

DISTRIBUTABLE (49)

A SHONHAYI DENHERE
v
MUTSA DENHERE (Nee MARANGE)

SUPREME COURT OF ZIMBABWE
GOWORA JA, GUVAVA JA & MAVANGIRA JA
HARARE, JULY 30, 2015 & AUGUST 17, 2017

F. Mahere, for the appellant

T. Mpofu, for the respondent

Judgment No. SC 51/17
Civil Appeal No. SC 64/14

GOWORA JA: On 27 November 2014, the High Court issued a decree of divorce together with ancillary relief to the appellant and the respondent respectively. On 17 December 2014, the appellant, filed an appeal with the respondent filing a cross appeal on 19 December 2014. For ease of reference I will refer to the parties as the appellant and the respondent.

The salient facts to this appeal are the following. On 7 May 1994, the parties entered into a customary law union. On 15 August 1998 the parties had their marriage solemnized in terms of the Marriage Act [*Chapter 5:11*]. The union was blessed with three children, two of whom, A and B are still minors.

On 17 April 2013, the respondent, citing irreconcilable differences between the parties, filed summons in the High Court for divorce and ancillary relief. The appellant opposed the claim and filed a plea in support thereof.

However, at the pre-trial conference, the parties agreed that the marriage had broken down irretrievably and that a decree of divorce should be granted by consent. The parties further agreed that an amount of \$300.00 per month be paid as maintenance for the two minor children and further that two immovable properties, namely No. 397 Tariro Road, Chitungwiza and No. 29 Collenbrander Road, Milton Park be shared equally between the parties. The issue of the custody of the minor children and the distribution of the remainder of the matrimonial assets were referred for trial.

The grounds of appeal raised by the appellant were the following:

- 1) The court *a quo* erred and misdirected itself in ordering that the appellant should pay maintenance in respect of B at the rate of US300.00 per month considering that the minor child is in boarding school and will only be with the respondent during holidays. (sic)
- 2) The court *a quo* erred and misdirected itself in awarding the respondent 50 per cent of the total herd of cattle at Plot 25 Highbury Estate, Mhangura and at the same time allowing the respondent to retain whatever movable assets at her 89 Shamva Road Farm. (sic)
- 3) The court *a quo* further erred and misdirected itself in awarding the respondent 100 per cent of No. 1 Reigate Flat whilst finding that respondent did not make any

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direct contribution towards the acquisition of the same. The 100 per cent award is unjustified in the circumstances.

- 4) The court *a quo* further erred and misdirected itself in awarding 50 per cent of No. 44 East Court Belvedere, Harare which was not supported by facts in the circumstances to the respondent. (sic)
- 5) The court *a quo* further erred and misdirected itself in dealing with No. 2 Reigate Flat as if it is owned by appellant entirely and also misdirected itself in dealing with No. 39A Dover Road as if the same is owned by appellant entirely. The two properties are jointly owned and ought not to have formed part of the matrimonial estate. In any event, no title was proven in respect of the properties as being with the appellant. (sic)
- 6) The court *a quo* also erred and misdirected itself in awarding the appellant as his sole and exclusive property No. 13 Mardmaz Flat when in fact it made a finding that the parties had both contributed to an extent that each has to get 50%. (sic)
- 7) The court *a quo* also erred by not ensuring that the obligations and liabilities are shared equally between the appellant and respondent in respect of;
 - i) outstanding loans from the purchase of the properties.
 - ii) US109 000.00 school fees per year for the minor children.
 - iii) ZAR160 000.00 outstanding mortgage bond for No. 10 Elizabeth Avenue, Rivonia, Sandton.
- 8) At any rate the court *a quo* erred and misdirected itself in not considering the respondent's assets for example Demusk Enterprises for distribution under assets of the spouses. (sic)

- 9) The court *a quo* also erred and misdirected itself in including the Toyota Land Cruiser and Mazda Titan for distribution. The same had long been sold by the appellant prior to the divorce proceedings and in any event, the court *a quo* erred in including the Land Rover Discovery which vehicle never existed and could therefore not be allocated. (sic)

The respondent's grounds in the cross appeal were as follows:

- 1 The court *a quo* grossly misdirected itself in ruling that custody of the minor child A should be granted to the appellant when it had made a finding that the same appellant was not suitable to be a custodian parent. (sic)
- 2 The court *a quo* misdirected itself by only ordering that the appellant pays as maintenance towards the minor child B US\$300.00 per month without directing the appellant to pay school fees and medical aid for the minor child, when in fact the appellant had offered to pay the same.
- 3 The court *a quo* misdirected itself in awarding appellant as his sole and exclusive property No. 13 Mardmaz Flat when in fact it had made a finding that the parties had both contributed to an extent that each has to get 50 per cent.

The part of the judgment being appealed against raises two fundamental questions on appeal, which are, firstly, whether or not the court *a quo* misdirected itself in the manner in which it distributed the matrimonial assets of the marriage. The second question is related to the custody of the minor children and the attendant issues of maintenance, the payment of school fees, school uniforms and the general welfare of the minor children.

The distribution of matrimonial property pursuant to a decree of divorce is provided for in accordance with the provisions of s 7 of the Matrimonial Causes Act [*Chapter 5:13*], “the Act”. It is trite that the court faced with such a dispute is required to exercise discretion, which discretion it has been held in numerous authorities must be exercised judicially.

The approach which a court should adopt in apportioning the assets of parties following the dissolution of a registered marriage was set out by MCNALLY JA in *Takafuma v Takafuma* 1994(2) ZLR 103(S). In that case the learned Judge stated at 106B-E:

“The duty of a court in terms of s 7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting out the property into three lots, which I will term “his”, “hers” and “theirs”. Then it will concentrate on the third lot marked “theirs”. It will apportion this lot using the criteria set out in s 7(3) of the Act. Then it will allocate to the husband the items marked “his”, plus the appropriate share of the items marked “theirs”. And the same to the wife. This is the first stage.

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Next it will look at the overall result, again applying the criteria set out in s 7(3) and consider whether the objective has been achieved, namely, “as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses in the position they would have been had a normal relationship continued”

Only at that stage, I would suggest, should the court consider taking away from one or other of the spouses something which is actually “his” or “hers”.”

The appellant contends that the court *a quo* exercised its discretion erroneously, acted on the wrong principle and failed to take into account some relevant considerations in its apportionment of the assets of the spouses upon the dissolution of the parties’ union. It is also contended that the court lumped all the property as “theirs” and proceeded to apportion the assets in ‘as fair a way’ as possible. It was submitted that to this extent, the court *a quo* departed from

the correct approach stipulated in the Takafuma case (*supra*). It was further argued that this was a proper case for intervention by the appellate court.

The appellant is correct in his assertion that in the exercise of its discretion in terms of s 7(4) of the Act, a court is enjoined to take into account all the factors set out in the provision, and that if the court fails to take into account any relevant factor then it would have failed to exercise its discretion judicially. Therefore, the starting point to the enquiry is the creation by a court of three lots, ‘theirs’, ‘his’ and ‘hers’. The court then follows up the process by applying the criteria set forth in s 7(4).

The principle set out in Takafuma is that in the distribution of property by a court pursuant to a decree of divorce it must be clear as to which property is individual and which constitutes matrimonial property. Only the latter category constitutes the assets subject to apportionment by the court in the exercise of its discretion. A court must therefore endeavor to clarify the category in which the assets forming the subject of the dispute fall. However, it must be made clear that the authority does not prescribe a stringent form that parties must always adhere to but the result from the exercise of discretion by the court must make it clear which property is ‘his’, ‘hers’ or ‘theirs’.

It is clear from a reading of the judgment that the court *a quo* was fully alive to the principle set out in s 7(4) and applied it correctly. The court approached the matter in the following manner:

“From the totality of the evidence before this court, it is not in dispute that the parties were married for about twenty years and that they acquired substantial property jointly and individually. It is not in dispute that both plaintiff and defendant are executives with

professional qualifications worth noting and that they were not living a substandard style of life. The case of *Shenje v Shenje* (supra) spelt out that all contributions material or otherwise matter when it comes to the consideration of all circumstances with a view to coming up with a fair distribution, trying of course to place the parties in a position they would have been had the marriage remained intact. It is apparent from the evidence on record that all the property mentioned in the pleadings and during trial falls under assets of the spouses which fall for distribution, division and apportionment. One needs not go further than the Matrimonial Causes Act. Also as clearly spelt out in *Gonye v Gonye* (supra) it would be erroneous to exclude property acquired by a spouse during the period of separation as that would not only fetter the wide discretion of the court on the rights of the parties but would also create an unjust situation. It is my considered view in the circumstances of this case that all the property acquired by either of the spouses with or without knowledge of the other ought to fall for consideration.”

In its determination on the question of distribution of the matrimonial assets of the parties, the court *a quo* found that theirs was a marriage of equals. The two are well educated, with both of them holding degrees in their respective professions. Both were employed throughout the greater part of the marriage. Whilst the respondent brought everything into the joint estate, the appellant would purchase assets without the knowledge of the respondent. On his own evidence he also disposed of vehicles behind her back and never accounted for the proceeds. The court took into account that the respondent and the children were living in the matrimonial home, whilst the appellant had created a home for himself in South Africa. Fully alive to the provisions of s 7 the court *a quo* considered that it would be impractical for the parties to share the matrimonial home as joint owners. An order where they were made to share would also not achieve a clean break in the relationship.

The court *a quo* is heavily criticized for not following the approach set out by McNALLY JA in *Takafuma* (supra). It was suggested in argument that to the extent that the

court *a quo* did not create three such lots of property at the start of the apportionment process, then its decision would be founded on a wrong principle.

It appears to me that the court in Takafuma's case was setting out an approach on the correct way of achieving an equitable distribution. The factors that a court had to take into account in the distribution are set out in the Act. The principle itself is found in the Act. The appellant fails to appreciate that what Takafuma prescribes is a formula and it is not one that is applicable in every situation. It is erroneous in my view to suggest that the court *a quo* should have strictly followed the formula as set out by MCNALLY JA. In this case, the court found that all the property, with the exception of the stand in Chitungwiza, was acquired during the union. In such a case one cannot speak of piles. They do not exist as all the property is matrimonial property and falls for distribution.

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The court *a quo* did not create three lots of the matrimonial estate. That is not to say that its approach was incorrect. Having found that theirs was a marriage of equals, there were no baskets in which to place the properties. It became unnecessary to do so.

The court *a quo* ordered that the respondent be awarded the following immovable property:-

- i) a 100 per cent share in 3 Wye Turn Crescent.
- ii) a 100 per cent share in 1 Reigate Flats
- iii) a 50 per cent share in Collen Brander Milton Park.
- iv) a 50 per cent share in 397 Tariro Road, Unit F Seke, Chitungwiza.
- v) a 50 per cent share in Eastcourt Belvedere

- vi) a 50 per cent share in 39A Dover Rd

The appellant was awarded the following property:-

- i) a 100 per cent share in 10 Elizabeth Avenue Rivonia, Sandton, Johannesburg, South Africa.
- ii) a 100 per cent share in 13 Mardmaz Flats, 109 Baines Avenue.
- iii) a 50 per cent share in Eastcourt Belvedere
- iv) a 100 per cent share in 2 Reigate Flats
- v) a 50 per cent share in 39A Dover Rd

The appellant challenged the order by the court awarding the respondent ownership of the matrimonial home in Vainona despite the fact that the property was jointly owned by the two. The appellant and the respondent both contributed towards the acquisition of this property and were joint owners. In deciding to award the entire property to the respondent the court reasoned as follows:-

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“It is clear in respect of the matrimonial home 3 Wye Turn Close, Vainona, Harare that the plaintiff and the children stay there while the defendant stays at his workplace. The parties contributed in such a manner that on the face of it 50% sharing would be justifiable. However, regard being had to the full circumstances of the case and the estate as a whole measured against the need to attain a fair and just distribution it is my considered view that the plaintiff be awarded a 100 per cent stake in the home. Sharing the house which is the home of the plaintiff and the children in the circumstances of this case where there is other property which can be allocated to the defendant who does not stay at the home is viewed as inappropriate.”

It was further contended that where a property is jointly held in equal shares, the court ought to be alive to the general principle that a joint owner is entitled to their individual half share of the property. It was further argued that a court will not award the co-owner more merely because it would be fair and equitable to do so. Reliance for this proposition was sought

from the dicta by MCNALLY JA in *Lafontant v Kennedy* 2000(2) ZLR 280, (S), at 283H-284D where this court 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 (as here) the parties are married to each other at the time ownership was acquired. Thus, Jones *Conveyancing in South Africa* 4 ed p118 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 title deeds of the property were not produced in evidence. We do not know whether the deed shows that the property was transferred specifically in equal shares or not. But either way, the fact remains that they are prima facie owners in equal shares. This is the basis of such decisions in this court as *Takafuma v Takafuma (supra)*. As KORSAN High Court SC 51/17 v *Ncube* S-6-93(unreported):

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“As a registered joint owner she is in law entitled to a half share of the value of the property.”

That therefore is the starting point.

“The court cannot move from that position on mere grounds of equity. It cannot give away A’s property to B on the mere grounds that it would be fair and reasonable or just and equitable, to do so. There must be a more solid foundation in law than that.”

The remarks by MCNALLY JA in *Lafontant (supra)* must be understood within the circumstances of the case before the court. The cause of action in the dispute was not premised on s 7. It was accepted by the court that s 7 did not apply and that therefore the cause of action was not the distribution of matrimonial assets pursuant to a divorce. The parties were no longer

married having been divorced by a court in Haiti before approaching the High Court for a determination of their rights in an immovable property and a motor vehicle.

Nevertheless, the principle as set out in Lafontant that a court cannot give away A's property to B on the mere grounds that it would be fair and reasonable, or just and equitable to do so cannot be disputed. A court should only do so where there is a solid foundation in law to do so.

Unlike the dispute in Lafontant, the parties herein are engaged in a tussle over the matrimonial estate pursuant to a decree of divorce. The court therefore has to have recourse to the Act. Section 7(1) provides as follows:

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- (1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to —
 - (a) the division, apportionment or distribution of the assets of the spouses, **including an order that any asset be transferred from one spouse to the other;** (my emphasis)_

To suggest as the appellant does, that the court erred in the manner in which it dealt with the matrimonial home, is to deliberately ignore the provisions of s 7 which section empowers a court to do just that. In granting an order for the transfer of the property of the appellant to the respondent the court *a quo* had to have a solid foundation at law. The ambit of s 7 empowers the court to transfer the property of one of the spouses to the marriage in order to achieve a justiciable and fair distribution of the matrimonial estate the effect of which is to

achieve a result that would leave the parties in a position that they would have been if the union had continued. The rationale behind the principle is that following a divorce neither spouse should be in a worse off position than they would have been had the marriage continued.

It has not been suggested by the appellant that such an order is not supported by law. In making an order in terms of s 7 the court is guided by factors set out in subsection (4) which are the following:

- (4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following—
- (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
 - (c) the standard of living of the family, including the manner in which any child 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.

In making the disposition it did, the court *a quo* had regard to the authority of *Gonye v Gonye* 2009 (1) ZLR 232 (S). What was at issue in that matter was the extent of the discretion of the court under s 7 with regard to the disposal of the matrimonial assets of parties pursuant to

a decree of divorce. Also at issue was what assets a court had to take into account in the division, apportionment or distribution under the ambit of s 7 of the Act. At pp236H-237F MALABA JA (as he then was) said:

“It is important to note that a court has an extremely wide discretion to exercise regarding the granting of an order for the division, apportionment or distribution 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) of the Act are dependent upon the exercise by the court of the broad discretion.

The terms used are the “assets of the spouses” and not “matrimonial property”. It is important to bear in mind the concept used, because the adoption of the concept “matrimonial property” often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are separated should be excluded from the division, apportionment or distribution exercise. The concept “the assets of the spouses” is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets.

To hold, as the court *a quo* did, that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under s 7(1) of the Act is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which rights the parties depend.

It must always be borne in mind that s 7(4) of the Act requires the court, in making an order regarding the division, apportionment or distribution of the assets of the spouses, and therefore granting rights to one spouse over the assets of the other, to have regard to all the circumstances of the case. The object of the exercise would be to place the spouses in the position they would have been in had a normal marriage relationship continued between them. As was pointed out by LORD DENNING MR in *Wachtel v Wachtel* [1973] 1 All ER 829 (CA) at p 842:

‘In all these cases it is necessary at the end to view the situation broadly and see if the proposals meet the justice of the case’.”

It must be accepted that the court *a quo* paid due regard to the factors set out above.

It considered that the appellant had a home in Kenya where he was in employment, and that in

addition there was the Rivonia house in South Africa where he had also set up home. The evidence showed that the respondent was not welcome there and had been refused access thereto.

In contrast the respondent had been living with the children at the matrimonial home. The evidence also showed that the respondent had always lived at the matrimonial home since its acquisition by the parties. That property was the only one where the spouses and the children had shared as a family. The other properties were to all intents and purposes investments from which the spouses were drawing an income. In my view, the decision to transfer the appellant's half share in the same cannot in the circumstances be impugned. Such order as the court *a quo* gave was completely within its discretion in accordance with the provisions of s 7(4) of the Act.

In addition to the above, the court *a quo* found as a fact that the appellant had lied to it with regards to his interest in some of the immovable properties. The evidence revealed that the appellant had purchased 2 Reigate, 29A Dover Rd 44 East Court Belvedere and the Rivonia property behind the respondent's back. The court clearly had in mind when distributing the assets, the fact that the appellant had not only tried to hide his assets he had also misled the court in the manner in which he had pleaded. He had stated that the Rivonia property was rented. In relation to 29A Dover Rd, the appellant initially denied its existence only to later claim that it was jointly owned with a friend residing in the United Kingdom. In *Beckford v Beckford* 2009 (1) ZLR 271(S), this court stated:

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

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

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

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

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

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

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

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

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

The appellant has also criticized the trial court for awarding the respondent 50 per cent of the herd of cattle currently at his plot in Mhangura, whilst at the same time allowing the respondent to retain whatever movable assets were at her farm in Shamva.

In respect of this ground, I find that the appellant has not shown that the court *a quo* grossly misdirected itself in the manner in which it disposed of the cattle. The court found that the appellant had sold some of the cattle after divorce proceedings had commenced. By law that sale should have been taken into account which should have resulted in the respondent being awarded a greater number than the 50 per cent. In fact the court awarded the appellant all the farm equipment, yet he does not claim that this has resulted in an inequitable distribution.

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The mere fact that the court did not make an order in respect to property at the respondent's farm would not on its own justify interference by this court of the award of half of the herd of cattle to the respondent. Further to this the appellant had lied to the court regarding the existence of the very cattle whose disposition he now seeks to challenge.

The appellant has contended that the court *a quo* misdirected itself in including the Toyota Land Cruiser and the Mazda Titan in the movable assets for distribution. He suggested that as he had sold them prior to the divorce they should not form part of the matrimonial estate.

The court *a quo* awarded the two vehicles to the respondent. The appellant suggested that the vehicles had been sold to his friend. He did not provide proof of such sale in an effort to counter the evidence of the respondent that the vehicles were still in existence. If indeed he had

sold them he was under an obligation to account to the respondent for the proceeds of the sale. He did not do so. The court *a quo* was well within its rights to consider them as matrimonial assets subject to distribution. Similarly, I find no merit on the attack against the inclusion of the Land Rover Discovery in the matrimonial assets. The court disbelieved the appellant and found the respondent a more credible witness. This finding has not been challenged on appeal.

It appears to me that the appellant has not shown that in making the award in respect of the matrimonial estate the court *a quo* took leave of its senses, applied a wrong principle or overlooked critical evidence.

It is trite that an appellate court is loath to interfere with the exercise of such discretion unless it has been shown that the trial court exercised its discretion improperly. It was stated in *Barros v Chimphonda* 1999(1) ZLR 58(S) at 62F-63A as follows:

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“The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first one-which clearly involved the exercise of judicial discretion- may only be interfered with on limited grounds. See *Farmers’ Co-operative Society v Berry* 1912 AD 343 at 350. 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 the wrong principle, if it allows extraneous or irrelevant factors 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 materials for doing so. In short, this court is not imbued with the same broad discretion as enjoyed by the trial court.”

Given that the distribution of assets in a matrimonial dispute has as its premise the exercise of discretion on the part of the trial court, it was incumbent upon the appellant to show

that in this case the court did not exercise its discretion properly. The appellant, in my view, had to establish that in its distribution of the assets of the parties, the court *a quo* failed to uphold the principles set out in s 7. The distribution of matrimonial property is done in the exercise of a discretion which an appellate court should be slow to interfere with.

It has not been shown that the court acted upon a wrong principle. Nor does it appear that the court *a quo* made an error in the exercise of its discretion under s 7. The formula suggested by the appellant in deciding which property belongs to whom would result in this court ignoring property that falls for distribution as matrimonial assets. This court would in fact fall into an error. The court *a quo* was correct in its manner of distribution. I find no misdirection.

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Turning to the cross appeal it was contended that the court *a quo* misdirected itself in awarding custody of the minor child A Junior Denhere, a male child born 13 November 1999, to the appellant.

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At the time of the divorce the child was just shy of fifteen years of age. The relationship between the mother and the child was to say the least, strained. The mother readily conceded the poor relations between her and the child but was of the view that if she got custody she would be able to retrieve and mend the relationship. The court *a quo* was not convinced that it would be in the interests of the child for him to be reunited with his mother. The court said:

“It is also not in dispute that since July 2013 the relations between A and his mother have been painted bad. This bad relationship was confirmed by the plaintiff in court and as a concerned mother she was tearful and shuddered to recall what her son had said to her showing the bad relations. The defendant confirmed the relation was not good. In as much as the court apportions the sour relations to the influence by the defendant given

that he took the child under the pretext of holiday but never returned the child, it is a fact that A Junior and the mother no longer enjoy cordial mother son relations. Harm has been done in so far as the relations have been tainted. It is however, my considered view that given what the mother and father said A would require time to heal and mend the relations. It would not be necessary at this stage to disrupt the child's school which was disrupted by the defendant when he transferred the child to learn in Kenya. To cause A Junior to transfer again and come to Zimbabwe would not be in the best interests of the welfare of the child. He is approaching majority and I am sure with proper guidance he will learn to appreciate what a mother and father mean to him. The child's educational, social and moral fabric would be negatively affected by changing his environment at this stage."

In determining the issue of the custody involving a minor child, a court is enjoined to consider the best interests of the child. It seems to me that the court *a quo* took into account the relationship that a mother has with a child and how precious such a relationship is. The court also took into account the sour relations that have developed between the mother and A and how it came about. The court also considered the importance of allowing the relationship between the mother and the son to mend. Also of consideration by the court was the desirability of keeping siblings together unless the circumstances demand otherwise.

However, it is settled law that the best interests of a minor child are the paramount consideration in issues surrounding the welfare of minor children. What constitutes the best interests of a minor child is dependent on the facts and the surrounding circumstances thereto. In this instance, the child is at school in Kenya. He has been there for some time and has now established roots in that country. He is learning in accordance with the Kenyan educational system. He has friends and a social network in that country. Even if this court were to accept the need for the relationship of the mother and the child to be mended, it would not be in his interests to be uprooted and brought to Zimbabwe. It would disrupt his entire life, education and social

life. I do not believe that such a course of action would be of benefit to the family as a whole, or most importantly, the child himself.

In my view, the court *a quo* was correct in the manner it exercised its discretion both as regards the distribution of the matrimonial assets and the question of custody of the minor child.

In the result both the appeal and the cross appeal are dismissed for want of merit. Each party is ordered to pay his or her own costs.

GUVAVA JA

I agree

Judgment No. SC 51/17
Civil Appeal No. SC 664/14

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MAVANGIRA JA

I agree

Venturas & Samukange, appellant's legal practitioners

Mutetwa & Nyambirai, respondent's legal practitioners