports which were not helpful. This was so because the valuations had been sought for purposes of applying for a loan and did not reflect their true values.

In counsel's view, the court *a quo* should have given sufficient weight to essentially three factors which militated against the award that it made. These are; the direct contributions of the appellant in the acquisition of the properties against the first respondent's indirect contributions; the fact that the appellant settled all the legacy debts of the parties even after divorce; the evidence led at the trial showing that it is himself who had always been the farmer and not the first respondent together with the fact that she only required land for purposes of constructing a

factory on 1000 square meters only. Counsel submitted that it is settled that the ultimate result to be achieved in the distribution of assets between spouses is to place them in the position they would have been, had a normal marriage relationship subsisted and to achieve a just and fair result.

Rounding off on that aspect Mr *Uriri* submitted that the decision of the court *a quo* was faulty in that the distribution of Machipisa farm was not just and equitable because awarding 777 hectares (84%) to the first respondent disregarded both the evidence and the pleadings which showed that only 34% of the shares in Machipisa farm were available for distribution. As a result, in awarding the first respondent 777 hectares the court *a quo* gave her a relief which she had not sought nor pleaded.

It was further submitted that, there was no justification for the first respondent's claim that she needed the Machipisa farm to set up a factory when she already had the Umwinsdale property big enough to accommodate the size of a factory she requires and another property in Nyanga.

Regarding Zororo Energy, Mr *Uriri's* submission was not very clear. I understood counsel to suggest that it was improper to award any of that property to the first respondent because the business was registered sometime in 2018 after the parties separated. I mention in passing that the basis for including that property within the regime of property to be shared at divorce was the uncontroverted s 45 report generated by the Companies Office.

The essence of counsel's submission on the issue of the alleged misappropriation of money by the first respondent was that the sum of $2.3 million withdrawn from the account

should have been regarded as compensating the first respondent for the appellant's claim to be awarded the whole of Machipisa farm.

The first respondent's submissions

Mr *Nyamakura* who appeared for the first respondent strongly defended the judgment of the court *a quo.* He submitted that when sharing matrimonial property at divorce, regard must be had to the value of such property in order to achieve fairness as was stated in the case of *Coumbis* v *Coumbis & Anor*, *supra*. He submitted that the first respondent had already been deprived of a lot of valuable property allocated to the appellant by virtue of the consent order signed by the parties and that the appellant had failed to demonstrate any misdirection on the part of the court *a quo* in sharing the remaining properties the way it did.

Counsel asserted that the division of Machipisa farm by the court *a quo* took into account the future needs of the first respondent who needs to set up a new factory at the farm for her business. He submitted that there was no misdirection whatsoever in sharing the farm at the ratio used by the court *a quo* as that achieved the balance informed by the valuation report on the values of all the relevant properties.

Regarding Zororo Energy, Mr *Nyamakura* submitted that the court *a quo* cannot be faulted for placing reliance on the extant report submitted by the Registrar of Companies which showed that the property was owned by the appellant and the first respondent in equal shares. Developing that point further, counsel submitted that courts of law will not lightly disregard the 50:50 share that comes with joint ownership and as such the first respondent's 50% share in Zororo Energy was a claim of right which this Court should not upset. On the question of the money

withdrawn from the company account by the first respondent, counsel defended the findings of the court *a quo* as being correct on the evidence placed before it.

THE LAW

The power of the court to divide the assets of spouses upon divorce or any time thereafter is premised on s 7 (1) of the Matrimonial Causes Act [*Chapter 5:13*] which empowers the Court to make an order for the apportionment or distribution of such assets. In making such an order the Court is guided by s 7 (4) of the Act which provides:

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

The provisions of s 7 have been subjected to judicial interpretation in a number of cases. One of the most recent cases is *Mhora* v *Mhora* 2020 (1) ZLR 1428 (S) at 1436 F-H. wherein this Court stated:

> "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 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:
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> > '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 wide discretion.'"

In this case both parties relied heavily on the case of *Coumbis* v *Coumbis & Anor, supra,* where at p 27 this Court remarked:

> "It is therefore essential to distribute properties in terms of their values to achieve an equitable distribution of the assets of the parties.
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> In *Gonye* v *Gonye* 2009 (1) ZLR 232, at 236H-237B, MALABA JA (as he then was) remarked:
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> > '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.'
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> It must however be added that the court's wide discretion can only be exercised on the basis of the evidence led by the parties.
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> In exercising its wide discretion, a court must determine the proportions on which it intends to distribute the assets to the parties. It should thereafter rely on the values of the assets to ensure that each party is awarded assets equal to the ratio it will have allocated to him or her. If, for example, the court allocates each party a 50 percent share of the value of the assets of the parties, it will then use the value of the assets to distribute them at the determined ratio."

Also, in *Chombo v Chombo* 2018 (2) ZLR 11 (S) at 16 F-G, the Court commented on the role of values of property in the distribution of matrimonial assets as follows:

> "… In terms of s 7 (4) (f), the court is entitled to consider the value of 'any benefit' a spouse will lose on divorce in distributing the matrimonial property of the spouses. **The court a *quo* failed to consider and distribute the value** of the benefits which flow from a registered long lease which confers real rights. **It is the value of those benefits and advantages which are distributable in terms of s 7(4) of the Matrimonial Causes Act**…" (Emphasis added)

Following a decree of divorce, the court ought to strive to arrive at a fair and equitable distribution of matrimonial property between spouses. This was articulated in *Coumbis supra*, at p 28 where the Court stated the following: -

> "The Constitution under s 26 (c) and (d) 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. This means there must be a fair division and distribution of property which is just and equitable in the circumstances.
>
> The division and distribution of assets of the spouses at divorce is governed by s 7 (1) (a) of the Matrimonial Causes Act. It is trite that in matters involving the distribution of property, the court has to exercise its discretion to reach a decision which can be deemed to be a just and equitable distribution between the parties.
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> Case law 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. Equitable distribution does not mean equal division but a fair division in relation to the circumstances of the case. The court may consider such factors as the extent of a party's contribution to the accumulation of the property, the market and emotional value of the assets, the duration of the marriage, the economic consequences of the distribution, the parties' needs and any other factors relevant to an equitable outcome. Fairness is the prevailing guideline the court must use."

This Court emphatically made the point in *Usayi* v *Usayi* SC 22/24 that in the discharge of the duty reposed upon it by s 7(1) of the Act, the Court will generally lean in favour

of dividing matrimonial assets equally between the spouses and that there has to be an obvious and compelling reason for a departure from the principle of equality in the sharing of property.

EXAMINATION

It is settled law that an appellate court will not readily interfere with the exercise of discretion by a lower court. It can only do so in exceptional circumstances of gross misdirection, unreasonableness and inconsistency. These sentiments, which have been hallowed by repetition, were expressed by this Court in the case of *Barros & Anor* v *Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A**,** where the Court stated as follows:

> "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." (Emphasis added)
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> 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**,** *TjospomieBoedey (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*." (Emphasis added)

The view that I take is that, without any pressure from the court or anyone else for that matter, the parties set down and shared their property which sharing was reduced into a consent order which they signed. The consent order was presented to the trial court ahead of the trial and promptly granted. There is nothing to suggest that the sharing of the property by the parties was not equitable. The manner in which these parties have asserted and defended their rights to every piece of property and every nook of what they acquired during the marriage, leaves no doubt

whatsoever that there was a balancing act in the sharing. What was then referred to the court *a quo* for determination was the sharing of Machipisa farm and Zororo Energy.

The principle of law examined above is generally that the court must lean in favor of equality in the apportionment of matrimonial assets. The court *a quo* approached the sharing of Zororo Energy on the celebrated principle of equality. One would have expected that the same approach would be adopted in the sharing of the only other item of property before it, Machipisa farm.

For some reason the court *a quo* then veered off course and adopted an obscure sharing formula. This was a gross misdirection inviting interference on appeal. I am fortified in that view by the outcome of the court *a quo's* industry, an award of 84% share to the first respondent and only 16% share to the appellant. It is obviously inequitable whichever way one looks at it.

But there is more. The evidence placed before the court *a quo* was that the first respondent needs land on that farm for purposes of relocating a factory currently at Utopia farm where it is sitting on only 1000 square meters of land. She has no farming pedigree, only the appellant has. Accordingly, there is nothing in favor of the inequitable division which was preferred. In other words, there was no obvious and compelling reason for the court *a quo's* departure from the principle of equality in the sharing of Machipisa farm. The moment it was found necessary to subdivide the farm, it had to be shared equally.

In respect of Zororo Energy, the appellant was relying on a clumsy fabrication of company documents which was easily called out by the Registrar of Companies in an unchallenged

report submitted as evidence at the trial. The court *a quo* cannot be faulted for finding that the parties owned the equity in the business equally. The issue of the alleged misappropriation of funds by the first respondent should not detain us unduly. This is because the Court *a quo* made both factual and credibility findings which have not been impugned. In fact, counsel for the appellant did not even begin to attack those findings, content to use that issue as a bargaining weapon for the claim of the whole of Machipisa farm. There is no basis for interfering with the findings *a quo* that the appellant failed to prove his claim.

DISPOSITION

The court *a quo* did not exercise its discretion in terms of s 7 (1) of the Matrimonial Causes Act properly and the outcome of its sharing of the two remaining properties was inequitable. There was no basis, having regard to the totality of the evidence, for not sharing Zororo Energy and Machipisa Farm equally between the parties.

Both parties having contributed to the acquisition of their property, and having regard to all the factors set out in s 7(4) of the Act, including their future needs, it is just and equitable that both Machipisa farm and Zororo Energy be shared equally between the parties.

The appeal succeeds in part. As none of the parties has succeeded in full, there is no basis for awarding costs to either of them.

In the result, it be and is hereby ordered as follows:

1. The appeal is allowed in part with no order as to costs.
2. The judgment of the court *a quo* is amended by the deletion of paragraph 2 thereof and the substitution of the following:

"2. The property shall be subdivided into two equal portions and the first defendant is awarded one portion while the plaintiff is awarded the other portion."

GWAUNZA DCJ : I agree

CHATUKUTA JA : I agree

Murisi & Associates Legal Practitioners, appellant's legal practitioners

Atherstone & Cook Legal Practitioners, first respondent's legal practitioners