

SUSAN SIWAWA (BORN MUNABA)
versus
AARON SIWAWA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 27 and 28 September 2017 & 6 February 2019

Civil Trial

T Mazikana, for the plaintiff
D.V Gapare, for the defendant

NDEWERE J: The plaintiff and the defendant were married to each other in Bulawayo, Zimbabwe, on 16 October 1987 in terms of the Marriage Act [*Chapter 5:11*]. The marriage still subsists. The marriage certificate was produced as exhibit and the plaintiff identified the signatures thereon.

The parties had four children namely Thabiso Aaron Siwawa (born 15 September 1988), Kudai Sharon Siwawa (born 2 August 1990), Sibonokuhle Laura Siwawa (born 16 November 1994) and Chikomborero Tyrone Siwawa (born 10 November 2000). The plaintiff issued summons for divorce on 28 April 2015, alleging that the marriage had irretrievably broken down in that the defendant had been unfaithful and abusive and they were no prospects of reconciliation. In his plea filed on 1 July 2015, the defendant agreed that the marriage had irretrievably broken down, but he was blaming the plaintiff for being the cause of the breakdown. The court noted that the parties had last lived together as husband and wife in 2013 when the defendant moved out of the matrimonial home. This confirmed an irretrievable breakdown.

On 30 March 2017, the parties filed a Joint Pretrial Conference minute following a Pretrial Conference before a High Court judge. The following were the agreed issues:

1. that the marriage had irretrievably broken down and both parties were consenting to the divorce.
2. that custody of Chikomborero Tyrone Siwawa, born on 10 November 2008 be awarded to the defendant.
3. that plaintiff shall have reasonable access to the minor child every alternative weekend that the child is in Harare during the school term and half of every school holiday.
4. that defendant shall pay all school fees and medical aid for the minor child.
5. that defendant shall be awarded all the household movable property of the marriage except for the refrigerator, TV set and its decoder, and a sofa set which plaintiff acquired in Botswana and the bed which plaintiff was using, which shall be awarded to the plaintiff.
6. the plaintiff shall be awarded the Nissan Tiida motor vehicle and the Honda Fit motor vehicle in her possession.
7. the defendant shall retain the rest of the motor vehicles in his possession.
8. the Norton House, called stand 573 Norton Township (18 Mopani Drive) shall be distributed as follows:
 - i) 50% share of property shall be donated to the children of the marriage in equal undivided shares.
 - ii) The defendant shall attend to the transfer and costs thereof of the said 50% share within three months of the decree of divorce.
 - iii) The defendant shall retain a 50% share in the property.
9. the plaintiff shall be awarded the Chegutu plot, at Tetbury Estate, Chegutu, as her sole property.
10. the defendant shall be awarded the Norton plot called Daisy Farm, as his sole property.

The following issues were referred to trial:

 - i) What is a just and equitable distribution of Stacks Imaging (Pvt) Ltd and DX Centre (Pvt) Ltd?
 - ii) Whether or not the Bulawayo house, called stand 30507, Entumbane, Bulawayo, should be shared between the parties and if so, what is a just and equitable distribution thereof?

The evidence established that both parties formed Diagnostic X-ray Services (Pvt) Ltd in 1991 and the plaintiff left her employment to operate the company whilst defendant remained in his formal employment and worked in the family business on a part-time basis. The parties had equal shareholding. By 2004 the company had acquired the machinery listed in exh 3, the fixed asset register. The parties, by agreement, later changed Diagnostic X-RAY Services (Pvt) Ltd to Stacks Imaging (Pvt) Ltd.

It was common cause that Stacks Imaging (Pvt) Ltd traded as DX Centre (Pvt) Ltd and that this trade name had established a lot of goodwill among several clients and stakeholders.

In 2005, the defendant left employment and joined the plaintiff in business. In May 2005 by special resolution Diagnostic X-Ray Service (Pvt) Ltd changed its company name to Stacks Imaging (Pvt) Ltd as indicated in exh 5. However, Stacks Imaging continued to use DX Centre as its trade name as revealed in exh 7, a letter dated 20 July 2007 where the letter head indicated that this was Stacks Imaging trading as DX Centre.

It was common cause that the plaintiff went to Botswana between 2008 and 2011 and left the company operating.

From the evidence referred to above, it is clear that the parties owned Stacks Imaging (Pvt) Ltd in equal shares. No evidence was led to show that their shareholding in Stacks Imaging ever changed. So upon divorce, each party will get 50% shareholding of the company as established by the evidence. The defendant tried to rely on a letter from Machiridza Law Chambers dated 7 September 2016 where he queried his alleged removal from the company as confirmation that he was no longer a director of Stacks Imaging. On the contrary that letter confirmed to the court that he was still a director and shareholder of Stacks Imaging since he never resigned and no other proof of his removal from the company was ever tendered by either party. Defendant also tried to rely on exh 10, an arrangement concluded on 25 July 2007, to show that they had split the company and its assets yet the document on page 62 is about the division of management duties as opposed to a splitting of the company and assets.

The defendant confirmed that plaintiff was running the business while he continued with his formal employment as a fallback position for the family. He said although the company was registered in 1991 it started operations in 1998. He confirmed that they were equal shareholders

with the plaintiff. He confirmed that they changed the company name to Stacks Imaging, but they continued to use DX Centre as a trade name.

Defendant's evidence was that he registered DX as a company in June 2011, when the plaintiff was in Botswana. During cross examination, he was unable to point to any resolution which authorised him to register DX Centre as a company. When he was asked to refer to any agreement to split the company assets he had none. He however insisted that plaintiff was not entitled to anything from the DX Centre Company.

Plaintiff's evidence was that by 2004, when she was running the operations of Stacks Imaging, all the equipment listed in exh 3 was acquired. Her evidence was that the defendant took all that equipment to his 2011 formed DX Centre Company except the Giraffe UX-52H-39-X-Ray.

The defendant did not dispute the evidence that he took all but one equipment from Stacks Imaging for use in the newly formed DX Centre Company.

The defendant alleged that his children were shareholders to his new company. But he did not produce any evidence to show that his children had received anything as shareholders. When this question was put to him during cross-examination, his response was that the children got fees, holidays and holiday expenses. Yet the children were always entitled to the fees as children, not as shareholders. This piece of evidence by the defendant tends to confirm that the children had just been used as a front to enable the defendant to prejudice the plaintiff and deny her benefits from the newly formed DX Centre Company.

To conclude on the DX Centre Company formed in 2011, the court noted that there was no company resolution by Stacks Imaging authorising the formation of the DX Centre Company. Yet this was required in terms of Article 8 of the Articles of Association of Stacks Imaging (Pvt) Ltd. There was no shareholders agreement either. Similarly, there was no Stacks Imaging resolution which authorised the defendant to take Stacks Imaging assets and move them to the newly formed DX Centre Company. So all of the defendant's actions in splitting Stacks Imaging and transferring Stacks Imaging property were unauthorised and are therefore null and void. DX Centre (Pvt) Ltd must therefore return all the Stacks Imaging equipment which it took back to Stacks Imaging.

Since Stacks Imaging is the lawful user of the trade name DX Centre, defendant's company should not use that name without the written authority of Stacks Imaging. This is because companies are separate and distinct persons. When the plaintiff and the defendant registered Stacks

Imaging (Pvt) Ltd, they created a third separate distinct legal person. The defendant is not that person; neither is the plaintiff. That third person, not being a physical person like plaintiff and defendant, operate through company resolutions in terms of the Companies Act, [*Chapter 23:03*] and in terms of the Company's Articles of Association. So before the defendant registered a new company, DX Centre, he ought to have obtained the authorization of Stacks Imaging (Pvt) Ltd to use its trade name for a new company name through a Stacks Imaging Board resolution. That was not done. Before the third defendant transferred the assets and equipment of Stacks Imaging to the newly created company, he ought to have obtained the authorization of Stacks Imaging (Pvt) Ltd, as owner of the assets and equipment through a resolution. That too was not done. This means that the use of the Stacks Imaging trade name and the transfer of Stacks Imaging assets and equipment were never authorised and are therefore null and void.

Instead of asking for a share in the newly formed unauthorised entity, the plaintiff's legal practitioners should have advised her to seek the nullification of the unauthorised entity and request the return of the DX Centre name and equipment to Stacks Imaging, the rightful owner. Since the distribution of the assets involve the two companies and since evidence was led about them, the court will proceed to determine the issue to its finality in this judgment.

DX Centre (Pvt) Ltd was not formed in a lawful manner the court cannot distribute it between the parties. Its formation is null and void. In addition the equipment which was unlawfully transferred from Stacks Imaging (Pvt) Ltd ought to be returned to Stacks Imaging.

As regards the Entumbane house, the agreement between the previous owner Sagia, is dated 27 March 1987. According to the agreement, \$3 550.00 was to be paid for stand 30507 Entumbane.

Thereafter, from June 1987, the defendant took over payments to City of Bulawayo. The parties Civil Marriage was in October 1987. The plaintiff said she had started living with the defendant after the customary law rights of lobola payment were made. She did not give a date of the customary union, but defendant said it was in July 1987 and this was not disputed.

It was common cause that payments for the house continued during the marriage. The defendant conceded that plaintiff was working and contributing financially to the family expenses. Plaintiff said she stayed at the Entumbane house and had her first child there. Defendant confirmed that plaintiff lived at the Entumbane house for over a year.

It is clear from the above that plaintiff is entitled to a share of the Entumbane house. It was the matrimonial home for a while and she had her first child there. It was also paid for during the marriage and since she was employed, she indirectly contributed towards its purchase by taking care of the other family expenses.

The defendant offered her a ten percent share in the alternative. The court's view is that 10% is too low for a 29 year old marriage where the plaintiff was working and contributing financially. The fact that defendant later housed his mother and sister there does not detract from it being matrimonial property in relation to distribution upon divorce. In my view, a forty *per cent* share for the plaintiff would be more appropriate. The defendant will get 60% because of the deposit and instalments he initially paid before marrying the defendant.

The parties had agreed that Chikomborero Tyrone Siwawa born on 10 November 2000 be given into the custody of the plaintiff, with defendant having reasonable rights of access. The defendant was also to maintain the minor child on his medical aid and dental schemes and pay all his education related expenses till the child reached 18 or became self-supporting. The court notes that Chikomborero Tyrone is now a major, having attained 18 years in November 2018. The court will therefore not make an order in relation to his custody and maintenance as part of this court order

Accordingly, it ordered as follows:

- a) That a decree of divorce be and is hereby granted.
- b) The defendant shall be awarded all the household movable property of the marriage except for refrigerator, TV set, decoder, sofa set and bed which shall be awarded to the plaintiff.
- c) The plaintiff shall be awarded the Nissan Tiida motor vehicle and the Honda Fit motor vehicle as her exclusive property while the defendant gets the remaining motor vehicles acquired during the marriage.
- d) The Norton house, called stand 573 Norton Township (18 Mopani Drive) shall be distributed as follows:
 - i) 50% share of the property shall be donated to the children of the marriage in equal undivided shares.
 - ii) The defendant shall attend to the transfer and costs of the said 50% to the children within three months of the divorce order.

- iii) The defendant shall retain 50% of his share in the Norton house.
- e) The plaintiff shall be awarded the Chegutu Plot, at Tetbury Estate, Chegutu, as her sole property.
- f) The defendant shall be awarded the Norton Plot, called Daisy Farm, as his sole property.
- g) The parties shall each get a 50% share of Stacks Imaging (Pvt) Ltd.
- h) The plaintiff shall get a 40% share of the Entumbane house, stand number 30507, Entumbane.
- i) There shall be no distribution of DX Centre (Pvt) Ltd; it having been formed illegally and having taken over Stacks Imaging Equipment illegally without a company resolution in terms of Article 8 of the Articles of Association.
- j) The defendant shall return the Stacks Imaging (Pvt) Ltd equipment which he unlawfully moved to the improperly formed DC Centre Company back to Stacks Imaging (Pvt) Ltd.
- k) Each party shall pay its own costs.

Lunga Attorneys, plaintiff's legal practitioners

Messrs Scanlen & Holderness, defendant's legal practitioners