**REPORTABLE (22)**

**PILATE NDLOVU**
**vs**
**ESTER NDLOVU**

**SUPREME COURT OF ZIMBABWE**
**GWAUNZA JA, HLATSWAYO JA AND MAVANGIRA JA**
**HARARE 9 DECEMBER, 2015 & 13 JUNE, 2016**

*R.Ndlovu,* for the Appellant
*T.Mpofu,* for the Respondent

**GWAUNZA JA**: This is an appeal against part of the judgment of the High Court of Zimbabwe, sitting at Bulawayo and handed down on 13 February 2014.

The facts of this case are as follows:

The parties were married at the Magistrates Court, Tredgold Building at Bulawayo in terms of the Marriages Act (*Chapter 37*) on 12 December 1986. There are four children of the marriage, one being a minor, namely Philathi Ndlovu (born on 5 August 2000). The marriage relationship between the parties flourished and they amassed substantial immovable and movable property. The latter included a substantial number of cattle located at various of the parties' farms.

ln May 2002 the parties separated as a result of irreconcilable differences, characterised by acrimony and their filing of numerous suits at the Magistrates Court, seeking protection orders against each other. The appellant moved out of the matrimonial home and

went to co-habit with another woman with whom he raised a family and four children. On 12 November 2008 the respondent filed for a decree of divorce and other ancillary relief.

Among other things, the appellant takes special issue with the way the court *a quo* dealt with and determined the distribution of the parties' cattle. The appellant's ground of appeal in this respect reads as follows:

> "The court *a quo* erred procedurally by allowing the respondent to introduce a new issue for trial relating to alleged undisclosed cattle when there was no motion moved to amend the Deed of Settlement or to introduce a new issue for trial"

I will determine this matter first.

On the first page of its judgment the court *a quo* commented as follows*:*

> "The parties resolved that an order for a decree of divorce be granted by consent and that the issue of custody and maintenance of the minor child be dealt with in terms of a Deed of Settlement. The parties further agreed that their movable assets be distributed in terms the (same) Deed of Settlement. The sole issue that remains for determination by this Court is what is a fair and equitable distribution of their immovable matrimonial property." (my *emphasis*)

Immediately after making this observation, the court went on to list the issues for determination, as follows:

> "(a) How should the cattle be shared between the parties?
> (b) How should the court distribute the following immovable assets, namely …"

The learned judge then went on to list the parties' eleven immovable properties.

There is an evident contradiction between what the learned judge initially said was the sole issue for determination, and what he then listed as the issues to be determined. Be that as it may, there is a divergence in meaning between what the learned judge stated was the issue in contest relating to the cattle, and what is stated on this issue, in the Deed of Settlement in question. This was signed on 4 March, 2013, and its paragraph 10 reads as follows:

> "10. The parties agree that the issues for trial are as follows:
> 10.1 How should the cattle mentioned in paragraphs 4.11 and 4.16 be allocated
> 10.2 How should the immovable assets listed in paragraph 9 of this Deed of Settlement (be) distributed between the parties?" (my emphasis).

In terms of paragraph 6 of the Deed of Settlement, the parties agreed that the "net total" of the cattle that was to be distributed between them was 587. This followed an acknowledgement by the parties of the fact that some 62 herd of cattle belonged to other people and were therefore not to be distributed. Of the 587 cattle, paragraphs 4.11 and 4.16 of the Deed provided that the appellant would be given 293 while the respondent would take 294. The cattle were to be "identified by mutual agreement between the parties"

The appellant in his heads of argument states, after correctly citing what the respondent said under cross examination, that the real issue for determination regarding the 587 cattle was from which of the parties' various farms, the cattle were to be drawn.

This then, was the sole issue that the court *a quo*, upon hearing evidence, was supposed to determine in relation to the parties' cattle. However, it so transpired during the lengthy trial, that in addition to evidence regarding where the cattle to be allocated in terms of the Deed of Settlement were to be drawn from, the respondent introduced new evidence to the effect that the appellant had deliberately and grossly understated the number of cattle the

parties owned. In this way, the respondent alleged, the appellant had failed to disclose the correct number of the parties' cattle. She submitted that she had personally, sometime after the signing of the Deed of Settlement, carried out investigations and traced over 900 herd of cattle to the various locations where she suspected that the appellant had taken them to.

The court *a quo* then proceeded to hear detailed evidence from both parties concerning the issue of the undisclosed number, (or numbers since several were cited), of the cattle they owned, where they were kept, how the appellant managed the big herd and what had happened to some of these cattle.

The court was satisfied after hearing this evidence, that the appellant had indeed hidden and failed to disclose the existence of some 900 cattle whose value was "substantial". The court, as a result, made this finding and gave an indication of how it would determine the matter:

> " I therefore make the factual finding that the number of cattle proposed by the defendant (appellant *in casu*) in the Deed of Settlement is misleading to the extent that there is failure to disclose all the cattle allocated to the various persons listed hereinabove……..The court consequently makes adverse inferences against the defendant arising out of this material non-disclosure. ……..This court shall make an award in respect of the cattle on the basis of specific findings of fact alluded to regarding the material non-disclosure"

I will later in this judgment determine whether or not the court *a quo* in its distribution of the parties' matrimonial assets, carried through with this admonition beyond the allocation of an extra 166 cattle to the respondent.

The court *a quo,* in its disposition, awarded cattle to the parties on the basis of what was agreed in the Deed of Settlement. It however, inserted, in the list of what was to be awarded to the respondent, the following:

> *"(f)* 166 head of cattle from Bona, Dollar Block and Airport Road farms".

The court also added to the item allocating 294 cattle to the respondent, the two farms from which the cattle were to be drawn, that is Mvuma and Linden farms.

It is contended on behalf of the appellant in his heads of argument, that the court *a quo* erred in that:

> "It allowed the respondent to depart from the issues for trial agreed to by the parties and set out in the Deed of Settlement by, without the leave of the court and without seeking an amendment of the issue for trial, introducing a new issue, namely the alleged non-disclosure of cattle"

A perusal of the record shows that there is merit in this submission, as the following exchange between the respondent and her counsel illustrates:[1]

> Q. Remember I stopped you from giving me a list of cattle which was not mentioned in the agreement?
> A. Yes
> Q. Did Mr Ndlovu make a full disclosure of all the cattle that you have as a family?
> A. No
> Q. What have you discovered regarding these cattle?

The respondent then went into a great deal of detail regarding what she discovered in relation to the undisclosed cattle, that is where they were located, in whose care they were, possible numbers and so forth. There is no indication that she sought the leave of

[1] The respondent's examination-in-.chief. This exchange followed immediately after the respondent had given evidence on the location of the 587 cattle to be distributed in terms of the Deed of Settlement

the court to depart from what was agreed in the Deed of Settlement, before adducing the fresh evidence in question. Clearly too, there is no evidence in the record indicating that such leave was granted.

In view of the foregoing, I find that the court *a quo* misdirected itself in a number of respects on the issue of the parties' cattle.

Firstly, contrary to the evidence before it, both *viva voce* (the respondent's) and written (the Deed of Settlement), the court stated that one of the issues for determination was how the cattle were to be shared between the parties. In view of the fact that 587 cattle had already been "shared" between the parties, the probability in my view becomes apparent, that the court *a quo* may have been referring to the cattle that the respondent alleged was not disclosed by the appellant. This probability is buttressed by the fact that the court allocated an extra 166 cattle to the respondent, in addition to the 294 specifically referenced in the Deed of Trust. As explained below, this is where the court fell into error.

It should be noted that in relation to the 294 cattle awarded to the respondent, the court also properly made a determination regarding which farms they were to be drawn from. Impliedly, even though this was not articulated in the disposition, the appellant's 293 cattle would be drawn from the other farms not specified.

Secondly, and in my view more to the point, the court *a quo* fell into the error of disregarding the fact that the evidence of the parties' cattle being a lot more in number than agreed in the Deed of Settlement, constituted new evidence being raised for the first time at the trial. The same applied to the alleged non-disclosure of this fact by the appellant, to the

respondent. The Deed of Settlement was effectively the parties' Joint Pre-trial Conference Minute. It stated exactly what issues were being placed before the court for determination. There is authority in our jurisdiction and elsewhere, to the effect that, absent the leave of the court properly sought and granted, the only issues to be heard and determined during trial are those which the parties have agreed to be outstanding. The appellant correctly submits that the respondent clearly admitted that she had agreed to the Deed of Settlement signed between the parties, in particular, the number of cattle to be allocated to each party. She, however, did not proceed to apply for the leave of the court to amend the issues for the trial or move to amend the Deed of Settlement to reflect the addition of the new issue she wished to be determined.

Specifically in relation to this issue, the learned judge in the South African case of *Price NO v Allied JBS Building Society* 1980(3) SA874 (A) at 882 D-E had this to say:

> "… therefore where a litigant is a party to a pre-trial minute reflecting agreement on certain issues, our courts will generally hold the parties to that agreement or to these issues. As a result a party is not entitled to resile from an agreement deliberately reached at a pre-trial conference or during the trial unless (perhaps) special circumstances are present."

It goes without saying that the party wishing to introduce a new issue at the trial, which was not agreed between the parties at the pre-trial conference, would be the one to prove the existence of any special circumstances justifying such a move. Had the respondent requested the leave of the court to introduce the new evidence in question, she would have been able to explain, among other issues:

i) what prompted her, after agreeing that the parties were possessed of only 587 cattle, to embark on her own fact finding mission on the very same issue;

ii) why she chose to embark on such fact finding mission after the Deed of Settlement was signed; and

iii) why, after ascertaining the details regarding the higher number of cattle than previously thought to exist, she had then not instructed her lawyers to take the necessary steps to amend her papers accordingly, before the date of the trial.

A satisfactory explanation and answer to these questions would in my opinion have laid a proper basis for the court to hear the new evidence in question. However, as evident from the record, none of this took place. The court allowed the respondent to introduce and give evidence on the new issue as if it had properly been placed before it.

Thirdly, as I so find, the court misdirected itself in relying on evidence improperly adduced by the respondent, to conclude that the appellant deliberately failed to disclose to the court the true number of cattle that the parties owned. In the absence of leave properly sought and granted, the question of whether or not the applicant had fully disclosed the number of the parties' cattle, was not open to argument before the court. Accordingly, no basis was established for the court *a quo* to suggest that it would penalise the appellant, as a mark of its displeasure, for failing to disclose to it the higher numbers of the parties' cattle that the respondent said she had uncovered. This finding in my view remains valid despite the fact that the court *a quo* was fully persuaded that the appellant exhibited bad faith in the negotiations surrounding the parties' cattle and in the evidence that he gave in court on the same matter. The court *a quo's* judgment leaves one in no doubt that the learned judge took a very dim view of this attitude. I am not satisfied, however that in the circumstances of this case, the court's view should take precedence over the effect that the unprocedural introduction of new evidence at the trial, may have had on the appellant's defence.

I am satisfied in this respect that the appellant correctly asserts that he was prejudiced in the conduct of his defence, since the matter of the alleged undisclosed cattle fell outside the parameters of what was agreed between the parties in terms of their Deed of Settlement. It is an established procedural principle of our law, that a party being sued is entitled to know all allegations and evidence forming the basis of a claim against him, before the trial commences. This is to enable such party not only to comprehend fully what the case is that he has to answer, but also to properly prepare his defence. Allowing the respondent to spring on the appellant the new evidence against him for the first time at the trial, was in my view both a misdirection and a violation of this principle.

Accordingly, the order made by the court *a quo,* which was premised on this misdirection, cannot be sustained. This is the order allocating to the respondent 166 herd of cattle over and above the 294 that the parties agreed should be given to her.

**2. Distribution of the immovable properties between the parties.**

I turn now to consider the appellant's appeal in relation to the manner in which the court *a quo* distributed the parties' immovable properties. Specifically, the appellant charges as follows in his amended grounds of appeal:

> "The court *a quo* failed to judiciously exercise the discretion conferred upon it by section 7(1) of the Matrimonial Cause Act (*Chapter 5:13*) in making the order distributing the immovable properties in that the distribution is so manifestly unjust and inequitable that no court applying its mind to the requirements of section 7 of the Matrimonial Causes Act could have made such an order"

The appellant accordingly seeks an order setting aside the distribution made by the court *a quo* and its substitution with an order re-distributing the parties' immovable property in the manner indicated below:

**Plaintiff (Respondent)**

a) Half-share of Linden Farm, Gweru, after subdivision of the property.
b) Half-share of Stand 1060 Bulawayo Township, Bulawayo (117 Herbert Chitepo Street, Bulawayo) after subdivision of the property.
c) Half-share of Lot 13 Burnside Farm 9m Matsheumhlope, Bulawayo (No.49-51 South way Road, Burnside, Bulawayo after subdivision of the property.
d) Stand 15195 Kelvin West, Bulawayo (No.8 Silver Crescent, Kelvin West, Bulawayo).
e) Stand 106 Marvel Township of 2 of Marvel A Bulawayo (No.106 Beresford Close, Killarney, Bulawayo)
f) Mvuma House.
g) Flea Market Stand 34, Unity Village, Bulawayo.

**Defendant (Appellant)**

a) Half-share of Linden Farm, Gweru, after subdivision of the property.
b) Half-share of Stand 1060 Bulawayo Township, Bulawayo (117 Herbert Chitepo Street, Bulawayo) after subdivision of the property.
c) Half-share of Lot 13 Burnside Farm 9 Matsheumplope, Bulawayo (No.49-51 South way Road, Burnside, Bulawayo) after the subdivision of property.
d) Lot 4 of Caerton A, Bulawayo (No.8 Babert Lane, Burnside, and Bulawayo).
e) Stand 1011 Bulawayo Township, Bulawayo (No.19 Herbert Chitepo Street, Bulawayo).
f) Lot 1 of Lot 8 of Sauerstown Township, Bulawayo (No.15A Jacaranda, Sauerstown, Bulawayo).
g) Stand 15171 Kelvin North, Bulawayo (no.153 Zenzele Crescent, Kelvin North, Bulawayo).

The court *a quo* prefixed its disposition in respect of the property distribution that it made, with the following pertinent remarks:

> "In making a full award of the matrimonial assets I am cognisant of the provisions of the Matrimonial Causes Act [*Chapter 5:13*] which enjoins the court to have regard to the parties' conduct in the distribution of the matrimonial assets. See the case of *Marimba v Marimba* 1999 (1) ZLR 87 (H) where Gillespie J set down the principle to be applied in interpreting s 7 (4) of the Act, as follows;
>
> > *"*…. The relevant legislation entrusts to the court a wide discretion to achieve a just result in the division of assets of the spouses and the maintenance of a spouse or a child. That discretion is a judicial discretion to be exercised upon a proper consideration of all the relevant factors. The aim is expressly to place the parties in the position they would have been in had the normal marriage relationship persisted. This aim is qualified on considerations of reasonableness, practicality and justice. The overall desideratum of justice,

> however, is itself expressly related by the clear words of the Act to the conduct of the parties."

> I therefore have to consider essentially what is an equitable distribution, and in doing so, I must exercise my judicial discretion to achieve a fair, practical and equitable distribution. I am mindful of the fact that the award that I make must place the spouses in the position they would have been in had a normal marriage relationship continued between them. See the case of *Gonye v Gonye* 15/09 …."""

It is evident from these remarks that the learned judge a *quo* fully appreciated the principles to be applied in a determination concerning the equitable distribution of the matrimonial assets of the parties upon their divorce. The considerations that an appeal court is enjoined to address in determining whether or not to interfere with the distribution made by a trial court which properly applied the principles outlined, are aptly set out in the case of *Barrows & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62F-63A as follows:

> "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 mistakes the facts, 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 so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court."

It is with these guidelines in mind that I must consider the court *a quo's* distribution of the immovable property between the parties, in the light of the appellant's grounds of appeal and contentions.

I consider it relevant at this juncture to comment on the total effect of the distribution ordered by the court *a quo,* and the manner in which the appellant prays this Court should interfere with it.

As correctly submitted for the respondent, of the 11 immovable properties owned by the parties, the court awarded 5 to the respondent and 6 to appellant. As is evident from the re-distribution that the appellant urges upon this Court, cited above, the appellant proposes the subdivision of three properties awarded to the respondent, and the allocation of a 50 per cent share therein, to each party. Effectively, this means taking away from the respondent 50 per cent of three properties awarded to her, and giving it to the appellant. In return for this, the appellant offers the respondent a property listed as the *"*Mvuma House" that had been awarded to him. The evidence on this property is to the effect that it is a two roomed house that the respondent "has never seen and had no interest in". Having filed no cross-appeal, the respondent clearly has not changed her attitude in this respect.

It therefore becomes abundantly clear that the real dispute on this matter relates to the equitable distribution of the three properties that the appellant argues should be awarded to the parties in equal half shares 'after subdivision"

The overall contention that the appellant advances in impugning the distribution made by the court *a quo* in the distribution of these properties reads as follows;[2]

> " The failure of the court to adopt the correct approach and to take into account all relevant factors in distributing the immovable property of the parties resulted in a manifestly unfair and inequitable distribution order which unjustly enriched the respondent at appellant's expense and did not place the appellant in a position he would have been in had a normal marriage relationship between the parties continued …. The court *a quo* clearly erred in the exercise of its discretion and the facts relevant to the exercise of that discretion are undisputed"

[2] *Paragraphs 40 and 43 of the appellant's supplementary Heads of Argument*

It is contented for the appellant that the correct approach that the court should have adopted was the one enunciated in the case of *Takafuma and Takafuma* 1994(2) ZLR 103.

A consideration of the court *a quo's* analysis of the evidence relating to each of the three properties at issue, as well as the court's reasoning in making the awards that it did, will in my view, establish whether or not there is merit in the appellant's averments in this respect.

**(a) Linden Farm, Gweru**

The court *a quo* accepted the evidence of the respondent to the effect that she used her exclusive resources to purchase this farm, and that the appellant contributed nothing in this respect. She testified that however, when the agreement of sale was being drawn up, the appellant 'insisted' that his name be included in the agreement. The respondent proved to the court that she was at the time, running a successful business that had secured a lucrative contract to supply 'Liner Kits' to the bus company, ZUPCO. She specified the amount she paid as deposit and explained that she cleared the balance of the purchase price by way of instalments. Her evidence was also that the appellant adopted a 'passive' attitude towards the farm and the expenses she incurred and paid, in particular the electrification of the farm since such a facility was not in place at the time of purchase.

The court's analysis of the evidence tendered by the parties with respect to this farm was that the defendant's claim to a share thereof rested on two grounds:

i) that the property was jointly registered in their names, and
ii) that he had attended to fixing the borehole on the farm as an indication of his interest in it.

The court outlined its reasons for awarding this farm to the respondent, thus:

> "As I have already indicated, the divorce is an acrimonious one. It is neither desirable nor practical to subdivide the farm. Given the substantial contribution made by Plaintiff towards the purchase and upkeep of Linden Farm, it is only equitable to award the farm to the Plaintiff. The Defendant has already moved a huge number of cattle from *Linden Farm* to other farms. He did not dispute that he had already been allocated a piece of land about 1000 hectares in extent along the Airport Road. He also has grazing land at Kennilworth and at various other places where he has distributed an undisclosed number of cattle …. It is my view that from income from Linden Farm and Stand 1060 Bulawayo Township, the Plaintiff can derive adequate income to sustain herself in a life similar to the one she enjoyed during the subsistence of the marriage. Linden Farm should therefore be awarded to the Plaintiff. "

It is argued for the respondent that, contrary to the appellant's averments in this respect, the court *a quo* in reasoning thus and allocating the farm to the respondent, fully embraced the principle cited below, which is enunciated in the case of Takafuma v Takafuma (*supra*)

> "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 items marked "theirs". And the same to the wife. That is the first stage.
>
> Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely "as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses … in the position they would have been in had a normal marriage relationship continued …".
> Only at that state, I would suggest, should the court consider taking away from one or other of the spouses something which is actually "his" or "hers"."

I am fully persuaded to the merit in the respondent's submissions. The court in my view properly considered, among other factors, the parties' contribution and conduct in so far as the acquisition and maintenance of Linden Farm is concerned, in reaching the decision

that it did. The appellant is said to have been 'passive' in these two regards. He drove away huge numbers of cattle from the farm, to the disadvantage of the respondent, and admits to only having fixed a broken borehole as an indication of his interest in the farm. The appellant therefore effectively concedes that he made minimal contribution to this property. This in my view is not the type of contribution that would justify an award to him of a half share in the farm. The argument that he was a registered part owner does not, on the basis of Takafuma's case, carry his case any further, since whatever was "his" could properly be taken away and given to the respondent on good cause shown. Of equal importance I find, is the court *a quo's* conscious regard to the need to place the parties in so far as was possible, in the same position they would have enjoyed had the marriage subsisted.

Thus when all is considered, I hold that the appellant has dismally failed to establish capriciousness, the application of a wrong principle nor any unreasonableness in the exercise by the court *a quo* of its discretion in making the award in question.

**b) Stand 1060 Bulawayo Township, Bulawayo (117 Herbert Chitepo Street, Bulawayo)**

In respect of this property, the court *a quo* accepted the evidence of the respondent, which the learned judge found was fully supported by documentary evidence not disproved by the appellant, to the effect that she had bought it largely with proceeds from a business, Hedgehog Marketing, that she had set up without the involvement of the appellant. Further, that the business in question was established in reaction to obvious signs of the impending breakdown of the marriage, and additionally, that the appellant had done all in his power to impede her efforts in purchasing the property. This included physically 'manhandling' the estate agent engaged by the respondent to facilitate the purchase.

The court was satisfied that the respondent had secured a mortgage bond from Founders Building Society to raise the balance of the purchase price, that the appellant contributed not a cent in this respect and that the appellant was solely responsible for the property's maintenance, rates and other related charges.

Based on this evidence, the court *a quo* then made the following determination:

> "Given the plaintiff's substantial contribution in the purchase and upkeep of the property, it is only fair and equitable that it be awarded to the plaintiff. The court also makes the finding that the Defendant made no direct or indirect financial contribution towards the purchase of the said property"

The court also rejected the appellant's averment that it was possible for the parties to share the same property even after divorce, having been persuaded to the merit in the respondent's submission that:

i) the divorce had been acrimonious, and included the appellant 'embarrassing' the respondent by bringing his lover to the premises;
ii) to compel the parties to continue occupying the same building or adjoining premises would lead to further acrimony between the parties and prevent 'closure' to the dispute; and
iii) a clean break from the appellant would serve the interests of all concerned.

The court accordingly found as follows:

> "This Court makes the finding that the proposal that Stand 1060 commonly known as 117 Herbert Chitepo Street, Bulawayo be subdivided and a portion be awarded to each of the parties is impractical and undesirable …"

The learned judge *a quo* also said the following:

> "The Defendant should be able to derive adequate income from Stand 15171 Bulawayo Township … and from Stand number 15195 Kelvin West …. The

Defendant will also derive additional income from leasing out 15A Jacaranda Avenue, Sauerstown, Bulawayo and 19 Herbert Chitepo Street, Bulawayo"

I do not find anything to fault in the court *a quo's* analysis of the evidence before it, nor with the reasoning behind its allocation of the whole of this property to the respondent. I do not find, in this respect, that the learned judge allowed extraneous or irrelevant factors to guide or affect him as argued for the appellant in his heads of argument. Finally, I am satisfied, even without articulating the point, that the court was properly guided, in part, by the principles in Takafuma v Takafuma 1994 (*supra*)

No basis has, therefore, been established for interference by this Court with the determination made by the court *a quo* in respect of this property.

**c) Lot 13 Burnside Farm of Matsheumhlope (4951 Southway, Burnside, Bulawayo)**

The appellant prays that this property either be divided equally between the parties, or alternatively that it be sold to best advantage and the proceeds shared equally between them.

The court *a quo,* which found the respondent to be a far more credible witness than the appellant, accepted her evidence over that of the appellant with respect to this property. The respondent's evidence was that the parties sold their former matrimonial home and shared the proceeds equally. She had applied her share towards the purchase of this particular property while the appellant, according to the court *a quo "*used his share on his own frolic". The court was in view of this persuaded by the respondent's contention that the

appellant would be "double dipping" if he was given a further share in this property. There is no suggestion that the appellant disputes the background to the acquisition of this property.

That being the case, I do not find any flaw in the court *a quo's* reasoning nor its finding that it would be just and equitable to allow the plaintiff to retain the property as her sole and exclusive property.

My reading of the evidence shows that the court awarded the rest of the parties' immovable property on the basis of concessions made and agreement reached, by the parties. One property in respect of which the court *a quo* stated there was a "serious dispute" between the parties over its ownership, was awarded to the appellant.

When all this is considered together with the court's reasoning and rationale for making the awards that the appellant disputes, I find the questions posed and answered in this useful passage from the case of *In parte Neethling & Ors* 1951 (4) SA 331 (A) at 335D-G to be apposite.

> "Can it be said in the present case that the court *a quo* has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons? I can see no ground for answering this question in the affirmative. The court fully considered the question and came to a decision on grounds that were relevant and of considerable force. Indeed, I am far from satisfied that I would not have come to the same conclusion … but even if this court was satisfied that it would have granted the application that in itself would not be ground for interference."

I respectfully adopt these words and apply them fully to the circumstances of this case. I find that the appellant has failed to prove a case for interference by this Court, with the court *a quo*'s award of the three properties in question to the respondent.

I should note in this respect that, alternative to the distribution of the immovable properties that the appellant suggested, he prays that this court exchanges the awards in respect of all the parties' immovable property, so that what was allocated to the respondent is given to him and *vice versa*. I find this prayer to be totally devoid of any legal or factual basis. It smacks of vindictiveness, a desire to unjustly enrich himself, and a clear lack of *bona fides* on the part of the appellant. In any case and given my determination on this part of the appellant's appeal, it is not necessary to give any further consideration to the matter.

The last issue I deal with relates to the appellant's averment that the manner in which the court *a quo* distributed the parties' immovable property was motivated in part by its displeasure at the appellant's alleged non-disclosure of the true number of the parties' cattle. A close analysis of the evidence before the court, the court *a quo's* reasoning and its *rationale* for the distribution it made, clearly does not reveal any basis for the appellant's averments in this respect. Nor has the appellant singled out any part of the court *a quo's* decision as having been unduly influenced by the consideration alleged. There is, instead, evidence that the court properly considered the matter, particularly that relating to the three disputed immovable properties, on the basis of the law, the facts and the authorities that have expressed themselves on such matters. A reading of the court's judgment gives the impression that in the process of applying the law and legal authorities in this respect, the court lost sight of the notion (if indeed it ever held it) of meting out any type of penalty on the appellant for failing to disclose important evidence regarding the parties' cattle.

The position, however and as indicated, seems to be different where the court *a quo's* distribution of cattle is concerned. Its award of an extra 166 cattle to the respondent, besides being premised on evidence improperly introduced for the first time at the trial, can in

my view reasonably be seen as a manifestation of the court's displeasure at the appellant's perceived lack of honesty.

I have in any case determined that such an award is not to be sustained.

**DISPOSITION**

In the result, I make the following order:

1. The appeal succeeds in part.
2. Sub-paragraph (f) in the list of immovable properties awarded to the respondent, which falls under paragraph 5 of the order of the court *a quo,* be and is hereby set aside.
3. In all other respects the appeal be and is hereby dismissed with costs.

**HLATSWAYO JA:** I agree

**MAVANGIRA JA:** I agree

*R. Ndhlovu and Company,* appellant's legal practitioners

*Webb, Low and Barry*, respondent's legal practitioners