

**REPORTABLE (119)**

**PHILIPPA ANN COUMBIS**  
**v**  
**(1) RONALD JOHN COUMBIS**  
**(2) DOVES FUNERAL ASSURANCE (PRIVATE) LIMITED**  
**(On The Purchase of a Half Share of the Matrimonial Home).**

**SUPREME COURT OF ZIMBABWE**  
**GARWE JA, GOWORA JA & UCHENA JA**  
**HARARE, 10 OCTOBER 2016, 19 JUNE 2017,**  
**23 JANUARY 2018, 23 JANUARY 2020,**  
**24 JUNE 2020 & 21 OCTOBER 2021**

*T. Mpofu* with Mr *T.L Mapuranga*, for the appellant  
*D. Tivadar*, for the respondent for the first respondent  
L. T Musekiwa, for the second respondent

**UCHENA JA:** This is an appeal and cross-appeal against the judgment of the High Court dated 4 September 2014 granting a decree of divorce and ancillary relief for and against the appellant (the plaintiff in the court *a quo* and the appellant in this appeal) and the cross-appellant (the defendant in the court *a quo* and first respondent in this appeal).

**FACTUAL BACKGROUND**

The facts of the case can be summarised as follows:

On 1 September 1990 the appellant and the first respondent were married in terms of the then Marriages Act [*Chapter 37*]. During the subsistence of the marriage, the parties were blessed with three children namely Murray John Coumbis, who was already an adult at the commencement of divorce proceedings, and the twins Julian Ronald Coumbis and Anton Phillip Coumbis. Julian and Anton were minors when divorce proceedings were

instituted. They are now adults but Julian remains a perpetual minor on account of his mental incapacity.

On 5 August 2010, the appellant instituted divorce proceedings against the first respondent. As Julian and Anton were minors the appellant claimed their custody and maintenance. She also claimed personal maintenance and a share of the assets of the parties. The appellant also claimed €10 400 from the respondent which she had advanced as a loan to Stir Crazy (Pvt) Ltd, a family business. She contended that the money was part of her inheritance. She claimed to have loaned it to the first respondent through Stir Crazy (Pvt) Ltd. She claimed the money from him alleging that the aforementioned company was an *alter ego* of the first respondent.

The first respondent opposed the appellant's claims and made a claim in reconvention wherein he claimed the custody of the minor children and their maintenance. He contested the appellant's claim for personal maintenance and matrimonial property. He alleged that some of the properties claimed by the appellant did not form part of their matrimonial estate.

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The matter proceeded to a joint pre-trial conference where the following issues were identified and referred to trial:

- a. The custody of Julian and Anton;
- b. What amount of maintenance was to be paid to the plaintiff if custody is awarded to her;
- c. Whether the plaintiff could be awarded the right to reside in the matrimonial home until both children became self-supporting;
- d. Whether the defendant was obliged to pay personal maintenance to the plaintiff.
- e. Which properties constituted the matrimonial estate
- f. What appropriate order the High Court was supposed to make for the sharing of property.”

## **PROCEEDINGS IN THE HIGH COURT**

When the trial commenced, Julian and Anton were no longer minors. However, the parties agreed that Julian was to be treated as a perpetual minor due to his mental incapacity. The parties' claim for custody and maintenance, therefore, only related to Julian. The parties adduced a lot of documentary evidence to support their respective claims.

During examination-in-chief, the appellant admitted that she had a broken relationship with Julian. She admitted that she had exchanged nasty emails with him. The appellant also admitted to smoking marijuana. The fact that she smokes marijuana was confirmed by Dr Chibanda who pointed out its adverse effect on her health and especially on her recovery from temporal lobe epilepsy. After hearing the evidence, the judge *a quo* interviewed Julian in his chambers.

The court *a quo* found that Julian was closer to the first respondent and took into consideration the fact that the two had been staying together after the parties' separation. It also found that the appellant needed to start a new life independent from the first respondent but still needed financial assistance to cushion her from the effects of the divorce. The court *a quo* found that the first respondent was dishonest and not credible in respect of evidence relating to the matrimonial estate.

The order granted by the court *a quo*, quoted *verbatim*, reads as follows:

“Accordingly it is ordered as follows:

1. A decree of divorce be and is hereby granted.
2. Custody of the perpetual minor child Julian Ronald Coumbis, born on 3 July 1994 be and is hereby awarded to the defendant.
3. The plaintiff be and is hereby granted reasonable access rights to the said perpetual minor child which shall be exercised as follows:
  - 3.1 She shall have the right to stay with the said perpetual minor child on alternate weekends.

- 3.2 She shall have the perpetual minor child on any other special occasions including but not limited to each alternate Easter holidays and Christmas holidays.
4. The defendant shall solely be responsible for the upkeep of the said perpetual minor child.
5. The defendant shall pay maintenance in respect of the plaintiff in the sum of US\$2000-00 per month as per the order granted by the Magistrate's Court for a period of six (6) months from the date of granting of this order inclusive of the month of September 2014.
- 5.1 Payments shall be made directly into the plaintiff's Bank Account whose details shall be provided forthwith to the defendant by the plaintiff.
6. The plaintiff is awarded as her sole and exclusive property all household furniture, contents and effects inclusive of all her personal items and jewellery, at the matrimonial house No 6 Northwood Rise, Mt Pleasant Harare, excluding the TV set, dinning suite and lounge suite which are awarded to the defendant.
7. The defendant shall transfer into the plaintiff's name a motor vehicle Nissan Navara Registration Number ABD 6847 presently being used by the plaintiff, at his sole cost within thirty (30) days of the grant of this order.
8. The defendant is awarded as his sole and exclusive property, immovable property known as No 6 Northwood Rise Mt Pleasant Harare currently registered in the names of the plaintiff and the defendant.
- 8.1 The defendant shall transfer against payment by him of all transfer costs the said property into his names and the plaintiff shall sign all relevant papers to effect such transfer within 30 days of being requested, failure of which the Sheriff shall sign all the documents.
- 8.2 The defendant shall be solely responsible for any encumbrances, mortgages or other obligations duly existing or registered by law over the said property.
9. The defendant shall transfer all shares of OPIUM INVESTMENTS (PVT) LTD, a property owning company whose sole asset is an immovable property known as No. 13 Bates Street Milton Park Harare, to the plaintiff within thirty (30) days of the grant of this order at his cost.
- 9.1 The defendant shall be solely responsible for any encumbrances or obligations duly existing or duly registered by law over the said property.

- 9.2 The defendant shall sign all the relevant documents to effect such transfer failure of which the Sheriff is authorised to sign all such documents.
10. The plaintiff is awarded as her sole and exclusive property, an immovable property known as No 6 Rosefriars, Avondale Harare.
- 10.1 The plaintiff shall transfer against payment by her of all transfer costs the rights title and interest in the said property No. 6 Rosefriars, Avondale Harare.
- 10.2 The defendant shall within thirty (30)days of being requested to sign all relevant documents to effect such transfer, failure of which the Sheriff is authorised to sign all such documents.
11. The plaintiff's claim for cash in the sum of US\$100 000-00 be and is hereby dismissed.
12. Absolution from the instance be and is hereby granted in respect of the distribution of the following assets:
- (a) 94 Matumi Sands Lonehill (Pty) Ltd
  - (b) 112 Matumi Sands, Lonehill (Pty) Ltd
  - (c) 182 Shingara (Pty) Ltd
  - (d) Theright Investments (Pvt) Ltd
  - (e) Stir Crazy (Pvt) Ltd
  - (f) Incavat Enterprises (Pvt) Ltd
  - (g) Telehic Investments (Pvt) Ltd
  - (h) Natsbury Trading (Pvt) Ltd
  - (i) Plaintiff's claim of £10 400
13. The defendant shall bear the costs of suit."

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Aggrieved by parts of the court *a quo*'s decision, the appellant and the first respondent noted the present appeal and cross-appeal respectively.

### **GROUND OF APPEAL**

The appeal involved an appeal and a cross-appeal, but the cross-appeal was withdrawn during the hearing of the appeal. The appellant's grounds of appeal attack the court *a quo*'s decision on the following issues:

1. custody and maintenance of Julian the perpetual minor,

2. her claim for inheritance money loaned to a company from the respondent,
3. the propriety or otherwise of the decision handed down by the court *a quo* concerning the distribution of the assets of the parties,
4. her claim for a lump sum maintenance payment in the sum of US\$100 000-00
5. the granting of absolution from the instance *mero motu* by the court *a quo* at the end of the defence case, and
6. whether or not the respondent should be heard in view of his contemptuous conduct against proceedings in this Court, the court *a quo* and its orders.

### **APPLICATION BY THE APPELLANT**

In September 2018, the appellant made an application to adduce further evidence to prove that the respondent had, pending the determination of the appeal, interfered with and defied the High Court's orders. We, in terms of s 22 (1) (b) (ii) and (v) of the Supreme Court Act [*Chapter 7:13*], ordered that the matter be remitted to MAWADZE J (the trial judge), for him to conduct an enquiry into the appellant's allegations and submit a report to us. On 3 April 2019, after holding an enquiry in compliance with our order, MAWADZE J submitted to us his report in which he made the following factual findings:

### **FINDINGS OF FACT MADE BY MAWADZE J.**

- "1(a) The perpetual minor Julian Ronald Coumbis (born on 3 July 1994) was removed from Zimbabwe by the respondent and taken to South Africa in 2013 well before the judgment of the court on 4 September 2014.
  - (b) The respondent has not placed any credible evidence before this Court for such conduct.
  - (c) Julian remains in South Africa to date.
  - (d) The appellant Philippa has not been able to exercise any access rights in respect of Julian (the perpetual minor) as awarded to her in terms of para 3 of this Court's order
2. (a) The respondent sold two immovable properties in South Africa being No. 94 Matumi Sands and No. 112 Matumi Sands and transferred them to third parties.
  - (b) The only available immovable property in South Africa is No. 182 Shingara against which the appellant successfully placed a caveat.

3. The respondent removed all movable household goods which had been awarded to the appellant Philippa in terms of para 6 of this Court's order from No. 6 Northwood Rise, Mt Pleasant, Harare and took them to South Africa without the appellant's knowledge or consent. The respondent has not explained his conduct.
4. The motor vehicle, a Nissan Navara Registration Number ABD 6847 awarded to the appellant Philippa in terms of para 7 of this Court's order was taken by the Vehicle Theft Squad as it was deemed to be subject to criminal investigations for which the respondent is allegedly accountable.
5. The respondent has not done anything to remove the encumbrances on immovable properties either awarded to him or the appellant as per this Court's order.
6. After the order of this Court the respondent transferred about USD\$2.8 million from Stir Crazy (Pvt) Ltd to Incavat Enterprises (Pvt) Ltd.
7. The respondent has not complied with the maintenance order granted in favour of the appellant Phillipa in terms of para 5 of this Court's order and has not paid a single cent.
8. Lastly, the following assets are still available;
  - (a) No. 6 Northwood Rise Mt Pleasant, Harare Zimbabwe but is still encumbered.
  - (b) Belgravia House, Harare but is still encumbered.
  - (c) No. 6 Rosefrias, Avondale, Harare Zimbabwe
  - (d) No. 13 Bates Street, Milton Park, Harare but is still encumbered.
  - (e) No. 182 Shingara in South Africa."

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### **APPELLANT'S SUBMISSIONS ON APPEAL**

In submissions before this Court, counsel for the appellant, Mr *Mpofu*, argued that the report to the Supreme Court following due inquiry by MAWADZE J dated 3 April 2019 confirmed that the first respondent was in contempt of the court *a quo*'s order. He further submitted that such disobedience went to the root of the matter.

Mr *Mpofu* further submitted that the court *a quo*'s decision on custody was influenced by the first respondent's alienation of Julian against the appellant and that the decision does not promote a bond between the appellant and the perpetual minor. Counsel for the appellant submitted that from 4 September 2014 to the last date of the hearing, the appellant had not enjoyed access to the perpetual minor because he had been removed from

the jurisdiction of this court. He submitted that it was in the best interests of the perpetual minor that he be in the custody of the appellant.

In respect of the court *a quo* granting the first respondent absolution from the instance *mero motu*, counsel for the appellant submitted that the court *a quo* erred in view of the fact that the first respondent had made offers which were equivalent to an admission. He also submitted that the first respondent had given evidence of his shareholding in *some* of the companies which could have enabled the court *a quo* to distribute those shares between the parties.

Mr *Mpofu* submitted that the distribution of the matrimonial assets was limited to three properties. He contended that evidence led before the court *a quo* on these assets established that the assets belonged to companies owned by the parties. He further submitted that the properties had been encumbered by the first respondent and consequently the appellant was disabled from acquiring any title in them in spite of their having been awarded to her by the court *a quo*.

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In relation to the appellant's inheritance funds loaned to Stir Crazy (Pvt) Ltd, Mr *Mpofu* argued that the latter, being the respondent's *alter ego*, they had to be returned to the appellant by the first respondent. He prayed that the appeal succeeds with costs.

### **THE FIRST RESPONDENT'S SUBMISSIONS ON APPEAL**

Mr. *Tivadar*, for the first respondent, submitted that even though the first respondent had breached the order of the court *a quo*, he had a right to be heard in terms of s 69 of the Constitution of Zimbabwe 2013 (the Constitution). Counsel for the first respondent argued that it was in the best interest of the perpetual minor that the first respondent be heard.



He contended that, even if it was found that the first respondent had no right of audience before this court, there were no documents relating to the companies proving that the court *a quo* was handicapped in making its determination.

Regarding the issue of the court *a quo* granting absolution from the instance *mero motu*, Mr Tivadar argued that the court *a quo* came to that conclusion because there was no evidence on the ownership of the companies as the appellant failed to present it to the court *a quo*.

In concluding his submissions, Mr Tivadar submitted that the first respondent was withdrawing his cross-appeal.

### **APPELLANT'S RESPONSE**

In response, counsel for the appellant contended that the enjoyment of the constitutional right to be heard comes with an obligation to obey court orders. He argued that the first respondent is in court to protect something yet he disobeys court orders. Counsel further argued that the court has inherent jurisdiction in terms of s 176 of the Constitution to determine who can or cannot be heard.

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He submitted that the perpetual minor's best interests remained with the court as the first respondent's contempt disentitles him from saying anything that benefits him. Counsel for the appellant submitted that an appellate court does not only deal with the direct dictates of the judgment but also deals with its effects.

### **FURTHER SUBMISSIONS**

By letter dated 31 January 2020, Musekiwa and Associates Legal Practitioners for Doves Funeral Assurance (Pvt) Ltd, informed the Registrar of this Court that its client had bought a half share of No 6 Northwood Rise, Mt Pleasant, Harare (the matrimonial

home) from a sale in execution conducted by the Sheriff and that that half share of the property had been transferred to their client on 20 February 2019.

As a result of this information, which had not been placed before us when we heard the appeal on 23 January 2020, parties were invited to appear before us on 24 June 2020 to give them an opportunity to address us on this issue. At that hearing we granted the following order:

**“IT IS ORDERED BY CONSENT THAT:**

1. Doves Funeral Assurance be and is hereby joined as a party to these proceedings as 2<sup>nd</sup> Respondent with Ronald John Coumbis becoming the 1<sup>st</sup> Respondent.
2. Mr Musekiwa for Doves Funeral Assurance is to avail documentation confirming the transfer of the half share in the property to itself and file heads of argument in connection therewith by the 30<sup>th</sup> June 2020 and serve the same immediately on the appellant and first respondents’ legal practitioners.
3. Advocate Mpofu is to file additional heads of argument in response to the heads of argument filed by Doves Funeral Assurance by Friday 3<sup>rd</sup> July 2020.
4. Mr Ndlovu, for the 1<sup>st</sup> Respondent Ronald John Coumbis is to file his additional heads of argument if any, by Wednesday 8 July 2020.”

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In his additional heads of argument Mr *Mpofu*, for the appellant, submitted that the matrimonial home which was jointly owned by the appellant and the first respondent be awarded to the appellant who will thereafter institute proceedings in the High Court to claim back the half share sold to Doves Funeral Assurance (Pvt) Ltd. He submitted that Doves Funeral Assurance (Pvt) Ltd took a risk when it bought the half share without the consent of the appellant.

The first respondent, whose conduct caused the sale of his half share to Doves Funeral Assurance (Pvt) Ltd, did not file additional heads.

In their heads Musekiwa & Associates, for Doves Funeral Assurance (Pvt) Ltd, submitted that it bought the respondent's half share through the Sheriff's sale in execution after due notice had been given to the appellant. They submitted that the half share is no longer part of the appellant and first respondent's matrimonial assets and is no longer available for distribution to either of them.

### **ISSUES FOR DETERMINATION BY THIS COURT**

The appellant raised several grounds of appeal but the material issues for determination are as follows:

1. Whether or not the first respondent should be heard in view of his contempt of proceedings of the court *a quo* and its orders and proceedings before this Court.
2. Whether or not the court *a quo* erred in awarding custody of Julian to the first respondent.
3. Whether or not the court *a quo* erred in granting absolute from the instance Judgment No. SC 130/21 Civil Appeal No. SC 448/14 against part of the appellant's claims.
4. Whether or not the appellant is entitled to claim her monetary inheritance from the first respondent.
5. Whether or not the court *a quo* erred in distributing the immovable property without taking into account the value of the properties.
6. Whether or not the distribution of the immovable property was fair.
7. Whether or not the appellant's claim for a lump sum maintenance payment in the sum of US\$100 000-00 was correctly dismissed.

### **APPLICATION OF THE LAW TO THE FACTS**

**Whether or not the first respondent should be heard in view of his contempt of this Court and court *a quo*'s proceedings and the orders of the court *a quo*.**

MAWADZE J, in his report subsequent to the remittal of the matter for him to inquire into the first respondent's alleged contempt against its orders, found that the perpetual minor who the appellant was granted access to, had been removed from Zimbabwe and taken to South Africa without the appellant's knowledge or consent resulting in the appellant not being able to exercise her rights of access.

He also found that all movable household goods at No. 6 Northwood Rise, Mt Pleasant, Harare awarded to the appellant in terms of para 6 of the court *a quo*'s order had been removed from the house by the first respondent and taken to South Africa without the appellant's knowledge or consent. The first respondent did not explain his conduct. It has also been established that a half share of No 6 Northwood Rise, Mount Pleasant the whole of which had been awarded to the first respondent but was one of the issues raised in this appeal, had been sold and transferred to Doves Funeral Assurance (Pvt) Ltd because of the first respondent's indebtedness which led to his half share being sold in execution.

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MAWADZE J also found that the first respondent had sold two immovable properties in South Africa being No. 94 Matumi Sands Lonehill (Pty) Ltd and No. 112 Matumi Sands Lonehil (Pty) Ltd in which he had fifty percent shareholdings in both and that he had thereafter transferred them to third parties without the appellant's knowledge or consent, at a time when their distribution was pending before the court *a quo*.

The motor vehicle, a Nissan Navara, Registration Number ABD 6847 awarded to the appellant in terms of para 7 of the court *a quo*'s order had been taken by the Vehicle Theft Squad as it was deemed to be subject to criminal investigations for which the first respondent was allegedly accountable.

The judge also found that the first respondent had not done anything to remove encumbrances from immovable properties awarded to the appellant in terms of the court *a quo*'s order.

He further found that the first respondent caused the transfer of USD\$ 2.8 million from Stir Crazy (Pvt) Ltd, a company jointly owned by the parties, to Incavat (Pvt) Ltd, a company incorporated after the separation of the parties in spite of the pending appeal.

Further the first respondent had not complied with the maintenance order granted in favour of the appellant in terms of para 5 of the court *a quo*'s order.

In light of the first respondent's contemptuous conduct, conceded by his legal practitioner, my considered view is that he has no right to be heard by this Court. It is settled law that a litigant with dirty hands cannot be entertained by the courts. Contempt of court is seriously viewed by the courts and disentitles a party from being afforded a hearing by the courts until he or she has purged the contempt.

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The first respondent cannot violate a court order on one hand and seek relief from the same court on the other. One cannot be allowed to do so with impunity. It is important to acknowledge the well-known canon that the Constitution is the supreme law and that the rule of law is a founding principle of our nation. The quintessence of the rule of law is this, and simply this, that where there is a law it must be complied with and when courts grant orders they must be obeyed. The Constitution under s 164 (3) provides as follows:

“An order or decision of a court binds the State and all persons and government institutions and agencies to which it applies, and must be obeyed by them” (emphasis added)

In *In Re: Prosecutor-General of Zimbabwe* on his constitutional independence and protection from direction and control CCZ 13/17 at p 13, the court made the following pertinent remarks:

“The simple fact of the matter is that the applicant has not complied with the orders in question and has proffered no explanation whatsoever for such non-compliance. He has for some reason seen it fit to disregard court orders; and yet he expects this Court to overlook his wanton and cavalier nonchalance. For the applicant to refuse to obey court orders, and then to avoid answering the critical question as to why he has not, is tantamount to exhibiting flagrant contempt for this Court. This type of contempt *in facie curiae* cannot be countenanced by the Court. We have a duty to protect our processes from abuse and scandalous impunity.”

The gravity and consequences of such contempt were articulately spelt out in *Associated Newspapers of Zimbabwe (Private) Limited v The Minister of State for Information and Publicity in the President’s Office & Others* SC 20/03 at p 11, where the court held that:

“The Court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged... This Court is a court of law, and as such, cannot connive at or condone the applicant’s open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards... In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable.”

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*In casu*, the first respondent has shown a flagrant disregard of court proceedings of the court *a quo* and this Court. He has not purged his contempt nor explained his conduct. In respect of some of the terms of the court *a quo*’s orders, he remains in continuous contempt. Such conduct cannot be countenanced by this Court. It is my considered view that he has no right to be heard. Consequently the submissions made on his behalf by Mr *Tivadar* will be ignored and not be taken into account in determining this appeal.

**Whether or not the court *a quo* erred in awarding custody of Julian to the first respondent.**

The court *a quo* granted custody of the perpetual minor to the first respondent. The appellant's complaint on appeal was that custody ought to have been awarded to her.

It is trite that the awarding of custody of a minor to either of the parents by a court is governed by the best interests of the minor. Therefore the parent who will be granted custody must satisfy the requirements of the best interests of the child. 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 of the courts, particularly by the High Court as the upper guardian of the rights of children. Section 81 (2) and (3) reads:

- “(2) A child's best interests are paramount in every matter concerning the child.
- (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian.”

This position was aptly illustrated in *Mackintosh (Nee Parkinson) v Mackintosh* SC 37/18 at p 15 para 33, where this court held that: Judgment No. SC 130 /21 Civil Appeal No. SC 448/14

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“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...”

**Cretney S M on *Principles of Family Law***, (Third Edition, Sweet & Maxwell, London, 1979) cited with approval in the *Mackintosh* case, *supra*, states at p 493 that:

“It has traditionally been stressed that the law is not that the welfare of the child is the sole consideration. There may, for instance, be cases where the public interest overrides the welfare of a particular child. But the requirement to treat the child's welfare as the ‘first and paramount’ consideration means

‘more than that [it] is to be treated as the top item in a list of items relevant to the matter in question. [The words] connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as

that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.”

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. It remarked thus:

“In determining what is in the best interests of the child, the Court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs - generally speaking, the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) the mental and physical health and moral fitness of the parent;
- (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status *quo*;
- (j) the desirability or otherwise of keeping siblings together;
- (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) the desirability or otherwise of applying the doctrine of same-sex matching; and
- (m) any other factor which is relevant to the particular case with which the Court is concerned.”

The court *a quo* took into account the strained relationship between the appellant and the perpetual minor, evident from emails exchanged between them. On the same note, the appellant also confessed that there was friction between her and the perpetual



minor. There is therefore no compatibility between the appellant and the perpetual minor. It would therefore be against the best interests of the perpetual minor to place him in the custody of a parent with whom he has a hostile relationship.

The court *a quo* considered that the perpetual minor is male and the appellant female. Although this should not ordinarily matter, evidence led established that the perpetual minor needs assistance in dressing himself starting from the first garment he has to wear. The inevitable question arising from this is whether the appellant can give him that assistance in view of the age of the perpetual minor and his sex. It is my considered view that the doctrine of same-sex matching is applicable in these circumstances. According to the best interests of the perpetual minor, it is important that he be given this essential assistance by a male he is close to. It would, in my view, be inappropriate to award the appellant custody of the perpetual minor in these circumstances.

The record of proceedings establishes that Anton, the perpetual minor's twin brother who stays with the first respondent, assists Julian to dress up. Awarding custody to the appellant would result in separating the perpetual minor from his twin brother and would entail the appellant taking over Anton's role in the life of the perpetual minor. Separating minors from siblings is undesirable though it can be done under exceptional circumstances. The record establishes that Anton's relationship with the appellant is more strained compared to that of the appellant and the perpetual minor. He is unlikely to agree to go and stay with the appellant. He, being an adult, cannot be forced to live with the appellant if she is awarded custody of Julian. In *casu*, taking into cognisance the pivotal role Anton plays in the perpetual minor's life it is, in my view, in the best interest of the perpetual minor that he is not separated from his twin brother.

Evidence on record establishes that the first respondent is a better custodian parent than the appellant. The appellant herself commented on his ability to switch from business to family affairs. The record shows that the first respondent has a good relationship with the perpetual minor as compared to the appellant. As already said there is no compatibility between the appellant and the perpetual minor.

The court *a quo* interviewed the perpetual minor after which it granted custody to the first respondent. This indicates the minor's preference as a consideration to his best interests.

The record establishes that the appellant suffers from temporal lobe epilepsy which she and her doctor said triggers her outbursts of anger which affects her relationship with members of her family. Dr Chibanda, testifying for the appellant, told the court *a quo* that the condition can be suppressed by taking medication. However, the appellant has been under treatment for some time but there is no evidence that she has overcome the ailment. The appellant admitted to smoking marijuana which the doctor said complicates her condition. According to the appellant and the doctor, it is that ailment that caused her outbursts and strained relationships with the children and others. The doctor testified that the appellant might have to take medication for life. These circumstances do not make her a suitable custodian of the perpetual minor.

In light of the foregoing, it is my view that custody should remain with the first respondent taking into account the best interests of the perpetual minor. In the event of there being changes in appellant's circumstances, she can apply for variation of the custody order as the court *a quo*'s decision is based on the current circumstances.

In light of the above, it is my view that the court *a quo* took into consideration the best interests of the perpetual minor in awarding custody to the first respondent. The court *a quo*'s decision in that regard is unassailable and I respectfully associate myself with it.

**Whether or not the court *a quo* erred in granting absolution from the instance against part of the appellant's claims.**

The court *a quo* granted the first respondent absolution from the instance in respect of the appellant's claims, to a share in the South African properties namely 94 *Matumi Sands, Lonehill (Pty) Ltd*, 112 *Matumi Sands, Lonehill (Pty) Ltd* and 182 *Shingara (Pty) Ltd* as well as a number of Zimbabwean assets. The court *a quo* stated :

“...I have also alluded to the various companies in which the plaintiff did not lay any claim but were alleged to be owned by the defendant and that I should consider that fact in the distribution of the assets of the parties.

These include:

- Telehec Investments (Pvt) Ltd
- Natsbury Trading (Pvt) Ltd
- Bywork Intermedia
- Incavat Enterprises (Pvt) Ltd
- Stir Crazy (Pvt) Ltd

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In respect of all the above properties inclusive of the companies, I am inclined to grant absolution from the instance. **I have already alluded to the fact that neither the plaintiff nor the defendant have been able to place evidence before the court to show the shareholding of these companies, I have dealt at length with the evidence of the parties and explained why I believed the defendant is an untruthful and incredible witness. I, however, hold the view that the plaintiff has not been able to make out a case in respect of these assets. I am also persuaded to grant absolution from the instance because of the fact that as the trial commenced but before its completion Stir Crazy was placed under provisional liquidation and is currently under liquidation...** Absolution from the instance would enable the plaintiff, if she so desires to deal with the defendant's interests in Stir Crazy and other related companies after a full public inquiry... The only viable and just option is to leave the door open for the plaintiff to approach the court after a decree of divorce is granted, **if she wishes, with sufficient evidence on the shareholding of both the trading and property-owning companies in Zimbabwe and South Africa...** Since evidence had been led in respect of these companies I cannot leave the matter hanging but to grant absolution from the instance...” (emphasis added)

The first respondent made offers to the appellant in respect of some of the properties included in the order of absolution from the instance and disclosed his shareholding in some of the companies.

Evidence on record established that the first respondent offered the appellant 10 percent of the Belgravia House owned by Stir Crazy (Pvt) Ltd, 10 per cent of Theright Investments (Pvt) Ltd, 20 per cent shareholding in Stir Crazy (Pvt) Ltd. The first respondent further confirmed some of these offers during oral evidence before the court *a quo* where he had the following exchange with the court *a quo*:

“Q. I am not worried about that document you are talking about, I am worried (sic) the list of all these companies we have dealt with. **You know what proof can be placed at any forum to prove ownership of a company?**

A. **And yet I have offered 40 percent to her my Lord.”** (emphasis added)

During the same oral evidence the first respondent conceded that he owns 80 percent shares in Stir Crazy (Pvt) Ltd, 80 percent shares in Opium Investments (Pvt) Ltd, 80 percent shares in the Theright Investments (Pvt) Ltd, 50 percent shares in 112 Matumi Sands Lonehill (Pty) Ltd and 50 percent shares in 94 Matumi Sands Lonehill (Pty) Ltd.

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It is trite that when insufficient evidence is led when the plaintiff closes his case, or when there is insufficient evidence at the end of a full trial the court can grant the defendant absolution from the instance. Absolution from the instance in both these instances simply means the defendant is freed from being held liable under that litigation but the plaintiff remains free to pursue his/her suit against the defendant through another suit on a subsequent occasion.

The factors to be considered in an application for absolution from the instance were discussed in the case of *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5 D-E where it was held that:

**“At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the court is: is there evidence upon which a reasonable man might find for the plaintiff? The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant... In other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against the defendant?” (emphasis added)**

Further, in *United Air Charters (Pvt) Ltd v Jarman* 1994 (2) ZLR 341 (S) at p 343, it was held that:

**“The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him.” (emphasis added)**

*In casu*, though absolution was granted by the court *a quo mero motu* after a full trial, the test of whether or not there was evidence to justify granting it still applies. Absolution should not be granted if there is evidence on which the court can find for the plaintiff. Absolution from the instance can be granted by a court. Judgment No. SC 130/21 for Civil Appeal No. SC 448/14 the defendant. That this is the position at law is confirmed by *Herbstein & Van Winsen’s, The Civil Practice of The High Courts Of South Africa, Fifth Edition, Vol 1*, at page 924 where they say:

“Although there is no express provision in rule 39 for an order of absolution from the instance at the conclusion of the whole case, the practise to grant absolution when a plaintiff has not established the facts in support of his case to the satisfaction of the court, has been extended to cases in which evidence for the defendant had also been given.”

In this case there was an offer upon which a court, exercising its mind reasonably, could find for the appellant. The offers made by the first respondent to the appellant are sufficient evidence to justify such a finding. When these offers were made, it became apparent that what was offered could be awarded to the appellant. It also became clear that the appellant had a case against the respondent in respect of the offered assets and

that absolution from the instance could not be granted in cases where there was evidence of first respondent's ownership of shares in companies the appellant had made claims against. While it is not permissible to claim distribution of assets of companies, it is permissible to claim shares owned by a spouse in a company.

An offer is a form of an admission. The thing offered need not be proved by leading evidence. In *Mining Industry Pension Fund v DAB Marketing (Pvt) Ltd* SC 25/12 at pages 8-9, it was held that:

“A formal admission made in pleadings cannot be ignored by the Court before whom it is made. Unless withdrawn, it prevents the leading of any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or facts admitted. Thus where liability in full, as *in casu*, is admitted, no evidence is permissible to prove or disprove the defendant's admitted liability. The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the Court in that where it is not withdrawn, it is binding on the Court and the Court cannot allow any party to lead or call for evidence to prove the facts that have been admitted.” See also *Rance v Union Mercantile Co Ltd* 1922 AD 312 *Gordon v Tarnow* 1947 (3) SA 525 (AD); *Van Deventer v de Villiers* 1953 (4) SA 72 (C); *Moresby-White v Moresby-White* 1972 (1) RLR 199 (AD) at 203E-H; 1972 (3) SA 222 (RAD) at 224; *DD Transport (Private) Limited v Abbot* 1988 (2) ZLR 98 and *Indigent No. SC/130 & 21C Holdings (Pty) Ltd v Guard Alert (Pty) Ltd* 1993 (2) ZLR 299 (Appeal No. SC 448/14)

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In light of the above, I find that the court *a quo* erred in granting absolution from the instance when the respondent had made offers to settle in respect of some of the companies' and when there was evidence of first respondent's shareholding in some companies which could be used to distribute those shares between the parties. It was not correct for it to hold that the appellant had failed to prove her case in properties in respect of which the first respondent had made offers and there was evidence of the first respondent's shareholding.

The court *a quo*'s decision on the affected assets should be set aside as it was premised on a misdirection. As there is evidence on record in the form of the first respondent's offer to the appellant and the first respondent's admitted ownership of shares in

those companies, this Court is able to distribute the assets of the parties in respect of which offers were made. This Court can distribute between the parties assets and shareholdings offered by the first respondent and his admitted shareholding in the stated companies.

In respect of Stir Crazy (Pvt) Ltd, the court *a quo* granted absolution because it had, while the trial was in progress, been placed under provisional liquidation and was subsequently placed under liquidation. In my view the court *a quo* correctly granted absolution from the instance in spite of the first respondent having led evidence to the effect that he held 80 percent of that company's shares and had offered to the appellant 10 percent of a property owned by it as well as 20 percent of his shareholding in it, because liquidation placed it under the control of a Liquidator who was entitled to make decisions in respect of that company.

Distributing assets of a company in liquidation would be contrary to the provisions of the then s 213 of the Companies Act [Chapter 24:03] which provided as follows:

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**“213 Action stayed and avoidance of certain attachments, executions and dispositions and alteration of status**

In a winding up by the court—

- (a) no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose;
- (b) any attachment or execution put in force against the assets of the company after the commencement of the winding up shall be void;
- (c) **every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.”** (emphasis added)

The court *a quo* was therefore correct when it said:

“I am also persuaded to grant absolution from the instance because of the fact that as the trial commenced but before its completion Stir Crazy was placed under provisional liquidation and is currently under liquidation”...

The court *a quo* therefore correctly granted absolution from the instance against the appellant's claim on shares and assets owned by Stir Crazy (Pvt) Ltd. It also correctly ordered absolution from the instance in respect of properties where no offers had been made and in respect of companies in which there was no evidence of the parties' shareholding.

No 182 Shingara should remain on the list of properties against which absolution from the instance was granted because it is alleged to belong to a third party (Murray the parties' first child). It can therefore only be distributed between the parties if it is proved to be an asset of the parties.

**Whether or not the appellant is entitled to claim her inheritance money from the first respondent.**

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The appellant contends that she advanced a loan of R10,000 to the first respondent as part of her inheritance to the first respondent through a company called Stir Crazy (Pvt) Ltd. She claimed the money from the first respondent alleging that the aforementioned company was his *alter ego*.

The first respondent disputed that he borrowed the money in his personal capacity and argued that the loan was advanced to Stir Crazy (Pvt) Ltd hence the appellant cannot seek to recover this money pursuant to s 7(1)(a) of the Matrimonial Causes Act but has to claim it as a debt owed by Stir Crazy (Pvt) Ltd.

The appellant did not dispute this clear position of the law. In his submissions before us, Mr *Mpofu* for the appellant, did not persist with this ground of appeal. He infact



submitted that the value of the claim was not worth pursuing as it has been affected by this Court's decision in *Zambezi Gas Limited v NR Barber (Pvt) Ltd & Another* SC 3/20.

The evidence on record does not prove that Stir Crazy (Pvt) Ltd was an *alter ego* of the first respondent. In evidence the appellant claimed that she used to hold 49 percent shares in that company. It is trite that a company duly incorporated is a separate legal entity endowed with its own legal personality. The acts of a company are attributable to it, and not to any one else, as a company is a separate legal *persona* with a separate existence from its shareholders. It can sue or be sued in its own right. See *Salomon v Salomon & Co Ltd* [1897] AC 22.

While there are instances in which the court may pierce or lift the corporate veil as held in *Van Niekerk v Van Niekerk & Ors* 1999 (1) ZLR 421 (S) at 427 G-H & 428A, I do not believe that a case has been made for such an approach as the appellant did not give evidence in that regard. The appellant should claim her money from Stir Crazy (Pvt) Ltd as it is a distinct and separate legal entity which can sue and be sued in its own right.

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The court *a quo* therefore correctly granted absolution from the instance against the appellant's claim on this issue.

**Whether or not the court *a quo* erred by not awarding the appellant a lump sum maintenance payment in the sum of US\$100 000 which was not opposed.**

In his heads Mr *Mpofu*, for the appellant, submitted that the court *a quo* erred when it did not grant the appellant's claim for a lump sum maintenance payment which had not been opposed by the first respondent. He submitted that because the claim had not been opposed, it is deemed to have been admitted.

A reading of the record establishes that the appellant's claim was opposed by the first respondent. The appellant claimed it under paragraph 10.6 as "a cash amount of US\$100 000". In his plea the first respondent in para 6 said:

"Ad paragraphs 9-10, Denied . Plaintiff is put to the strict proof of her claim. Otherwise the Defendant refers to the claim in reconvention".

In para 5.2 of his claim in reconvention, the first respondent said:

"Defendant denies that the plaintiff is entitled to maintenance since she is a person of means".

It is therefore clear that the appellant's claim for a maintenance cash payment of US\$100 000-00 was opposed. The court *a quo* did not therefore err when it dismissed that claim. The claim was not proved by the appellant in her evidence.

**Whether or not the court *a quo* erred in distributing immovable properties without taking into account their values.**

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The appellant contends that the court *a quo* erred in distributing some of the immovable property without taking into consideration the values testified to by the appellant. A perusal of the record establishes that the first respondent was awarded as his sole and exclusive property, the immovable property known as No. 6 Northwood Rise, Mt Pleasant, Harare. The appellant was awarded as her sole and exclusive property, the immovable property known as No.6 Rosefriars, a Flat in Avondale, Harare. She was also awarded No. 13 Bates Street, Milton Park, Harare which is owned by Opium Investments (Pvt) Ltd in which the respondent admitted that he holds 80 percent of its shares.

I am inclined to agree with the appellant that the court *a quo* erred in proceeding to distribute immovable properties without the benefit of a valuation because one immovable property of high value can be equal to several immovable properties of lower

value. It is therefore essential to distribute properties in terms of their values to achieve an equitable distribution of the assets of the parties.

In *Gonye v Gonye* 2009 (1) ZLR 232, at 236H-237B, MALABA JA (as he then was) remarked:

“It is important to note that a court has an extremely wide discretion regarding the granting of an order for the division, apportionment or division of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make an order with regard to the division, apportionment or distribution of the assets of the spouses including an order that any asset be transferred from one spouse to the other. The rights claimed by the spouses under s 7(1) are dependent upon the exercise by the court of the broad discretion”.

It must however be added that the court’s wide discretion can only be exercised on the basis of the evidence led by the parties.

In exercising its wide discretion a court must determine the proportions on which it intends to distribute the assets to the parties. It should then allocate the values of the assets to ensure that each party is awarded assets equal to the ratio it will have allocated to him or her. If, for example, the court allocates each party a 50 percent share of the value of the assets of the parties, it will then use the value of the assets to distribute them at the determined ratio.

It is settled law that, in matters which involve the exercise of discretion by a lower court, the appellate court should not be quick to interfere with such an order. It can only do so in extraordinary circumstances where there is evidence of gross misdirection, unreasonableness and illogicality. The position was enunciated in the case of *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62G-63A, where the court stated as follows:

“These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. **It must appear that some error has been made in exercising the**

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

It is my respectful view that overlooking the values of properties in the distribution of matrimonial property is an improper exercise of discretion which warrants interference by this Court. This is because it goes against the principle of equitable distribution upon divorce envisaged in the Constitution and the Matrimonial Causes Act .

The Constitution under s 26 (c) and (d) provides that the State must ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution and in the event of dissolution, whether through death or divorce, provision must be made for the necessary protection of spouses. This means there must be a fair division and distribution of property which is just and equitable in the circumstances.

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The division and distribution of assets of the spouses at divorce is governed by s 7 (1) (a) of the Matrimonial Causes Act. It is trite that in matters involving the distribution of property, the court has to exercise its discretion to reach a decision which can be deemed to be a just and equitable distribution between the parties.

Case law authorities, in construing the provisions of s 7 as a whole, refer to the need to achieve an equitable distribution of the assets of the spouses consequent upon the grant of a decree of divorce. Equitable distribution does not mean equal division but a fair division in relation to the circumstances of the case. The court may consider such factors as the extent of a party’s contribution to the accumulation of the property, the market and

emotional value of the assets, the duration of the marriage, the economic consequences of the distribution, the parties' needs and any other factors relevant to an equitable outcome. Fairness is the prevailing guideline the court must use.

In *Chombo v Chombo* SC 41/18 at p 8, commenting on the role of values of property in the distribution of matrimonial assets the court held:

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

*In casu*, it is my respectful view that the court *a quo* erred by improperly exercising its discretion without taking into consideration the values of the properties it distributed. It is important to note that shares of different companies cannot be of the same value hence the need to value all shares where more than one company is involved, to enable the court to effect an equitable distribution of the assets of the parties. What is required is a fair distribution of the shares.

This Court can exercise its own discretion in view of the misdirections of the court *a quo* as there is evidence it can exercise its discretion on the issues.

According to the report by MAWADZE J the only properties left are No. 6 Northwood Rise Mt Pleasant, Harare Zimbabwe, the Belgravia House, Harare owned by Stir Crazy (Pvt) Ltd, (which is also still encumbered and is affected by the liquidation of the company), No. 6 Rosefrias, Avondale, Harare, No. 13 Bates Street, Milton Park, Harare owned by Opium Investments (Pvt) Ltd and is still encumbered and No. 182 Shingara in South Africa. According to evidence on record No 182 Shingara is alleged to be owned by Murray, the parties’ first born child.

As already indicated properties owned by companies in which the spouses have interests whose shareholding has not been disclosed, can not be distributed in terms of s 7 (1) (a) of the Matrimonial Causes Act which authorises the distribution of assets of the parties.

It is therefore not possible for this Court to distribute the houses owned by companies in which the parties' shareholding is unknown. In view of the court *a quo*'s distribution of the assets of the parties without taking into consideration their values, the affected orders must be set aside and substituted with orders distributing their shares in companies where the parties' shareholding' in the companies is on record.

This will however not affect No. 6 Northwood Rise Mt Pleasant in which it has become clear that the parties had a half share each. It will also not affect the order of the Court *a quo* that the respondent transfer all his shares in Opium Investments (Pvt) Ltd which owns No 13 Bates Street Milton Park as the distribution of shares owned by one of the parties is legally competent. It is also lawful to order the transfer of a spouses' property to the other spouse. The award of No 6 Rosefriers which is an asset of the parties not owned by any of their companies will also not be affected.

No. 6 Northwood Rise Mount Pleasant, Harare, is no longer fully available because the first respondent caused the sale of his half share in it. A half share of this property now belongs to Doves Funeral Assurance (Pvt) Ltd the second respondent under Deed No. 909/2019.

Mr *Mpofu*, for the appellant, in his additional heads, urged this Court to award the whole property to the appellant who intends to thereafter litigate over the respondent's sold half share in the High Court.

It is my view that the issue of the said half share should be left to the appellant to take whatever action she deems appropriate as this Court cannot, on appeal, make a decision on an issue the court *a quo* did not consider as it was not raised before it.

The court *a quo* awarded the matrimonial home to the first respondent because it had granted him custody of the perpetual minor (Julian). It was therefore for the convenience of the perpetual minor that the matrimonial home was awarded to him. The circumstances have changed. The minor was taken out of the country and no longer needs the use of that house. The first respondent and the rest of the family also left the matrimonial home and now live in South Africa.

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The first respondent demonstrated lack of interest in that property because in spite of his apparent means, he did not save his half share in it from being sold in execution.

He sold two South African properties No 94 Matumi Sands Lonehill (Pty) Ltd and No 112 Matumi Sands Lonehill (Pty) Ltd in each of which he held 50 percent of the shares, when their distribution was pending before the court *a quo* as they were part of the appellant's claim. He, in defiance of the court *a quo*'s order, took the household property which had been awarded to the appellant to South Africa without her knowledge or consent. He clearly demonstrated an intention to frustrate the distribution of their assets by the courts.

In view of the circumstances discussed above, the respondent's unlawful and contemptuous interference with court processes and orders does not entitle him to retain the appellant's half share in No 6 Northwood Rise Mt Pleasant. The appellant's appeal should succeed in part in respect of the remaining half share of that property.

The report by MAWADZE J proves that the first respondent has resorted to self-help. He has made it impossible for the court to effect an equitable distribution of their property. He sold the two properties in South Africa. He has not done anything to remove encumbrances on immovable properties awarded to the appellant. He has stripped assets of Stir Crazy (Pvt) Ltd by transferring US\$2.8 million from it to Incavat Enterprises (Pvt) Ltd.

It must be emphasised that, where a spouse acts in contempt of court orders distributing their assets, hides some of the assets, lies about his or her ownership of some of the property and deliberately resorts to self help, the court is entitled to award to the other spouse the remaining property proved to be assets of the spouses. It is my view that the properties in which the first respondent has disclosed his shareholding should be awarded to the appellant on the basis of his ownership of those shares. It is also important to note that the first respondent's sale and stripping of assets during the pendency of this appeal in defiance of the court *a quo's* order entitles the appellant to compensation for the losses she has suffered as a result of the respondent's conduct.

In the circumstances of this case, the court must endeavour to do justice between the parties. The appellant must be awarded what is left of the properties since most of them have been disposed of by the respondent. The appellant must be awarded shares of property holding companies in respect of which the respondent's shareholding is on record. Stir Crazy (Pvt) Ltd which owns the Belgravia house can not be distributed on account of it



having been liquidated and there is no evidence of its current status. The appellant should be awarded the respondent's 80 percent shares in Theright Investments (Pvt) Ltd. The respondent must remove all encumbrances on the properties awarded to the appellant.

It has been established that the respondent held 50 percent shares in No. 94 Matumi Sands Lonehill (Pty) Ltd and No. 112 Matumi Sands Lonehill (Pty) Ltd. The court *a quo* could therefore have used that evidence to distribute the shares between the parties. The properties were sold to third parties by the respondent. The appellant is entitled to a portion of the proceeds. The portion she is entitled to cannot be established without leading evidence on the purchase price and how it relates to the respondent's 50 percent shares in each property. This Court does not therefore have material to enable it to make an order substituting the court *a quo*'s order of absolution.

It is, in my view, in the interest of the appellant to uphold the court *a quo*'s order to enable her to, through subsequent litigation, pursue her interests in these properties.

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The court *a quo*'s decision of absolution from the instance in respect of properties on which there was no evidence should be upheld. No. 94 Matumi Sands Lonehill and No. 112 Matumi Sands Lonehill should remain on the list of properties in respect of which absolution was granted for the reasons stated above.

The properties and claims to remain on the list of cases for which absolution from the instance was granted are as follows:

- a. No. 94 Matumi Sands Lonehill (Pty) Ltd
- b. No. 112 Matumi Sands Lonehill (Pty) Ltd
- c. 182 Shingara (Pty) Ltd.
- d. Stir Crazy (Pvt) Ltd.

- e. Incavat Enterprises (Pvt) Ltd.
- f. Telehic Investments (Pvt) Ltd
- g. Natsbury Trading (Pvt) Ltd and
- h. Plaintiff's claim of £10 400.

### **DISPOSITION**

I find that the appellant's appeal has merit on the following issues.

- (a). the respondent's lack of the right of audience due to his being in contempt of court.
- (b). the erroneous granting of absolution from the instance by the court *a quo* in respect of properties in respect of which the first respondent had made offers and properties on which the first respondent had given evidence on his shareholding in specified companies,
- (c). the court *a quo*'s distribution of properties without taking into consideration their values and the parties shareholding in some companies.

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The court *a quo* correctly found that the appellant should claim her inheritance money from the company she loaned it to.

The court *a quo* correctly granted custody of the perpetual minor to the first respondent as this was in the best interests of the perpetual minor.

The appellant's claim for a once-off payment of maintenance in the sum of US\$100 000-00 was correctly dismissed by the court *a quo*.

The appellant is entitled to an award of costs on the higher scale against the respondent, who is responsible for the prolonged hearing of the appeal due to his contempt of court, which resulted in an enquiry by MAWADZE J being ordered and the re-hearing of the parties in respect of his having caused the sale of his half share of the matrimonial home.

It is accordingly ordered as follows:

1. The appeal against the court *a quo*'s decision on the perpetual minor's custody, the appellant's claim for inheritance money she loaned to Stir Crazy (Pvt) Ltd from the first respondent and her claim for a lump sum maintenance payment of USD\$100 000-00, be and is hereby dismissed.

2. The appeal against the awarding of the matrimonial home to the respondent partially succeeds to the following extent:

Paragraph 8 of the court *a quo*'s order be and is hereby set aside and is substituted as follows:

"8. The plaintiff's half share in the matrimonial home No. 6 Northwood Rise, Mt Pleasant, Harare be and is hereby awarded to the plaintiff".

3. The appeal against the court *a quo*'s order of absolution from the instance on the distribution of immovable properties partially succeeds to the following extent:

- 3.1 Paragraph 12 (d) of the court *a quo*'s order is amended by the deletion there from of the words "Theright Investments (Pvt) Ltd".

- 3.2 "The respondent shall transfer his 80 percent shareholding in the "Theright Investments (Pvt) Ltd" to the plaintiff and sign all relevant documents to effect transfer of his shares to the plaintiff within 30 days of this order failing which the Sheriff be and is hereby authorised to sign such documents".

4. The first respondent shall pay the appellant's costs at the legal practitioner and client scale.

**GARWE JA** : I agree

**GOWORA JA** : I agree

*Atherstone& Cook*, appellant's legal practitioners

*Gill, Godlonton&Gerrans*, respondent's legal practitioners