

HILDA MBIKWAPHI SIBANDA

Versus

TEEJAY SIBANDA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 OCTOBER 2010 & 27 OCTOBER 2011

S S Mazibisa, for plaintiff
Advocate H. Zhou instructed by J Tshuma, for the respondent

Civil Trial

NDOU J: This is an opposed divorce matter, in which, divorce is sought on grounds of irretrievable break-down of the marriage. The parties were married to each other on 20 September 1996 and the marriage still subsists. There is one minor child of the marriage, namely, Simpson Nqobizitha Sibanda, a boy born on 11 March 1996. The parties agreed to a decree for divorce being granted at the commencement of the trial. Also, at the commencement of the trial the parties agreed to settle a number of issues relating to the distribution, sharing or apportionment of some movable assets. The agreement was captured in the memorandum signed by the parties in the following terms:

“Now therefore, the parties hereby agree as follows:

1. That the terms of this agreement, may be incorporated in the final order to be made by this honourable court in respect of those matters where the parties have reached agreement;
2. The parties have agreed:-
 - 2.1 That the marriage between them has irretrievably broken down to such an extent that there are no reasonable prospects for the restoration of a normal marriage relationship between them;
 - 2.2 That the plaintiff shall have custody of the minor child of their marriage Simpson Nqobizitha Sibanda (born 11 March 1996);
 - 2.3 That the defendant shall have reasonable access to the minor child;
 - 2.4 That the maintenance of the child shall be in accordance with the order already in existence.

3. The plaintiff shall have the following motor vehicles:

- 3.1 a) Toyota Prado (Runner)
- b) Peugeot 406 registration number AAA929 (non-runner)
- c) Isuzu Trooper (non-runner)
- d) Toyota Dyna (runner)

3.2 The defendant shall have the following motor vehicles

- a) Isuzu KB 280
- b) Mercedes Benz E320
- c) Isuzu Bighorn

4. That in respect of the other movable assets:

4.1 The plaintiff shall have the following property:

- a) 1 x fitted oven (kitchen)
- b) 1 x fitted stove (kitchen)
- c) 1 x Daewoo frost free fridge
- d) 1 x deep freezer
- e) Kitchen utensils in her custody
- f) 1 x Royal lounge suite (pink with soft fabric)
- g) 1 x set of coffee table
- h) 2 x lamp tables
- i) 2 x brass tables
- j) 1 x oak corner cabinet
- k) 1 x Royal bedroom suite
- l) 1 x double bed and mattress (from cottage)
- m) 1 x Hi-fi system

- n) 1 x television set
- o) 1 x oak bar
- p) Wall pictures and ornaments
- q) 1 x micro wave
- r) 1 x Vivid decoder
- s) 1 x lamp shade
- t) 1 x bread maker
- u) 1 x deep frier
- v) 1 x child's bedroom suite
- w) 1 x child's television set
- x) 1 x DVD player
- y) 1 x set of green garden chairs
- z) curtains in bar
- aa) [deleted]
- bb) 2 x water tanks
- cc) 1 x brick making machine
- dd) 1 x water bowser on trailer
- ee) wooden windows
- ff) half of the scaffoldings
- gg) half of the French windows
- hh) 1 x green lister engine
- ii) four wheel trailer
- jj) 1 x small concrete mixer
- kk) 1 x coal stove

- ll) caravan
- mm) 1 x Ferguson tractor
- nn) steel tables with vices
- oo) Blue water pump

4.2 The defendant shall have the following property:-

- a) 1 x small CD Hi-fi
- b) 1 x pink leather suite
- c) 1 x set coffee table (5 pieces)
- d) 6 bar stools
- e) 10 piece Oak dining room suite
- f) 1 x room divider
- g) 1 x double bedroom suite
- h) 1 x bed
- i) 1 x brass tables (5 pieces)
- j) 1 x home theatre
- k) 1 x Sansui television set
- l) 1 x Wiztech decoder
- m) 1 x Elset decoder
- n) Persian rugs
- o) 1 x kist
- p) 1 x 7 piece garden set
- q) 1 x 18 inch LCD television set
- r) Bar fridge
- s) curtains presently in defendant's custody

- t) 1 x brick making machine
- u) half of scaffolding material
- v) half of French doors
- w) 1 x heavy duty concrete mixer
- x) PVC pipes
- y) 1 x Land in tractor and trailer
- z) 1 x water cart
- aa) 1 x grinding mill
- bb) 1 x blue solar cooker
- cc) wooden window frames
- dd) 1 x Mercedes Benz E 230 wreck
- ee) 1 x Ford truck engine
- ff) 3 x wheelbarrows
- gg) 1 x 2 wheel trailer
- hh) 1 x 4 wheel trailer
- ii) old tyres
- jj) wrecks of petrol dispensing machines

5. The parties failed to reach agreement on the following matters which they hereby submit to trial by this honourable court:

- 5.1 Whether the Sandford leather brown lounge suite should be given to the plaintiff or the defendant;
- 5.2 The number of cattle which belong to the matrimonial estate and how they should be distributed;
- 5.3 Whether the plaintiff is entitled to any share in respect of the value of the improvements on Inyathi Farm;

- 5.4 [deleted]
- 5.5 How should the following immovable properties be distributed between the parties:
- a) Plot 461 Old Esigodini Road, Manningdale, Bulawayo;
 - b) The remainder of stand 615 Bulawayo Township, also known as 50 Josiah Tongogara Avenue, Bulawayo;
 - c) Number 15 Kilmanock Road, Hillcrest, Bulawayo;
 - d) Stand 12438 Bulawayo Township of Bulawayo Township Lands also known as number 9 Goodwood Road, Woodlands, Bulawayo.
- 5.6 Whether the plaintiff is entitled to any shares in Simpson Electrical (Private) Limited and, if so, the percentage thereof;
- 5.7 Whether the plaintiff is entitled to a share in the immovable property stand 15053 Bulawayo Township situate in the District of Bulawayo which is owned by Muntomuhle Investments (Private) Limited."

During the trial issue 5.1 was disposed of as the defendant no longer wants to claim the Sandford Leather brown lounge suite which must necessarily be awarded to the plaintiff.

The approach to the question of distribution of assets upon divorce is set out in the celebrated case of *Takafuma & Takafuma* 1994(2) ZLR 103 (S) at 106B-E:

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

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

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

Further in *Gonye v Gonye* SC-15-09 the Supreme Court further clarified the meaning of section 7(1) in the following terms:-

“It is important to note that *a court has an extremely wide discretion to exercise* regarding the granting of an order for the division, apportionment or distribution of the assets of the spouses in divorce proceedings. Section 7(1) of the Act provides that the court may make or order with regard to the division, apportionment or distribution of *“the assets of the spouses including an order that any assets be transferred from one spouse to the other.”* (Emphasis added)

The rights claimed by the spouses under section 7(1) of the Act are dependent upon the exercise by the court of the broad discretion.

The terms used are the “assets of the spouses” and not “matrimonial property.” It is important to bear in mind the concept used because the adoption of the concept “*matrimonial property*” often leads to the erroneous view that assets acquired by one spouse before marriage or when the parties are on separation should be excluded from the division, apportionment or distribution exercise. The concept “*the assets of the spouse*” is clearly intended to have assets owned by the spouses individually (his or hers) or jointly (theirs) at the time of the dissolution of the marriage by the court considered when an order is made with regard to the division, apportionment or distribution of such assets. To hold, that as a matter of principle assets acquired by a spouse during the period of separation are to be excluded from the division, apportionment or distribution a court is required to make under section 7(1) of the Act is to introduce an unnecessary fetter to a very broad discretion, on the proper exercise of which the rights of the parties depend. It must always be borne in mind that section 7(4) of the Act requires the court in making an order regarding the division, apportionment or distribution of the assets of the spouses and therefore granting rights to one spouse over the assets of the other, to have regard to all the circumstances of the case. The object of the exercise must be to place the spouses in the position they would have been had a normal marriage relationship continued between them. As was pointed out by Lord DENNING MR in *Watchel v Watchel* [1973] 3 ALL ER 829 at p 842:

“In all these cases it is necessary at the end to view the situation broadly and see if the proposals meet the justice of the case. Each case must depend on its own fact” – see *Mangwendeza v Mangwendeza* 2007 (1) ZLR 216(H).

With this background I now propose to deal with the outstanding issues in turn.

a) Cattle at the farm in Inyathi

It is the plaintiff's case that at the time the parties separated there were approximately 250 herd of cattle at the Shangani Farm (which was rented) and the Inyathi Farm. The stock record book produced during the trial showed that the cattle belonged to the parties or were at best registered under the name of the defendant. It is beyond dispute that some of the cattle were acquired through the disposal of a truck. The truck was bought in the United Kingdom in the name of the defendant's daughter (from a previous marriage) one Nomalanga. The plaintiff's evidence is that this was done for convenience as Nomalanga was resident in the United Kingdom. She said the resources used to buy the truck were from the parties. She said that explains why the cattle were not registered in the names of Nomalanga. The plaintiff had facts, figures, dates and explanation as to where the cattle were acquired, the disposal of some of the cattle, the multiplication of the cattle and their subsequent removal from the Shangani Farm to Inyathi Farm. She testified that when they started renting the Shangani Farm, she used to go there almost every Saturday alternating with the defendant to attend to the cattle. Even when they sold the cattle, they would use the proceeds for family needs. She was also involved in the relocation of the cattle from Shangani to Inyathi farm. The parties were both involved in the relocation and the construction of cattle pens and water tanks. They also purchased other cows from some farms in the neighbourhood. The money for such purchases came from the family business. Before the parties separated she said that the defendant never told her of his children having been bought cattle on the farm. She said the defendant only raised this issue after their separation in 2007 and this issue was informed by the divorce proceedings.

According to her assessment from the records the head count of the cattle was 250. When she checked on 15 January 2010 there were only 95 head of cattle left at Inyathi Farm. When they left Shangani farm, they left behind 22 head of cattle which had become too wild to transport. Some of the cattle were collected by the defendant's mistress MaNdlovu. The plaintiff has credibly established that these cattle are assets of the parties as husband and wife. She is therefore entitled to a share. She has also shown that when their marriage started having serious challenges, the defendant started disposing the cattle to the extent that he allowed his mistress MaNdlovu to have a free hand to dispose the cattle. I find all the above testimony of the plaintiff credible. Because of the role she played in the acquisition and rearing of the cattle evinced above, I consider that an award of 50% of the cattle as fair and reasonable. I find that Nomalanga Sibanda was being untruthful when she alleged that she bought the cattle through her father. She was merely being used by the defendant to defeat the just claim by the plaintiff. She conceded that she was not sure about most aspects as the acquisition and disposal of the cattle. She did not even know how many cattle were purchased. The defendant would slaughter or sell the cattle without her knowledge. Even MaNdlovu would collect the cattle and sell them without her knowledge. This is a clear indication that she did not own

cattle. I propose to share equally the 95 head of cattle which are still on the farm plus progeny if any.

b) Claim: Value of improvements on Inyathi Farm

In this instance, the plaintiff is claiming improvements on the Inyathi Farm. She is not claiming the ground or “vacant” land which belongs to the Government of Zimbabwe. It is trite that the measure of the compensation would be the value by which the property (the farm) was enhanced or the actual amount spent on the materials used in putting up the structures, whichever of the two is lesser – Van der Merwe & de Waal – *The Law of Things and Servitudes*, page 95. *In casu*, it is beyond dispute that as a result of the structures put up by the joint effort of the parties the Inyathi Farm has been improved. The court should determine the value of the “add on” structures and share the same between the parties. Looking at the credible testimony of the role played by the parties I am satisfied that the value of the improvements should be shared equally.

c) Sharing of the immovable properties

These properties have to be shared in terms of section 7 of the matrimonial Causes Act, *supra*, and the principles articulated in *Takafuma v Takafuma*, *supra*; *Gonye v Gonye*, *supra*, and *Mangwendeza v Mangwendeza*, *supra*.

i) Stand 461 Essexxale Road, Manningdale, Bulawayo

This property is registered in the name of the plaintiff. According to evidence, this property is not in a prime residential area. The original stand was acquired partially with some proceeds from some property that plaintiff inherited from her parents. She also received some assistance from her children in the development of the property. The property is not complete as evinced by two estate evaluators called by the parties i.e. Oswald Nyakunika and Mpumelelo Ndlovu. The defendant contributed some floor tiles which he later peeled off and the police had to be called to stop him from vandalizing the property in the process. Both parties agree that this property should go to the plaintiff. I agree with this sharing in terms of section 7, *supra*.

ii) Stand 12438 Bulawayo Township a.k.a 9 Goodwood Drive, Woodlands, Bulawayo

It is common cause that the original property was acquired by the defendant prior to his marriage to the plaintiff. It is registered in the name of the defendant. But there is credible evidence to the effect that the property was developed substantially during the subsistence of the parties’ marriage. The property was developed into a double storey

with more parking, paving and rooms. Both parties contributed towards these extensions. These extensions were accepted and not disputed in court. The property we are dealing with here is not the same as the original one acquired by the defendant. This property has had its size and character changed materially and substantially during the course of the marriage of the parties. Its value has been substantially enhanced by these developments and extensions. Surely the defendant cannot possibly get these improvements free. This property is in prime residential area and far more valuable than stand 461 Essexvale Road, *supra*. Because of the above improvement, it is up-market property. The parties lived in this property as their matrimonial home for several years before the challenges surfaced in their marriage. This property, according to credible evidence by Mr Nyakunika of Knight Frank Estate Agents is substantially higher in value than the Manningdale property. This property has to be taken into account in terms of section 7(4), *supra*, in placing the spouses "in the position they would have been in if a normal marriage relationship continued between them". But, having acquired the original stand with improvements and having participated in the above-mentioned extensions, the defendant's share should, in my view be substantially higher than the plaintiff's in this property. Accordingly I award this property to defendant. The extra value of the property is accounted for by the fact that it was purchased prior to the marriage.

iii) The Remainder of stand 615 Bulawayo Township a.k.a 50 Josiah Tongogara Street, Bulawayo

This property is registered in the names of the defendant. According to the plaintiff, this property was acquired during the subsistence of the marriage. When it was acquired it was an old house needing renovations. It was indeed renovated, painted and walled. The property was acquired through funds from the family. The property was rented out and rentals were paid into the family. Apart from the fact that the property is registered in his sole name, there is nothing in the evidence that shows that the defendant was solely responsible for the acquisition of this property. There is no evidence that he contributed more than the plaintiff. The property should, therefore, be shared equally.

iv) Stand 8053 Bulawayo Township, Bulawayo, a.k.a 15 Kilmanock Road, Hillcrest, Bulawayo

This property is registered in the names of both parties. Both parties agree that it should be shared equally.

d) Simpson Electrical (Pvt) Ltd and Muntomuhle Investments (Pvt) Ltd

The plaintiff wants to be given twenty-five (25%) percent of the shares in Simpson Electrical (Private) Ltd and fifty percent (50%) of the value of the immovable property owned by Muntomuhle Investments (Pvt) Ltd. Simpson Electrical was incorporated in 1989 before the defendant met the plaintiff. The defendant and his late brother were the only shareholders when it was incorporated. It is the defendant's case that he is no longer a shareholder of Simpson Electrical having donated his shares to his children from a previous marriage as per share certificates dated 3 December 1995. That is almost a year before the parties were married. The courts have accepted as trite the principle that a company duly incorporated is a distinct legal entity endowed with its own legal personality. It is equally trite that the veil of incorporation may be lifted were necessary in order to prove who determines or who is responsible for its activities, decisions and control of the company – *Sibanda & Anor v Sibanda* 2005 (1) ZLR 97 (S) at 103E-F and *Mangwendeza v Mangwendeza, supra*, at 218D-F. In my view, this is a case that requires the lifting of the veil of incorporation because of the reasons that will be explained hereinunder. According to the credible testimony of the plaintiff when she got married to defendant, Simpson Electrical was situated in Robert Mugabe Way between 14th and 15th Avenue. It was a small shop. They moved the shop into bigger premises in Pioneer House. The latter premises proved too big for the level of their trading. More stock was required. The defendant's resources proved inadequate for stocking a shop of that magnitude. They sold their cars to raise capital for the business. She also put in her funds. She was the one doing the buying of stock for the business. This involved her travelling up and down to South Africa. She was told that the business was registered under the names of the defendant and his late brother. The business grew in leaps and bounds. The family benefitted a lot from the growth of the business. They were able to carry out extensive extensions of the Woodlands property as alluded to above. Because the business was flourishing they acquired the Hillcrest property and two stands in Pumula South built houses thereon. These latter houses were registered in the names of the family members. The business had some substantial disposable income even after these investments. They decided to expand the business further. According to the plaintiff they then approached her uncle (who was in the employ of the Bulawayo City Council). Through her said uncle, they were offered an industrial stand in Donnington West. They used money from the business to pay for the industrial stand. When the defendant went to pay for the stand he registered it in his name. She said they toiled to build a factory i.e. double storey structure. They sent their children abroad. She also said that she sold her Paddonhurst house to the defendant's cousin and ploughed the proceeds thereof to Simpson Electrical by way of purchasing stock.

This factory was massive. They rented it out to a company known as Setex. The tenants developed interest in the factory and offered to purchase it. The parties agreed to sell it. The proceeds of the sale of the factory were used to buy and reconstruct the building in 129-130 Robert Mugabe Way, which is the major asset of Muntomuhle Investments. This fact is admitted by the defendant as evinced by his letter dated 5 March 2007 in the bundle of documents. In the same letter drafted by his legal practitioners of record, the defendant concedes that the plaintiff is a shareholder of Simpson Electrical holding 25% shares. After the acquisition of the Robert Mugabe Way property she fell ill. She was away for three months. She was first hospitalized and operated at Mater Dei Hospital and later at St Annes Hospital, Harare where she was further operated. When she recovered she approached the defendant for the title deeds of the property and he refused to show her. She said she was not amused and accused him of trying to make her "his slave". They eventually decided to go separate ways. The defendant offered her 25% of this property saying the other shares belonged to his children and himself (i.e. 25% and 50% respectively) She said that she was later surprised to be told that the same building belongs to Muntomuhle Investments. It is her case that this company was incorporated to cheat her. I am in agreement with this testimony. The evidence points to a major contribution by the plaintiff in growth of Simpson Electrical. After plaintiff got involved in the running of Simpson Electrical there was fundamental expansion, thanks to the joint effort of both parties. As far as Muntomuhle is concerned it is a creature of the defendant for the dissipation of the assets of Simpson Electrical in order to defeat the plaintiff's just claims. Even the defendant's own witness Nomalanga Sibanda, conceded that Muntomuhle was a family project. More importantly she evinced that-

- a) Muntomuhle company never had an annual general meeting or directors' meeting;
- b) The shareholders had never been paid dividends;
- c) They were never (as shareholders) made aware of the donation of the shares or the company affairs;
- d) And that as far as she was aware Muntomuhle was the defendant's project and he could do as he wished or liked with the company or the shares.

The defendant was, therefore, the alter ego of Muntomuhle. He was not only running the show at Muntomuhle, he and Muntomuhle have become one. In light of the plaintiff's immense contribution towards the main asset of Muntomuhle as explained above, this court has no option but unmask Muntomuhle and declare plaintiff an owner of 50% of the market value of the building owned by Muntomuhle Investments (Pvt) Ltd known as Downings Buildings, Robert Mugabe way, Bulawayo.

Accordingly, I make the following order:-

It is hereby ordered that:-

1. A decree of divorce be granted;
2. Custody of the minor child of the marriage, namely Simpson Nqobizitha Sibanda (a boy, born 11 March 1996) be awarded the plaintiff with the defendant enjoying reasonable rights of access to the minor child;
3. The maintenance of the minor child shall be in accordance with order already in existence;
4. The movable assets be awarded to the parties in terms of paragraphs 3 and 4 of Memorandum of Agreement signed by parties at the commencement of trial as articulated above;
5. The Sandford leather brown lounge suite be awarded to the plaintiff as her sole and exclusive property;
6. The 95 head of cattle and their progeny be shared equally between the parties;
7. The value of the improvements on the Inyathi Farm be shared equally between the parties. The parties to agree on the valuer for this purpose failing which, the Deputy Registrar of this court to appoint one;
8. Stand 461 Essexvale Road, Manningdale, Bulawayo be awarded to the plaintiff as her sole and exclusive property;
9. Stand 12438 Bulawayo Township a.k.a 9 Goodwood Drive, Woodlands, Bulawayo be awarded to defendant as his sole and exclusive property;
10. The remainder of stand 615 Bulawayo Township a.k.a. 50 Josiah Tongogara Street, Bulawayo to be shared equally between the parties;
11. Stand number 8053 Bulawayo Township a.k.a. 15 Kilmanock Road, Hillcrest, Bulawayo to be shared equally between the parties;
12. The plaintiff is awarded 25% of the shares of Simpson Electrical (Pvt) Ltd and the defendant the remainder of the shares;
13. The plaintiff is awarded 50% of the value of the immovable property known as Downings Building, Robert Mugabe Way, Bulawayo registered under the name of Muntomuhle Investments (Pvt) Ltd and the defendant the remainder;
14. Each party is to bear its own costs.

Cheda & Partners, plaintiff's legal practitioners
Webb, Low & Barry, defendant's legal practitioners