

BETWEEN:

**HILARY BRUCE DANCKWERTS**

APPELLANT

AND

**DIANA JULIAN ENTJES**

RESPONDENT



CORAM: **Chashi, Lengalenga and Siawwapa, JJA**

On 27<sup>th</sup> June, 2018 and 24<sup>th</sup> January, 2020.

For the Appellant: Miss T. Marietta & Miss I. Nambule – Messrs Sharpe & Howard.

For the Respondent: Mr. S. Bwalya & Mr. M. Desai – Messrs Solly Patel, Hamir and Lawrence.

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## J U D G M E N T

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**LENGALENGA, JA delivered the Judgment of the Court.**

Cases referred to:

- 1. WACHTEL v WACHTEL (1973) 1 ALL ER 829 at p. 830**
- 2. KANKOMBA & ORS v CHILANGA CEMENT PLC – SCZ JUDGMENT Nº 30 OF 2002**

- 3. MUSUSU KALENGA BUILDING LTD & ANOR v RICHMAN'S MONEY LENDERS ENTERPRISES (1999) ZR 27**
- 4. VANGELATOS v VANGELATOS & ANOR – SCZ JUDGMENT Nº 35 OF 2016**
- 5. NKHATA & 4 ORS v THE ATTORNEY GENERAL OF ZAMBIA (1966) ZR 124**
- 6. WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT (1982) ZR 172 at p. 174**
- 7. PHILIP MHANGO v DOROTHY NGULUBE & ORS (1983) ZR 61**
- 8. KEARNEY & COMPANY LTD v AGIP LTD & ORS (1985) ZR 7**
- 9. EVANS v BARTLAM (1937) AC 473; (1937) 2 ALL ER 646**

Legislation referred to:

- 1. THE COURT OF APPEAL RULES, 2016**
- 2. THE MATRIMONIAL CAUSES ACT, 2007**

## **1.0 INTRODUCTION**

1.1 This is an appeal against the judgment dated 24<sup>th</sup> November, 2017 by the Court below.

## **2.0 BACKGROUND**

2.1 The brief history of this case is that the Respondent, on 12<sup>th</sup> January, 2015 filed a petition for dissolution of marriage against the Appellant herein. After dissolution of her marriage to the Appellant, the Respondent applied for a lump sum payment of US\$150 000. The learned Deputy Registrar, in determining the application, awarded

her a lump sum payment of US\$48 000 instead, which the Appellant was ordered to pay within four months of the ruling. She was further awarded the sum of US\$3 000 payment for Specialty Emergency Services as well as payment by the Appellant of all medical bills incurred by the Respondent during her illness from 2008 to 2012. These too were ordered to be paid within four months of the ruling.

2.2 Dissatisfied with the learned Deputy Registrar's award, the Appellant appealed to a single judge of the High Court in chambers. The single judge ordered the Appellant to pay a lump sum of US\$75 000 within a period of six months from the date of the Court's ruling.

### **3.0 GROUNDS OF APPEAL**

3.1 The Appellant, being further dissatisfied with the decision of the judge of the Court below, has appealed to this Court on the following grounds:

- 1. The learned Court below misdirected itself when it found that the Appellant runs and operates Tombwe Processing Limited, owns shares in Little Connemara, Bluff Hill, Zimbabwe, New Venture, Farm N<sup>o</sup> 1634, Choma, Bonanza Tobacco Company, Choma and investment in Abbey National in the United Kingdom.**
- 2. The learned Court below misdirected itself when it found at page J10 of the judgment that the Appellant neglected**

**to produce documents relating to his current financial status.**

#### **4.0 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL**

4.1 In support of ground one, Miss T. Marietta submitted on behalf of the Appellant, that when the Appellant appeared before the learned Deputy Registrar, he made it clear that he is an out-grower for Tombwe Processing Limited, a company incorporated in Zambia. He further stated that he is neither a shareholder nor a director or a manager of the said company, contrary to the learned Deputy Registrar's assertions in his ruling at page 290 of the record of appeal and which assertions it is contended by the Appellant, the Court below failed to take into consideration.

4.2 It was further submitted that no evidence whatsoever has been adduced to show that the Appellant owns Tombwe Processing Limited, and that the only evidence before the Court is that of the Appellant's indebtedness to Tombwe Processing Limited. The said evidence is shown in the copy of the Farmers' statement for the Appellant as \$238 636.95 due to Tombwe Processing Limited as at 24<sup>th</sup> September, 2015, exhibited at page 371 of the record of appeal.



- 4.3 In support of ground one, it was also submitted that the Appellant has consistently suffered losses as indicated in the profit and loss accounts exhibited in the record of appeal. It was further submitted that contrary to the findings of the Court below, the Appellant did provide his latest financial statements to indicate his financial position. However, it is contended that the Appellant, as a sole trader, could not produce financial statements for the year 2015 as the same would only have been available at the end of 2015.
- 4.4 With regard to Plots 21 and 22 Sinazongwe, it was submitted that the Appellant only maintains a partial interest in the said properties along with other partners.
- 4.5 However, the Appellant denied that Plots 2 and 3, Sibanyanti in Choma are registered in his name and he submitted that in any case, their value is estimated at no more than US\$10 000 net and that, this evidence was not rebutted by the Respondent.
- 4.6 It was also submitted that the cottages in Little Connemara and Bluff Hill, Zimbabwe are not registered in the Appellant's names and that he, therefore, has no interest in them. The Appellant, however, hastened to state that he once owned the said properties and that

they were reflected in his Will of 2007, a copy of which is exhibited at pages 408 to 409 of the record of appeal, but they are no longer mentioned in the will made in 2011.

- 4.7 With respect to the investments with Abbey National in the United Kingdom the Appellant admitted owning the said investments but he stated that after the global financial crisis in 2008, they became worthless and they are no longer owned by him.
- 4.8 It was further submitted that the Life Assurance Policy with Scottish Provident Fund would only become effective and of value upon the Appellant's death.
- 4.9 It was submitted that the foregoing only points to the fact that the Appellant's financial position is such that he cannot pay a lump sum of either US\$48 000 or US\$75 000.
- 4.10 The Appellant, through his advocate, conceded that the Court below has the power to order the payment of a lump sum, and that the test to be applied in quantifying the award was laid down in the case of **WACHTEL v WACHTEL**<sup>1</sup> where it was held *inter alia* that:

**"In every case, the Court should consider whether to order a lump sum to be paid by her husband to the wife under s.2(1)(c) of the 1970 Act, but no such order should be made unless the husband has capital assets**

**out of which to pay a lump sum without crippling his earning power.”**

4.11 In light of the foregoing, Miss Marietta, submitted that in the absence of cogent evidence of ownership of capital assets by the Appellant and that based solely on the Respondent’s reliance on a number of the Appellant’s draft wills, the Court below erred in awarding the Respondent a lump sum of US\$75 000 without considering the Appellant’s actual financial position.

4.12 In support of ground two, it was submitted that the Court below fell in grave error when it failed to acknowledge exhibits **“HBD1(a)** to **“HBD(q)”** that were attached to the Appellant’s affidavit in opposition to summons for an order for payment of a lump sum, shown at pages 354 to 371 of the record of appeal. The said exhibits comprise the Appellant’s profit and loss accounts, balance sheets and farmer’s statement with closing balances. It was further submitted that the said exhibits demonstrate the Appellant’s indebtedness to Tombwe Processing as well as the Appellant’s overall financial position.

4.13 It is the Appellant's contention that it is unjust for the Court below to allow the Respondent to succeed on her claims on the basis of unsupported evidence.

4.14 It was further submitted that it is a well established principle of the law that **"he who alleges must affirm"** and that the Supreme Court re-affirmed the said principle in the case of **KANKOMBA & ORS v CHILANGA CEMENT PLC**<sup>2</sup> where it stated *inter alia* that:

**"A plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanity or some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly, a defendant in such circumstances would not even need a defence."**

4.15 In conclusion on the strength of the foregoing and arguments advanced by the Appellant, the Court was urged to set aside the award by the Court below and substitute it with a more reasonable one, in consideration of the Appellant's actual financial position. That the said award be paid in instalments, in consideration of the seasonal nature of the Appellant's business and his limited resources.

## **5.0 RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE APPEAL**

5.1 In response to ground one, the Respondent's advocates firstly pointed out that the Appellant's arguments in support of ground one, are not entirely in consonance with the said ground. It is also contended that the Appellant has surreptitiously included arguments relating to findings of facts by the Court below which are completely unrelated to ground one and for which no ground of appeal was provided in the Memorandum of Appeal.

5.2 It was submitted that ground one attacks the following three findings of fact by the Court.

- (i) That the Appellant runs Tombwe Processing Limited;**
- (ii) That the Appellant owns shares in Little Connemara and Bluff Hill, Zimbabwe, and;**
- (iii) That the Appellant has investments with Abbey National in the United Kingdom.**

5.3 Further to that, it is the Respondent's contention that the issue raised in the Appellant's arguments about his failure to produce financial statements for the year 2015 owing to their non-availability was



never raised before the Court below. Hence, reliance was placed on the case of **MUSUSU KALENGA BUILDING LTD & ANOR v RICHMAN'S MONEY LENDERS ENTERPRISES**<sup>3</sup> where the Supreme Court expressed the undesirability of raising issues on appeal that were not raised before the Court below.

- 5.4 This Court's attention was drawn to the Appellant's argument in relation to the finding of fact by the Court below on his partial ownership of Plots 21 and 22, Sinazongwe which was not included in ground one and has no connection to any of the three findings of fact being impeached herein.
- 5.5 It was submitted that the same applies to the arguments advanced relating to the Appellant's proprietorship of Plots 2 and 3 Sibanyati, Choma and the Life Assurance Policy relating to the Scottish Provident Fund, respectively.
- 5.6 It was submitted that the Appellant is attempting to persuade this Court to re-hear the entire application that was heard before the Court below, when this Court does not have the jurisdiction to do so and the Court was implored not to consider them in its determination of the appeal.

5.7 It was further submitted that the Appellant was attempting to persuade this Court to make a determination on the propriety of the findings of fact made by the Court below which are not contained in the Memorandum of Appeal without leave contrary to Order 10 Rule 9(3) of the Court of Appeal Rules which states in part:

**“The appellant shall not thereafter without the leave of the Court put forward any grounds of objection other than those set out in the memorandum of appeal....”**

5.8 Counsel for the Respondent argued that leave goes to jurisdiction and that absence of leave robs the Court of the requisite jurisdiction. He submitted that where the Court exercises jurisdiction which it does not have, its decision amounts to nothing. He fortified his argument by relying on the Supreme Court’s pronouncement in the case of **VANGELATOS v VANGELATOS & ANOR**<sup>4</sup> where Mutuna, JS stated that:

**“Where a Court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. It can be discerned from the foregoing position of the law, that the absence of jurisdiction nullifies whatever decision follows from such proceedings.”**

5.9 It was submitted that in any event, the Appellant could have prompted this Court by way of an application for amendment to the Memorandum of Appeal which would have enabled him to file an Amended Memorandum of Appeal containing the grounds of appeal relating to all the findings of fact by the Court below not connected to ground one. For this submission, Counsel for the Respondent relied on Order 10 Rule 17(1) of the Court of Appeal Rules which provides that:

**"The Court or judge may at any time allow amendment of a notice of appeal, respondent's memorandum of appeal or other part of the record of appeal on such amendment of its own motion."**

5.10 It was further submitted that based on the foregoing, all the arguments advanced by the Appellant that are not connected to or supporting the said ground are not properly before this Court and should not be considered in the determination of the appeal.

5.11 Counsel for the Respondent reverted to the three findings of fact expressly stated in ground one. He submitted that the findings under attack in ground one are all findings of fact and he referred this Court to the case of **NKHATA & 4 ORS v THE ATTORNEY GENERAL OF**

**ZAMBIA**<sup>5</sup> which was followed with approval in the case of **WILSON MASAUO ZULU v AVONDALE HOUSING PROJECT LTD**<sup>6</sup> where the Supreme Court held that:

**“Before this Court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make.”**

5.12 Further reliance was placed on the later case of **PHILIP MHANGO v DOROTHY NGULUBE & ORS**<sup>7</sup> where the Supreme Court further pronounced itself on the foregoing principle of law.

5.13 In the present case, it is contended that ground one, firstly attacks the trial court’s finding that the Appellant runs Tombwe Processing Limited. Counsel for the Respondent submitted that the Respondent in her affidavit in support of summons for an order for payment of a lump sum filed on 2<sup>nd</sup> October, 2015 contained at pages 374 to 375 of the record of appeal, enumerates the Appellant’s assets from which money could be generated to pay the lump sum of one hundred fifty thousand dollars (USD 150 000.00). He further submitted that she reiterated the same averment in her affidavit in

reply to the affidavit in opposition to summons for an order for payment of a lump sum.

5.14 It is contended that the Respondent's evidence on record shows that she never led any evidence to the effect that the Appellant owns Tombwe Processing Limited.

5.15 With regard to the Appellant's affidavit in opposition filed on 25<sup>th</sup> November, 2015 and contained in the record of appeal, in his averments, Counsel for the Respondent submitted that he attempted to dispute the Respondent's averments relating to his ownership of the property. He further submitted that the said evidence does not refer to his ownership of Tombwe Processing Limited but his indication of his farm's indebtedness to Tombwe Processing Limited.

5.16 He submitted that the Appellant exhibited a self-generated statement of account that was found by both the Deputy Registrar in his ruling and the Court below in its judgment to be contradictory and at variance with the Respondent's evidence.

5.17 Counsel for the Respondent drew this Court's attention to the Appellant's affidavit in support of notice of appeal filed on 12<sup>th</sup> May, 2017 and contained in the record of appeal that he described himself



as an out-grower farmer for Tombwe Processing Limited and that he did not explain the implication of that description to the Court, hence the Court's finding at page 18 of the record of appeal, where it states that:

**"In ground three of the appeal, the Appellant averred that the learned Deputy Registrar erred in fact when he held that the Petitioner now the Respondent (sic) owns or otherwise is responsible for the business of Tombwe Processing Limited. I have thoroughly gone through the evidence on record as well as the Ruling being appealed against, there is nowhere it was mentioned that the Respondent owns or otherwise is responsible for the business of Tombwe Processing Limited. Accordingly, this ground of appeal is dismissed for lack of merit."**

5.18 It is, therefore, Counsel for the Respondent's contention that from the foregoing, it is clear that the Court below did not make a finding of fact that the Appellant runs Tombwe Processing Limited. He submitted that the Court below may have made a mistake earlier in its judgment when it found that one of the facts not in dispute from the evidence was that the Appellant runs and operates Tombwe Processing Limited, which was later taken over by events in her judgment as is evident from the portion quoted.

- 5.19 Counsel for the Respondent turned to the second issue in ground one which assails the finding of fact by the Court below that the Appellant owns shares in Little Connemara and Bluff Hill in Zimbabwe.
- 5.20 In response he referred to the Respondent's affidavit in support of summons for an order for payment of a lump sum, and her averment in paragraph 17(e) that the Appellant owns shares in Little Connemara and Bluff Hill in Zimbabwe, which averment she supported with production of a document marked "**DJE 12,**" being a handwritten will dated Saturday, 31<sup>st</sup> March, 2007 authored by Hillary Bruce Peacy Danckwerts found at page 408 of the record of appeal.
- 5.21 He submitted that the Respondent reiterated the same in her affidavit in opposition to the Appellant's affidavit in support of notice of appeal filed on 15<sup>th</sup> June, 2017 contained in the record of appeal. Counsel for the Respondent further submitted that in his affidavit in opposition to summons for order for payment of a lump sum in his averment at paragraph 16(d) the Appellants attempted to dispute his ownership of the subject shares by merely stating that:

**"these properties are not registered in my name nor do I have any interest, whether directly or otherwise in the same."**

- 5.22 He referred to the fact that the Appellant did not lead any new evidence on the ownership of the subject shares in his affidavit in support of notice of appeal filed into Court on 12<sup>th</sup> May, 2017.
- 5.23 He submitted that after considering the competing evidence, the Court below found that the Appellant owned the subject shares based on a Will produced by the Respondent, in which the Appellant had indicated that he owned the shares. He drew the Court's attention to the fact that the Appellant did not dispute that he wrote the Will.
- 5.24 Counsel for the Respondent submitted that based on the arguments advanced, the Court below was on firm ground in finding that the Appellant owns shares in Little Connemara and Bluff Hill in Zimbabwe as the same is supported by evidence.
- 5.25 In response to the Appellant's assertion that the shares referred as his by the Respondent, were disposed of by virtue of having been omitted in a subsequent Will, Counsel for the Respondent submitted that it was an attempt by the Appellant to raise a new issue on appeal. He reiterated the Supreme Court's pronouncement in the

**MUSUSU KALENGA BUILDING LTD** case that issues that were not raised in the Court below cannot be raised on appeal.

5.26 He submitted that ground one further impugns the propriety of the finding of fact by the Court below that the Appellant has investments with the Abbey National in the United Kingdom. He invited this Court to consider the opposing evidence of the parties on record.

5.27 He drew this Court's attention to the Respondent's averment in paragraph 17(f) of her affidavit in support of summons for an order for payment of a lump sum, that the Appellant has investments with the Abbey National in the United Kingdom. While the Appellant in his affidavit in opposition at paragraph 16(e) disputed the evidence and merely opined that:

**“those shares may now be worthless since the global financial crisis of 2008 and as such the Appellant does not hold the same anymore.”**

5.28 Counsel for the Respondent argued that the Court below found that the Appellant has investments in the Abbey National after considering the documentary evidence, that is, the Will produced by the Respondent. He submitted that the Appellant did not dispute writing

the Will but merely responded by speculating that the shares were now worthless owing to the global financial crisis of 2008.

5.29 He submitted that the Court cannot be faulted for finding as it did and he urged this Court not to interfere with the said finding of fact.

5.30 In concluding his arguments in opposition to ground one, he prayed that ground one be dismissed for lacking merit.

5.31 The Appellant's ground two attacks the finding by the Court below that the Appellant neglected to produce documentary evidence of his financial status. Counsel for the Respondent responded to this ground by drawing this Court's attention to the Appellant's affidavit in support of notice of appeal dated 12<sup>th</sup> May, 2017 exhibited in the record of appeal relied on by the Appellant. He submitted that the averments therein made no reference to the Appellant's financial status and that the documents exhibited in the Court below did not disclose any evidence that related to his financial status that would have assisted the Court below in the proper assessment of his ability to pay the amount sought by the Respondent.

5.32 He contended that the documents exhibited were attached to an affidavit in opposition to the Respondent's affidavit in support of



application for an order for payment of lump sum that was filed on 25<sup>th</sup> November, 2015 almost two years before this appeal was filed in the Court below.

5.33 It was contended that the said documents were not current as they were not generated in 2017 at the time of the appeal in the Court below and that as such they could not be regarded as a reflection of the Appellant's financial status at the time of the appeal.

5.34 It was further submitted that the Appellant had an opportunity to exhibit and produce documents relating to his financial status in his affidavit in support of notice of appeal filed in the Court below as the appeal from the Deputy Registrar to the Judge in chambers was a re-hearing of the application.

5.35 To support that submission, Counsel for the Respondent relied on the case of **KEARNEY & COMPANY LTD v AGIP LTD & ORS**<sup>8</sup> where the Supreme Court echoed the decision of the House of Lords in the case of **EVANS v BARTLAM**<sup>9</sup>.

5.36 It was further contended that the Appellant could have also filed a further affidavit in the Court below in which he could have exhibited and produced documents indicating his financial status. It was

submitted that, alternatively, the Appellant could have filed an affidavit in reply to the Respondent's affidavit in opposition, when he was challenged about his failure to produce documentary evidence to show his financial status at that time.

5.37 It was submitted that, therefore, in the absence of an opposing affidavit, the Respondent's affidavit is deemed to be uncontroverted and the Appellant is also deemed to have admitted the contents or facts deposed therein.

5.38 Counsel for the Respondent finally submitted that the Court below was on firm ground in finding as she did. He submitted that, therefore, ground two is devoid of merit.

5.39 In conclusion, he submitted that since the appeal is based on findings of fact which do not attack and cannot affect the award of the sum by the Court below, the appeal ought to be dismissed for being devoid of merit.

## **6.0 THIS COURT'S CONSIDERATION OF THE APPEAL AND DECISION**

6.1 We have considered the grounds of appeal, respective arguments by the parties, authorities cited, evidence on record and judgment appealed against.

6.2 Ground one attacks the finding by the Court below that the Appellant runs Tombwe Processing Limited, owns shares in Little Connemara and Bluff Hill in Zimbabwe and investments in Abbey National in the United Kingdom.

6.3 Upon perusal of the Court's judgment at page 18 of the record of appeal, we observed that the learned Judge made a further finding that:

**".... there is nowhere it was mentioned that the Respondent (Appellant herein) owns or otherwise is responsible for the business of Tombwe Processing Limited."**

6.4 Consequently, we find that the learned judge contradicted herself in her finding. A further perusal of the record of appeal at pages 312 and 316, shows that Tombwe Processing Limited is owned or run by the neighbouring farmers, Piers Counsel and Aldert Van Der Vinne as indicated in the copies of the unexecuted Wills of 2011 and 2012 which were exhibited as **"DJE 5"** and **"DJE 6"** and attached to the Respondent's affidavit in support of summons for order of payment of lump sum.

6.5 Therefore, we find that in the absence of any evidence to the contrary, the Appellant's assertion that he does not run or operate Tombwe Processing Limited can be accepted.

6.6 We, therefore, find that in relation to Tombwe Processing Limited, ground one has merit.

6.7 We turn to the issue of the Court's finding that the Appellant owns shares in Little Connemara and Bluff Hill in Zimbabwe and has investments in Abbey National in the United Kingdom. In determining whether the Court below misdirected itself or not, in arriving at the conclusion that it did, we looked at exhibit "DJE 12" that was earlier referred to. We note that the said document is the Appellant's draft will in which he made reference to shares and investments in the following terms:

**"My share in the cottage at Little Connemara, and the property in Bluff Hill, both in Zimbabwe. My investments with Abbey National, in the UK ....."**

6.8 The Appellant's argument was that the properties referred to are not wholly owned by him and that the investments in Abbey National in the United Kingdom became worthless following the 2008 global financial crisis.

- 6.9 We note from the evidence on record that no evidence was led by the Appellant to demonstrate that his investments in Abbey National no longer exist or have become worthless as alleged. Whilst we accept that it is a fact that there was a global financial crisis in 2008 that wiped out the investments of so many people. However, in the absence of evidence in the form of statements of accounts to confirm that the investments no longer exist, it is difficult for this Court to accept that they are non-existent. We reason that if that was the position, the Appellant would not have referred to them in the draft wills of 2011 and 2012.
- 6.10 We, therefore, opine that the learned judge cannot be faulted for deciding as she did. We, find that she was on firm ground when she found that the Appellant owns shares in Little Connemara and Bluff Hill in Zimbabwe, and that he has investments in Abbey National in the United Kingdom.
- 6.11 We, therefore, find that that part of ground one lacks merit and we, accordingly, dismiss ground one only to that extent as we already found the first part relating to Tombwe Processing Limited to be meritorious.



6.12 We turn to ground two which attacks the learned judge's finding that the Appellant neglected to produce documents relating to his current financial status. We are alive to the fact that when a court is called upon to consider the issue of granting ancillary relief of payment of a lump sum, the same requires the court to consider certain factors. Section 56(1) of the Matrimonial Causes Act, 2007 gives guidance on the factors to be considered. The said provision states that:

**"Subject to the provisions of this section, the Court may, in any matter or cause in which application is made for the maintenance of a party to a marriage, or of children of the family, other than proceedings for an order for maintenance pending the disposal of proceedings, make such an order on such application as it thinks proper having regard to –**

- (a) the income, earning capacity and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;**
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future."**

6.13 Based on the foregoing, it is apparent that the income, earning capacity and other financial resources a party may have or is likely to

earn can only be ascertained by a party providing documentary evidence which can assist the court to make an informed and just decision.


6.14 In this case, we note from the evidence on record and the respective arguments and affidavits, that the learned judge in the Court below considered the Appellant's financial statements that were marked "**HBD1(a) to (q)**" and rejected them on the basis that they were at variance with those exhibited by the Respondent and that the statements were for the period 2006 to 2014. However, upon perusal of the documents exhibited on record, it seems that the learned judge was referring to the balance sheet for the period 2007 to 2010 which is exhibited as "**DJE 12**" and attached to the Respondent's affidavit in support of summons for an order for payment of a lump sum found in the record of appeal.

6.15 In the circumstances, we find that the Appellant did provide through the balance sheet the means by which the Court below could make an assessment of his financial status. Therefore, ground two has merit and it succeeds.

## 7.0 CONCLUSION

7.1 The appeal, therefore, succeeds in ground one to some extent and fails in the last part of the ground and succeeds in ground two.

7.2 That being the position, we award costs to the Appellant and in default of agreement, same to be taxed.



.....  
J. CHASHI

**COURT OF APPEAL JUDGE**



.....  
F. M. LENGALENGA

**COURT OF APPEAL JUDGE**



.....  
M. J. SIAWAPA

**COURT OF APPEAL JUDGE**