DISTRIBUTABLE (38)

LIPANI DOUBT MAPHOSA
v
CHIEDZA MAPHOSA (Nee Mawere)

SUPREME COURT OF ZIMBABWE
MAKARAU JA, MAVANGIRA JA & UCHENA JA
HARARE, FEBRUARY 18, 2020

T.R. Mugabe, for the appellant

M. Chimhoga, for the respondent

UCHENA JA:

[1] This is an appeal against part of the judgment of the High Court granting a decree of divorce and ancillary relief to the respondent against the appellant. After hearing submissions from counsel for both parties, we dismissed the appeal with costs and indicated that reasons for the decision would follow. These are they.

FACTUAL BACKGROUND

[2] The facts of the case can be summarised as follows;

[3] The appellant and the respondent were on 10 December 2010 married in terms of the Marriages Act [*Chapter 5:11*]. The union was blessed with two daughters born on 17 April 2009 and 21 January 2012.

[4] The respondent issued summons for divorce and ancillary relief claiming that the marriage had irretrievably broken down and that they had lost love and affection for each other. The appellant did not oppose the granting of divorce.

[5] The parties agreed that a decree of divorce should be granted. They agreed on how to share their movable assets. At the pre-trial conference they agreed that the following issues be referred to trial:

> "1. Whether the appellant should pay the respondent the amount of $29 000 or any amount at all being the respondent's share of proceeds from the sale of a Kwekwe property: being stand 1324 QueQue Township of stand 277A QueQue Township.
>
> 2. Who should be the custodian parent and what access rights the non-custodian parent was to be awarded?
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> 3. What quantum of maintenance would be appropriate for each of the two minor children?
>
> 4. Whether or not the appellant should be ordered to pay post-divorce spousal maintenance and if so, the quantum thereof and;
>
> 5. Who should bear the costs on the ordinary scale."

APPELLANT'S EVIDENCE BEFORE THE COURT *A QUO*

[6] In respect of the Kwekwe property, the appellant told the court that the proceeds were used to fund the family business and to fend for the family. He alleged that the proceeds were used for the purpose for which the property was disposed.

[7] On the issue of custody of and access to the minor children, the appellant contended that the respondent was concerned about herself and not about the best interests of the children. He further argued that it was not in the best interests of the children that they stay with the respondent who had mental health issues.

[8] The appellant submitted that it was in the best interests of the children that he be granted their custody. He argued that the children's school routine had been maintained with little or no disruption and that their social and moral upbringing will be properly cared for if he is awarded their custody. He further averred that the children were healthy and thriving academically when they were staying with him.

[9] He told the court *a quo* that when he is not at home, the children will be under the care of a childminder. His overall testimony was to the effect that he had a healthy relationship with the children and was able to provide for their welfare, hence he deserved to be awarded their custody.

[10] In respect of the respondent's maintenance, the appellant argued that the respondent was an able-bodied, educated young woman who could support herself, therefore, she did not deserve spousal maintenance. He further averred that she claimed a globular figure which was not supported by the actual expenses she was incurring or likely to incur.

[11] In respect of the maintenance for the children he told the Court that if he did not get custody of the children, he had no income other than from the family business through which he could properly contribute towards their maintenance.He alleged that the respondent was a reckless woman who could not be trusted to use money wisely if he had to pay the maintenance which she claimed for herself, and the children.

[12] Regarding costs, the appellant contended that it was unfair for him to be ordered to pay the costs of suit on the basis that he was the intransigent party or the one who

insisted on the matter being referred to trial. In light of that, he argued that both parties were entitled to equal protection of the law.

RESPONDENT'S EVIDENCE BEFORE THE COURT *A QUO*

[13] On the distribution of proceeds of the Kwekwe property, the respondent told the court *a quo* that the property was jointly acquired. She told the court that when it was sold the proceeds were placed in the appellant's custody. She contended that the appellant did not give her her share which she is entitled to.

[14] The respondent averred that if she is granted custody of the minor children, it would be just that the appellant be ordered to pay maintenance in the sum of US$500 per child per month, 75 per cent medical aid subscriptions, 75 per cent of school fees and all educational expenses, US$1000 per child twice a year for clothing, US$1000 twice a year for holidays, 75 per cent for rent and utility bills and US$1000 per month for her maintenance. She told the court *a quo* that she was not employed as the respondent had asked her to leave employment so that she could look after the family. The respondent thereafter started abusing her and assaulting her. She eventually left the matrimonial home due to the appellant's violent attacks on her. She therefore has, no access to funds from the family business, or any other funds.

[15] The respondent prayed that custody be granted to her because it would be in the best interests of the children that they stay with her. She told the court *a quo* that before she was driven out of the matrimonial home by violence, she would carry out school runs, do homework with the girls and attend their school activities.

DISPOSITION OF THE COURT *A QUO*

[16] The court *a quo* held that custody and access are not guided by the best interests of the parents but those of the children. It held that the appellant did not hide his temper and hostility towards the respondent in court and in chambers, even in the presence of the children. The court *a quo* was of the view that the appellant was cruel as demonstrated by the manner in which he treated the respondent and his refusal to allow the respondent to have access to the children. It, as a result, held that this proved that he was not a suitable custodian parent. It therefore granted custody to the respondent.

[17] On the other hand, the court *a quo* held that the respondent portrayed herself as a mother who is ready and willing to play a role in raising her children. It consequently granted custody of the two female children to her.

[18] In respect of the respondent's maintenance, it held that she was a young able-bodied lady capable of taking care of herself and that there was no reason why she should be awarded holiday allowances and perpetual maintenance. It, however, granted her a six-month rehabilitative maintenance of $1 000 per month to enable her to adjust and set herself up and to thereafter sustain herself and also contribute towards the upkeep of the children.

[19] On the issue of the Kwekwe property, the court *a quo* held that it was sold by agreement of both parties but the appellant used the proceeds, including the respondent's share, without her consent. It held that the respondent was entitled to 50 per cent of the proceeds being $27 523.50.

[20] On costs of suit the court *a quo* held that:

> "The defendant is able to contribute and provide costs given his earning (sic) from the company Maphosa projects. The plaintiff on the other hand was rendered unemployed as she moved out of the matrimonial home due to abuse and acrimony. The engagement of counsel to deal with the matrimonial matter was necessary. The defendant as the spouse with means shall bear the costs"

[21] It accordingly granted the appellant's claims which had been referred to trial.

Aggrieved by the court *a quo's* decision, the appellant noted an appeal to this court on the following grounds:

> "1. The Court *a quo* erred in awarding sole custody of the minor children to the respondent regard being had to the best interest of the children;
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> 2. The Court *a quo* erred in awarding conditional and onerous access rights to the Appellant in respect of the minor children given the envisaged living arrangements of the parties;
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> 3. The Court *a quo* erred in ordering that all the medical expenses of the minor children be the exclusive responsibility of the appellant given its rejection of the "means" test;
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> 4. The Court *a quo* erred in ordering the quantum of maintenance from the appellant for the minor children given the established means of the parties;
>
> 5. The Court *a quo* erred in awarding the respondent post-divorce maintenance, the quantum thereof and the duration thereof given the actual and prospective means and equal legal rights of the parties;
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> 6. The Court *a quo* erred in confirming the distribution list in respect of movables notwithstanding manifest errors and omissions;
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> 7. The Court *a quo* erred in finding and ordering that the Respondent was entitled to payment of half of the proceeds from the disposal of the Kwekwe property; and
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> 8. The Court *a quo* erred in awarding costs to the respondent."

[22] The appeal raises the following four issues namely:

1. Whether or not the court *a quo* erred, in the distribution of matrimonial property?

2. Whether or not the court *a quo* erred in granting the custody of the minor children to the respondent?

3. Whether or not the court *a quo* erred in granting rehabilitative spousal maintenance to the respondent and the children's maintenance against the appellant?

4. Whether or not the court *a quo* erred in granting an order of costs against the appellant

SUBMISSIONS MADE BY THE PARTIES ON APPEAL

[23] Mr *Mugabe* counsel for the appellant, submitted that the court *a quo* should have inquired into the best interests of the children, equality of the parties and the means of the parties to enable it to make a proper determination of the issues before it. Concerning the custody of the children, he submitted that the court *a quo* disregarded evidence to the effect that the appellant was already taking care of the children. He averred that the minor children's interests were not properly taken into consideration by the court *a quo*.

[24] He argued that the appellant had retained the matrimonial home and had been looking after the children all along whilst the respondent was unemployed and is a person of no fixed abode. Mr *Mugabe* contended that the court *a quo* erred in taking away custody from the appellant when there were no adverse findings on the welfare of the children during the period they were under the appellant's custody. He further submitted that the court *a quo* ought to have balanced the best interests of the children with the competing interests of the parents taking into consideration their respective means. He therefore prayed that custody be granted to the appellant.

[25] On the issue of the children's maintenance, counsel for the appellant submitted that the appellant's concession to pay maintenance did not mean that he was the only one obliged to contribute towards the welfare of the children. He submitted that the family lived off the proceeds of the family business and that the duty to maintain the minor children rested on both parties according to their means. Counsel for the appellant averred that the means of the respondent were not inquired into resulting in no obligations being placed on her. Mr *Mugabe* submitted that the quantum of maintenance for the children ordered by the court a quo was not within the appellant's means.

[26] In respect of spousal maintenance granted against the appellant, he submitted that the respondent was an able-bodied, educated young woman who failed to explain her failure to mitigate her circumstances. He therefore submitted that the respondent did not deserve spousal maintenance and that the court *a quo* erred in ordering him to pay rehabilitative maintenance to her.

[27] Commenting on the distribution of proceeds of the Kwekwe property, the appellant's counsel submitted that the proceeds were used to fund the family business and to fend for the family. He submitted that, the proceeds were used for the purpose for which the property was sold. He therefore submitted that the court *a quo* erred by ordering the appellant to give half of the proceeds to the respondent.

[28] On costs of suit, Mr *Mugabe* contended that it was unfair to order the appellant to pay all costs just because he insisted that the case be referred to trial. He submitted that both parties are entitled to equal protection of the law.

[29] Ms. *Chimhoga*, counsel for the respondent, submitted that the appellant did not allege irrationality on the factual findings of the court *a quo*, thus, they cannot be interfered with. She submitted that the findings of fact by the court *a quo* remained unchallenged. On the issue of custody, she submitted that the court *a quo* found that the appellant has a hot temper and had exhibited a hostile attitude towards the respondent before the court *a quo* and the children. It also found that the children were afraid of the appellant which had an adverse effect on his suitability as a custodial parent. She submitted that granting the appellant custody would not be in the best interests of the children.

[30] She further contended that the means of the parties is not the sole consideration in granting custody. She submitted that a parent without means can be granted custody as the overriding factor is the best interests of the minor children.

[31] In respect of the minor children's maintenance, Ms. *Chimhoga* argued that the order of the court *a quo* was correct as the respondent had no means, while the appellant has financial resources from the family business on which the family depends.

[32] In respect of spousal maintenance ordered against the appellant, counsel for the respondent argued that it was properly granted as the respondent had left the matrimonial home because of the appellant's violence and therefore had no access to the family business and had no means of her own. She submitted that rehabilitative maintenance was awarded to her to enable her to find her feet. She further contended that an order of maintenance was a discretionary issue and the appellant had not alleged any gross irregularity on the findings of the court *a quo* which would entitle the appellate court to interfere.

[33] Ms *Chimhoga* argued that the Kwekwe property was owned by both parties, but the appellant used all the proceeds without the respondent's consent. She averred that the respondent was entitled to her half-share and the court *a quo* was correct in that regard. She argued that the appellant had failed to challenge the factual findings and discretion of the court *a quo.* She prayed that the appeal be dismissed with costs.

APPLICATION OF THE LAW TO THE FACTS

1. Whether or not the court *a quo* erred in the distribution of matrimonial property?

[34] The division and distribution of the assets of the spouses at divorce should be done in terms of s 7 of the Matrimonial Causes Act [*Chapter 5:13*]. 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. It is trite that in matters involving the distribution of property, the court has to exercise its discretion to reach a decision which is just and equitable. In the case of *Ncube v Ncube* 1993 (1) ZLR 39 (S) at 41A this 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." (emphasis added)

[35] It is settled law that in matters involving the exercise of discretion by a lower court the appellate court is not quick to interfere with such an order. It can only do so if there is evidence that the primary court acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect it or did not take into account some relevant consideration. The position was clarified in the case of *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A.

[36] The appellant failed to challenge the exercise of the court *a quo's* discretion as shall appear in the ensuing analysis. The record established that the Kwekwe property was jointly acquired by the couple and disposed of. Section 7 (4) (e) of the Act provides for the consideration of direct and indirect contribution in the distribution of matrimonial property. This means that the proceeds of this property had to be shared equally. In *casu,* the appellant failed to provide a reasonable explanation as to why he failed to remit to the respondent her share of the proceeds of the property after its sale. He averred that the proceeds were used for the family's upkeep. This was unreasonable considering that the family business was prospering and could sustain the family.

Where a property is jointly owned in equal shares, the court must take into consideration the general principle that a joint owner is entitled to her half share of the property. In the case of *Lafontant v Kennedy* 2000 (2) ZLR 280, (S), at 283H-284D MCNALLY JA said:-

> "Where two persons own immovable property in undivided shares (as is the case here) there must, I think, be a rebuttable presumption that they own it in equal shares. That presumption will be strengthened when the parties are married to each other at the time ownership was acquired. Thus, Jones *Conveyancing in South Africa* 4 ed p 118 states:
>
> > 'Where transferees, acquire in equal shares, it need not be stated in the deed that they acquire 'in equal shares', as this fact is presumed in the absence of any statement to the contrary.'"

The court *a quo* therefore correctly awarded the respondent a half share of the proceeds of the Kwekwe property. It also correctly distributed the movables with the consent of the parties.

[37] In the case of *Chioza v Siziba* SC 4/15, it was held that the court must satisfy the requirements of public policy, or obviate a situation where one party is unjustly

enriched at the expense of the other. The appellant failed to show how the court *a quo's* discretion was improperly exercised in the distribution of the Kwekwe property. As regards the distribution of the movables the appellant alleges the consent list had errors. A party cannot appeal against a consent order. In any event the alleged errors were not specified.

2. Whether or not the court *a quo* erred in granting custody to the respondent?

[38] The best interests of the children are the guiding principle on issues relating to custody and access. Section 81(2) of the Constitution has codified this position and provides that in every matter concerning a child, it is the child's best interests that are paramount and that minor children are entitled to protection, particularly by the High Court as their upper guardian. The position is clearly stated in the case of *Mackintosh (Nee Parkinson) v Mackintosh* SC 37/18, where the court held that:

> "A court, such as the court *a quo*, must always keep in mind that the interests of the minor children are always paramount. In considering those interests, the court should not allow itself to be misled by the appearances that the parties give. It must, in addition to any evidence given, be guided by its own experiences and sense of what is fair…"

See also Cretney S. M. on *Principles of Family Law*, (Third Edition, Sweet & Maxwell, London, 1979) at p 493.

In *McCall v McCall* 1994 (3) SA 201 (C) at 204-205, the court provided a guideline which can be used in determining the best interests of the child. It is not exhaustive but covers many factors which have been considered in many jurisdictions.

[39] In light of the above, a court is, therefore, under an obligation to apply its mind directly to what is in the best interests of a child. A perusal of the record proves that the appellant is a violent man who physically and verbally abused the respondent in

the presence of the children. The respondent had to seek a protection order against the appellant. While the appellant was staying with the children, he refused the respondent access to the children and this deprived them of maternal care and love. This is clearly, not in the best interest of the children. Further, the interviews held by the judge in the court *a quo* with the minor children established that they are afraid of their father and that they missed their mother.

[40] The appellant also relied on a childminder in taking care of the children as he is a businessman whilst the respondent was prepared to give them first-hand care as their biological mother. In light of the above authorities, it is my view that the court *a quo* correctly, held that it was not in the best interests of the children to award their custody to the appellant as it does not create a conducive environment for the proper development of the children. The court *a quo* correctly exercised its discretion in this regard.

3. Whether or not the court *a quo* erred in granting, rehabilitative spousal maintenance to the respondent and maintenance for the minor children against the appellant?

[41] The Court has a wide discretion to grant spousal maintenance and maintenance for the parties' minor children. The claimant must however prove the need for maintenance from the responsible person. In EH *v SH* 2012 (4) SA 164 (SCA), it was held:

> "…that a person claiming maintenance must establish a need to be supported by the other party and that if no such need is established, it would not be just and equitable for a maintenance order to be made."

[42] A perusal of the record established that the appellant failed to rebut the allegation that he had stopped the respondent from working so that she could take care of family matters. It was also established that the respondent has no source of income as the

appellant stopped her from participating in the family business. The appellant's counsel referred to her as an unemployed person of no fixed abode. The family business and its finances is now under the sole control of the appellant. The respondent has no access to income from it. The record also establishes that the respondent left the matrimonial home due to the appellant's violence on her for which she had to apply for a prohibition order.

[43] In spite of the above the respondent wishes to find employment and become self-supporting. I am satisfied that the respondent established her need for maintenance. The court *a quo* correctly noted that she was an able-bodied and educated woman who could secure employment. It as a result awarded her rehabilitative maintenance.

She required rehabilitative maintenance from the appellant to enable her to reorganise her life before she could be able to sustain herself. She needed rehabilitative maintenance to enable her to recover from the position the appellant had reduced her to. This was in keeping with the principle of need in maintenance matters and the consideration of the requirements of s 7 (4) of the Matrimonial Causes Act which states that:

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

In view of the above mentioned principles, it must be stated that an abusive spouse who deliberately, as the appellant did, dis-empowers and impoverishes his or her spouse can, on divorce, not escape the duty to maintain him or her until he or she is rehabilitated. The court *a quo* therefore correctly exercised its discretion when it ordered the appellant to pay rehabilitative maintenance to the respondent.

[44] With regards to the maintenance of the minor children, the court *a quo* properly exercised its discretion. It was guided by s 7 (4) of the Act which provides for the following considerations:

> "(a)…
> (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;…"

As already stated, a court must always keep in mind that the interests of minor children are always paramount in matters involving them. In considering those interests, the court should not allow itself to be misled by the appearances that the parties give. The court must, as was held in *Lindsay v Lindsay* 1993 (1) ZLR 195 (S) at pages 199 A-B and 202 B, take a pragmatic view of the means of the appellant. The court *a quo* was entitled to assess what money the appellant raises from the family business with which, prior to the granting of the children's custody to the respondent he was able to sustain a high standard of living for them. The position cannot suddenly change because the children are no longer in his custody.

[45] The court *a quo* correctly found that the standard of living of this family was high. The family business was under the sole custody of the appellant and was doing fairly well. The appellant therefore has the means to pay maintenance for the minor children. In my view, the amounts granted by the court *a quo* are just as they will enable the children to maintain the standard of living they are used to. The appellant is in control of all the family funds. He could therefore not expect the respondent who was not employed and had no access to funds from the family business to contribute. In my view, the court *a quo* correctly exercised its discretion in ordering the appellant

to pay rehabilitative maintenance to the respondent and maintenance for the minor children.

4. Whether or not the court *a quo* erred in granting costs against the appellant?

[46] The appellant contends that the court *a quo* erred by awarding costs against him. It was submitted on his behalf that the court *a quo* erred by granting costs against him when there was no evidence or justification for granting such an order. It must be stated that costs fall within the discretion of a court and that, that discretion cannot be interfered with unless it is proved that it was injudiciously exercised. See *Paul Gary Friendship v Cargo Carriers Limited* SC 01/13.

[47] The appellant has not alleged any gross irregularity or irrationality in that regard. He therefore failed to challenge the exercise of discretion by the court *a quo* in ordering him to pay the respondent's costs. It is clear from the evidence that the appellant has the means while the respondent did not have any means from which she could pay her own costs. It is also clear that the respondent was successful on all issues which were referred to trial. That justifies the invocation of the principle that costs should follow the results.

DISPOSITION

[48] Consequently, the appellant failed to challenge the factual findings and the exercise of discretion by the court *a quo* on the issues before it. The appeal has no merit. It was for these reasons that we, after hearing counsel for the parties, dismissed the appellant's appeal with costs.

MAKARAU JA : I agree

MAVANGIRA JA : I agree

Tafadzwa Ralph Mugabe Legal Counsel, appellant's legal practitioners.

Gutsa & Chimhoga Attorneys, respondent's legal practitioners.