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SIPHOSAMI TSHUMA

Versus

SIPHATHISIWE TSHUMA

And

PEACOCKS HIRING SERVICES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 4 NOVEMBER 2014, 15 MAY 2015,

20 OCTOBER 2016; 26 & 27 JANUARY 2017 & 7 JUNE 2018

Civil Trial

J. Tshuma for the plaintiff

N. Mazibuko for the 1st defendant

Advocate L. Nkomo for the 2nd defendant

TAKUVA J: Plaintiff issued summons against 1st defendant on the 31st May 2003 claiming the following relief:

- 1.1 A decree of divorce.
- 1.2 That the custody of the children namely Lindokuhle Tshuma a female born on the 2nd December 1996 and Nandipha Tshuma a female born on the 10th April 2000 and a third child born after the summons was issued Lubelihle Yenziwe Tshuma a female born on the 6th December 2005, be awarded to 1st defendant.
- 1.3 That plaintiff contributes maintenance for all the children until they attain the age of majority or become self supporting, whichever occurs first.
- 1.4 An order sharing the movable property between the parties.
- 1.5 An order that the immovable property situate at number 5 Shaw Close, Sunnyside be declared plaintiff's sole and exclusive property.
- 1.6 An order of cost if defendant opposed the action.

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The 1st defendant entered appearance to defend on 17 June 2003 and pleaded to plaintiff's declaration on 10 September 2003. She filed her counter-claim wherein she claimed division of movable assets and that she be awarded number 5 Shaw Close, Sunnyside, Bulawayo. Further, she claimed that stand 16694 Romney Park be sold and the proceeds shared equally. Plaintiff pleaded to 1st defendant's counter claim on 16 September 2003 and 1st defendant replicated to the plaintiff's plea to her counter-claim and joined issue. The pleadings were then closed.

On the 31st October 2007, 1st defendant filed a notice of intention to amend her counter-claim seeking to add to her claim inter alia, "an order directing that the two immovable properties acquired by the parties; namely stand 469 Bulawayo Township (Ruben Mansions) and number 5 Shaw Close, Sunnyside, Bulawayo be valued with 1st defendant being awarded the latter property (the smaller property) and plaintiff being awarded the former (bigger property) provided that the plaintiff shall be obliged within a period of 30 days from the date of this order, or such longer or shorter period as may be agreed by the parties to pay to defendant the difference between the two properties." Plaintiff pleaded to the defendant's notice to amend the counter-claim by denying that defendant was entitled to the relief sought and specifically stating that stand 469 Bulawayo Township belonged to a company known as Peacock Hiring Services (Pvt) Ltd.

Plaintiff filed his pre-trial conference memorandum on 28 June 2011 and 1st defendant filed her pre-trial conference memorandum on the 29th October 2011. On 31 October 2012, 2nd defendant was joined in the action between plaintiff and 1st defendant and the matter was subsequently referred to trial after a pre-trial conference.

By mutual agreement, plaintiff and 1st defendant resolved the following issues as follows:

Divorce

Both parties admitted that the marriage had irretrievably broken down and there are no prospects of reconciliation.

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Custody of minor children

The plaintiff and 1st defendant agreed that defendant should be awarded the custody of the two minor children and plaintiff is entitled to reasonable access to the children. For the avoidance of doubt, the minor children are; Nandipha Tshuma (female) born on the 10th April 2002 and Lubelihle Yenziwe Tshuma (female) born on the 6th December 2005. The third child Lindokuhle Tshuma (female) born on 2nd December 1996 is a major attending tertiary education at a South African University. Plaintiff agreed to be responsible for paying fees for Lindokuhle.

Maintenance of the minor children

Since there is a maintenance order registered in the Magistrates' Maintenance Court, the parties have agreed that the maintenance of the children will be regulated in terms of that maintenance order.

Division of movable assets

At separation, plaintiff and 1st defendant divided between themselves the movable assets. By mutual agreement, the parties consented to an order that each party shall be declared the sole owner of the movable assets in the possession of each of them.

Division of immovable property

There are two properties in dispute namely stand number 15558 Bulawayo Township of Bulawayo Township Lands also known as 5 Shaw Close, Sunnyside, Bulawayo registered in plaintiff's name and Rubin Mansions registered in the name of the 2nd defendant. As regards number 5 Shaw Close, the parties have agreed that the 1st defendant be awarded 50% of the value of the property. Following their agreement, the property was valued by John Pocock & Company (Pvt) Ltd estate agents and valuers. It was valued for US\$40 000,00. The property which is situated in the medium density suburb of Sunnyside is 946m² in extent. It is common

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cause that the free hold property is held in the name of Siphosami Vusumuzi Tshuma (born 31st December 1969) by virtue of transfer number 3269/98. Plaintiff concedes that 1st defendant contributed indirectly to the acquisition of the property and that she should get 50% of the value of the house as compensation. The sole issue for determination is who should be awarded the property and who should be compensated? Put differently who should be allowed to buy the other out.

As regards Rubin Mansions, the issue is whether this is a proper case for the court to exercise its discretion to pierce the corporate veil of the 2nd defendant and treat Rubin Mansions as part of the matrimonial property for distribution notwithstanding that it is registered in the name of a separate legal entity.

The evidence

Despite the numerous concessions by both parties, the proceedings were characterised by accusations and counter-accusations regarding the turbulent journey the marriage relationship went through. Each party tried to lay the blame of the breakdown of the marriage on the other's doorstep. Consequently, detailed evidence of adultery by both parties was presented. This left the court in no doubt whatsoever as to the backdrop of the marriage that existed between the parties.

Plaintiff's evidence

He married 1st defendant in December 1994 and barely two years down the line, they started having marital problems emanating from 1st defendant's unfaithfulness and her open pursuit of her own interests at the exclusion of the plaintiff. Plaintiff engaged the services of lawyers and initiated divorce proceedings which were stayed after the intervention of family members. The parties' efforts to save their marriage were short-lived and plaintiff had no choice but to initiate these proceedings in 2003. The parties never pooled their resources or ideas together leading to their separation in 2004 which lasted 7 months. Plaintiff left the matrimonial

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home and rented a house in Four Winds. When plaintiff's parents got wind of his separation, they prevailed over him to attempt reconciliation once again. The parents' efforts were successful as plaintiff returned to the matrimonial home in November 2004 and they had their third born child.

In 2007, the parties were using separate bedrooms culminating in plaintiff again leaving the matrimonial home until February 2009 when the parents again intervened. The parties' reconciliation lasted one week because plaintiff caught defendant in a compromising situation with another man. As this was not enough, 1st defendant found another lover, this time a church member. Plaintiff again caught them and he decided to vigorously pursue the divorce action. However, during that process, plaintiff found 1st defendant with one Vusumuzi Moyo in their matrimonial home. Plaintiff applied for a peace order which was granted barring this man from entering their home or interfering with their children.

The 1st defendant immediately left the matrimonial home to live on her own at SOS where she was now employed. She took all the children with her together with most household goods. Plaintiff agreed that 1st defendant be granted custody of the minor children. He also agreed to pay maintenance for all the children and stated that the movable assets have been shared.

With regard to the matrimonial home plaintiff gave some background to its acquisition. He said in 1995 he suggested to 1st defendant that they jointly apply for a residential stand but she spurned the offer. He then applied for and secured stand number 5 Shaw Close Sunnyside. He sold his house number 9178 Nkulumane Township to raise the purchase price for the stand. Later plaintiff secured a loan from his employer to finish the construction of the house. Plaintiff was by then employed as an internal auditor at the Bulawayo City Council while 1st defendant was employed as a teacher. Due to the quarrels that the parties were perpetually experiencing during their turbulent marriage, the plaintiff completed the construction of the house without any direct contribution whatsoever from the 1st defendant. Despite all this, plaintiff agreed that 1st

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defendant should get 50% of the value of this house and when asked why, his answer was; 'I have agreed because despite her non-contribution, she has been my wife for all the years that have passed, she is the mother of my children, she got the house and tried to look after it, and to quite an extent had had the responsibility in just making sure that the stand becomes a home and that I have admitted that she contributed indirectly'. See page 15 of the record of proceedings.

Plaintiff indicated that he prefers to buy out the 1st defendant's interest in the house. His reasons are shown in the following extract from the record of proceedings on page 16:-

“Q - why would you want to retain the house?

A - I believe that is my house, I worked for it heavily without any financial assistance from her. She initially had even refused for us to get land from City Council ... She got her own forms and up to today I do not know if she sourced the house somewhere else, I have never bothered myself to investigate on that.

Q - She is saying she needs the house more than you because she has the children?

A - I want to believe that she is in full time employment if the house is to be valued and she gets 50% in cash, she will be able to afford a decent house where she can continue with her life. She could get a mortgage if the money is not enough and I am sure from her salary she would be able to pay the mortgage bond.

Q - At the meantime has she been requiring that house over the years?

A - Well, I have made several offers to her, she dismissed all my offers and told me that obviously the house is hers and she will get it whether I like it or not.

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She never came with a request, but has only been telling me what will happen and I have learnt to live with all those utterances.

Q - If the court orders that you pay her the 50% where will you get the money from?

A - I will approach a bank

Q - Currently where are the children living?

A - They are staying with her at SOS Village

Plaintiff also testified in his capacity as the managing director of Peacock Hiring Services (Pvt) Ltd, the second defendant *in casu*. His evidence can be summarised thus:

1. Plaintiff purchased 2nd defendant as a shelf company in 1995 from Mr and Mrs Nala. At the time, there were only 2 ordinary shares of Zimbabwe \$1,00 each and plaintiff nominated the 1st defendant to be a nominee shareholder on his behalf in respect of one share. He also appointed 1st defendant to be a director of the 2nd defendant.
2. The 2nd defendant did not carry out any business from 1995 until 2004 when it started to carry on the business of supplying medical equipment to hospitals from an office at number 7 Rubin Mansions. In May 2004 the plaintiff removed the 1st defendant from the position of director of the company as the divorce proceedings had commenced and the parties were estranged.
3. The 2nd defendant purchased immovable property known as Rubin Mansions in July 2004. Plaintiff produced the document trail showing how the 2nd defendant purchased Rubin Mansions – see pages 89 – 125 of the 2nd defendant's bundle of documents.
4. After paying the required deposit the 2nd defendant faced difficulties in paying the instalments resulting in plaintiff representing 2nd defendant requesting money from his parents, niece Nonhlanhla Tshuma; sisters Simangaliso Tshuma and Beatrice Tshuma in

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2005. He managed to raise a total of Z\$220 million to capitalize the 2nd defendant and clear the purchase price through installments.

5. When plaintiff's father passed on in 2006, the family held a meeting on 19 August 2006 in which the family agreed that those who contributed to the Z\$220 million capital injection into the 2nd defendant be allotted shares *in lieu* of repayment of their money. See pages 84-85 of the 2nd defendant's bundle of documents. Subsequently the transfer of shares was effected in February 2007 as shown by Form CR2 on page 128 of the 2nd defendant's bundle of documents.
6. Plaintiff denied that he clandestinely transferred ownership of the property to the 2nd defendant in order to defeat the 1st defendant's claim. He pointed out that initially the transfer of ownership of Rubin Mansions was erroneously effected to the name of the plaintiff by Messrs Calderwood, Bryce Hendrie & Partners, but was later corrected and the transfer was made from the name of the plaintiff to the name of the 2nd defendant.
7. Finally, plaintiff denied that 2nd defendant was his *alter ego* pointing out that there are other 8 shareholders of 2nd defendant as reflected in Form CR2. Rubin Mansions was purchased by 2nd defendant and not by the plaintiff and therefore is not an asset of the plaintiff to be distributed upon divorce. He contended that the 1st defendant's claim in relation to Rubin Mansions ought to fail with costs.

Evidence for the 2nd defendant was also led from Nonhlanhla Tshuma who is plaintiff's niece. She is employed as a Senior Internal Auditor at OK Zimbabwe. Her evidence was basically to confirm that she is a director and shareholder in the 2nd defendant since 2006 and 2007 respectively. She confirmed how and why shares had to be allotted to plaintiff's family members in the manner reflected on pages 85-86 of the 2nd defendant's bundle of documents. Her own shareholding is 8.7% and she confirmed that plaintiff is the managing director of the 2nd defendant. During the numerous directors and shareholders' meetings she attended annually, the 1st defendant was conspicuous by her absence. Under cross-examination she flatly denied that her participation in 2nd defendant was a grand scheme orchestrated by plaintiff with the collusion of other relatives to defraud the 1st defendant of her right to Rubin Mansions.. She insisted that

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her contribution of Z\$40 million was paid in cash deposit into a Barclays Bank account and she ended up with 2 800 shares.

Plaintiff and 2nd defendant closed their respective cases after leading evidence from these witnesses. The 1st defendant gave evidence which confirmed that their marriage was rocked with problems right from inception. However, she blamed all this on plaintiff's alleged adulterous relationships with various women and his habit of stalking her wherever she went. She gave details of the numerous fights and legal battles that they fought, the causes thereof and admitted that the marriage has irretrievably broken down. First defendant eventually secured employment at SOS where she was required to reside within the premises. She moved there with her children on 4 August 2011 and is currently living in that accommodation.

Coming to finances, the witness said she was employed as a teacher from 1994 and plaintiff was then employed at Bulawayo City Council. Their salaries were at par and they would discuss and agree on how to spend their income. They agreed to venture into small projects like selling second hand goods, river sand where her contribution was indirect and at times direct. At one time she accompanied plaintiff to Botswana to buy door and window frames. Using the proceeds from these projects, they ended up renting an office at Rubin Mansions. She admitted that plaintiff owned a house prior to their marriage which house he sold and used proceeds to purchase two stands, one in Sunnyside and the other in Riverside.

After sometime, the couple agreed to buy a shelf company called Peacock Hiring Services and she signed documents relating to the opening of a bank account with Barclays Bank in 2004. Later, plaintiff proposed that they buy Rubin Mansions after selling the matrimonial home. She disagreed and they discussed securing a loan for Z\$70 million for that purpose. As regards the contribution by plaintiff's parents and other relatives she said this never happened as the niece and two sisters had no capacity to raise the required amounts. Further, she doubted the authenticity of documents produced by the plaintiff and 2nd defendant. She also said she was never informed of any company or directors' meetings.

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Upon being asked how Rubin Mansions should be dealt with she said;

“I have the right to claim an equal share because the resources used to acquire it were raised over years through both of us contributing.”

According to 1st defendant there is no difference between herself, plaintiff and 2nd defendant. The reason she wants a 50% share in Rubin Mansions is so as to look after the children as plaintiff has not been paying the \$400,00 per month he was ordered to pay as maintenance. As regards the matrimonial home, she wants to buy the husband out because she requires a more spacious accommodation with the children.

Under cross-examination, 1st defendant stated that although No. 5 Shaw Close, Sunnyside, Bulawayo is registered in plaintiff's names, she considered it “family property”. She also insisted that she jointly purchased Rubin Mansions with plaintiff but the latter clandestinely registered it in his name in a bid to deprive her of her share upon divorce. Asked why she left out Rubin Mansions while compiling a list of property she wanted protected from disposal by plaintiff under case number HC 3226/04 the witness said it was due to an oversight. As regards the details of the contract of sale involving Rubin Mansions, like the purchase price, the deposit, the monthly installment required and how much she personally contributed, all she could say was, “I cannot remember, they were huge figures.”

The 1st defendant admitted that the “nominal share” she allegedly signed “without reading”, does not belong to her but she insisted she participated in the opening of the company's bank account as a director. She claimed to have signed documents relating to the Z\$70 million loan towards the purchase of Rubin Mansions from ZB Bank. However, when these documents on pages 93-4 of the record were shown to her, she conceded that her signature does not appear on them. Again when asked why her signature has “vanished” from the loan agreement, her response was, “I was involved in the acquisition of the property. It is difficult to answer that, but what I remember is I was involved.

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While accepting that 50% of No. 5 Shaw Close is US\$20 000,00, the witness readily conceded that it would not be easy for her to obtain a mortgage. Accordingly, she pinned her basis for saying she should remain in the house on the success of her claim in Rubin Mansions. Put differently, if she loses her claim in Rubin Mansions, she will be unable to buy out the plaintiff due to lack of funds.

Nigel Potera was 1st defendant's only witness. He works at the Deeds and Companies office as an Examiner based in Bulawayo. According to the record kept in his office, the original shareholders of the 2nd defendant in 1995 were Mr C. Nala and Mrs Cathrine Nala. The 1st annual return done on 31 December 1995 shows that there were 2 shares held by Siphosami Tshuma and Siphathisiwe Tshuma. This remained the position in 2013 and 2015. However under cross-examination he conceded that the CR 2 form filed in his office shows that the 2nd defendant's directors are plaintiff and one Nonhlanhla Tshuma. He also conceded that according to the allotment form in his office filed on 6 February 2007 the listed shareholders are as follows;

(i)	Siphosami Tshuma	-	9 598 shares
(ii)	Lindokuhle Tshuma	-	2 800 shares
(iii)	Nandipha Tshuma	-	2 800 shares
(iv)	Quiver P/L	-	<u>2 800 shares</u>
	Total	-	<u>31 998 shares</u>

Finally, he pointed out that the Registrar's directive to companies to redenominate from Zimbabwe dollars to US dollars did not amount to an allotment of shares which remained as shown in the company's CR2 form.

Analysis

The provisions of the Matrimonial Causes Act Chapter 5:13 are applicable *in casu* in particular section 7 which provides as follows;

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- “(1) Subject to this section in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to –
- (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;
 - (b) the payment of maintenance, whether by way of lump sum or by way of periodical payment, in favour of one or other of the spouses or of any child of the marriage;
- (2) An order made in terms of subsection (1) may contain such consequential and supplementary provisions as the appropriate court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between the spouses and may in particular but without prejudice to the generality of this subsection-
- (a) order any person who holds any property which forms part of the property of one or other of the spouses to make such payment or transfer of such property as may be specific in the order;
 - (b) confer on any trustees of any property which is the subject of the order such powers as appears to the appropriate court to be necessary or expedient;
- (3) The power of an appropriate court to make an order in terms of paragraph (a) of subsection (1) shall not extend to any assets which are proved, to the satisfaction of the court, to have been acquired by a spouse, whether before or during the marriage –
- (a) by way of an inheritance; or
 - (b) in terms of any custom and which in accordance with such custom, are intended to be held by the spouse personally; or
 - (c) in any manner and which have particular sentimental value to the spouse concerned.
- (4) In making an order in terms of subsection (1), an appropriate court shall have regard to all the circumstances of the case including the following –
- (a) the income earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
 - (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
 - (c) the standard of living of the family including the manner in which any child was being educated or trained or expected to be educated or trained.
 - (d) the age and physical and mental condition of each spouse and child;
 - (e) the direct or indirect contribution made by each spouse to the family including contributions made by looking after the home and caring for the family and any other domestic duties;

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- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
 - (g) the duration of the marriage and in so doing, the court shall endeavour as far as is reasonable and practicable and having regard to their conduct is just to do so, to place the spouse and children in the position they would have been in had a normal marriage relationship continued between the spouses.
- (5) In granting a decree of divorce, financial separation or nullity of marriage an appropriate court may, in accordance with a written agreement between the parties, make an order with regard to the matters referred to in paragraphs (a) and (b) of subsection (1).”

In *Gonye v Gonye* 2000 (1) ZLR 232 (S) MALABA JA (as he then was) spelt out how the court should exercise its discretion under this section in the following words;

“The court has a wide discretion in the exercise of its powers under section 7 (4) of the Act. The assets upon which a court has to exercise such discretion are the assets of the spouse 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 spouses are separated should be excluded from the division, apportionment and distribution exercise. The concept “assets of the spouse” is clearly intended to have assets owned by spouses individually (his or hers) or jointly (theirs) at the time of dissolution of the marriage by the court, considered when an order is made with regard to the division, apportionment or distribution of such assets.”

The proper approach to be adopted while distributing assets was laid down by McNALLY JA in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) as follows:

“The duty of a court in terms of s7 of the Matrimonial Causes Act involves the exercise of a considerable discretion, but it is a discretion which must be exercised judicially. The court does not simply lump all the property together and then hand it out in as fair a way as possible. It must begin, I would suggest, by sorting the property into three lots, which I will terms “his”, “hers” and “theirs”. Then it will concentrate on the third lot marked “theirs”. It will apportion this lot using he criteria set out in s7 (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.

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Next it will look at the overall result, again applying the criteria set out in s7 (3) and consider whether the objective has been achieved, namely, “as far as is reasonable and practicable and, having regard to their conduct is just to do so, to place the spouses ... in the position they would have been 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 something which is actually “his” or “hers.” (my emphasis)

Discussing the concept of registration of rights in immovable property, the court in the *Takafuma* case *supra* stated:

“The registration of rights in immovable property in terms of the Deeds Registries Act (Chapter 139) is not a mere matter of form. Nor is it simply a device to compound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of “real right” in s2 of the Act. The real right of ownership, or *jus in repropria*, is the sum total of all the possible rights in a thing”. See *Wille’s Principles of South African Law* 8 ed p 255.” See also *Mtengwa v Mtengwa* 2010 (1) ZLR 312 (H)

Applying the above principles to the present case, it should be noted that unlike in the *Takafuma* and *Mtengwa* cases, the property *in casu* is registered in the plaintiff’s name. It follows that at law it is “his” property. The parties’ marriage is out of community of property. The Married Property Act (Chapter 5:12) section 2(1) provides as follows:

“Community of property and of profit and loss and the marital power or any liabilities or privileges resulting therefrom shall not attach to any marriage solemnized between spouses whose matrimonial domicile is in Zimbabwe, entered into after the 1st January 1929 unless such spouse shall by an instrument in writing signed by each of them prior to the solemnization of their marriage and in the presence of two persons one of whom shall be a magistrate who shall subscribe thereto as witnesses have expressed their wish to be exempt from the Act.”

The meaning of the above provision is that arising from the type of the marriage, the house in dispute which is registered in plaintiff’s name is his property in his sole right. It is not “theirs”. It follows therefore that 1st defendant’s argument that she is entitled to be awarded the

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house because it is a matrimonial house belonging to both of them is flawed both in facts and in law. On the evidence, it is clear that it is the 1st defendant who is claiming compensation from plaintiff for her indirect contribution in the acquisition of the house. Simply put, the house is not their property, it is plaintiff's property. Plaintiff has offered fifty percent of the value of the house as compensation which 1st defendant has accepted but wants the whole house awarded to her with plaintiff being compensated by getting 50% of its value. In other words she desires to buy out plaintiff's ½ share in the house. I take the view that since plaintiff has the rights of an owner, such rights should only be taken away in very compelling circumstances. *In casu*, there are no such compelling reasons why plaintiff should be deprived of his right of ownership.

Further, if the house is awarded to the 1st defendant, the order is likely to be rendered inoperative in that firstly, 1st defendant, in her own admission has no capacity to compensate plaintiff. On the other hand, plaintiff does have that capacity. Secondly, if 1st defendant were to be awarded the house, the plaintiff in addition to losing the house would have to pay Capital Gains Tax, an expense that can be avoided by letting him retain the house. On the other hand, 1st defendant would be expected to pay stamp duty and transfer fees for the house to be transferred into her name. Again on her own admission she does not have such money. It is common cause that since July 2011, plaintiff has been residing alone in the house, while 1st defendant has been residing in a house supplied by SOS Trust her employer. If the house is awarded to her, this would cause undue hardship to plaintiff who would remain without accommodation.

In addition to her argument that the house is a matrimonial house and therefore jointly owned, 1st defendant contended that because she has the custody of the children she ought to be given ownership of the house.

In my view, this cannot be reason enough to deprive plaintiff of his ownership right because there is a current maintenance order that caters for the needs of the children.

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In all the premises, having regard to the fact that plaintiff is the owner of the property and that he had offered to compensate 1st defendant fairly for her indirect contribution, it would be fair and equitable that plaintiff be awarded the house and that he compensates 1st defendant by paying her the sum of US\$20 000,00 within 6 months of the court order.

The flash point in this case is whether the court should pierce the corporate veil and rule that Rubin Mansions should form part of the matrimonial property for distribution notwithstanding that it is registered in the name of a separate legal entity. The starting point is that a company duly incorporated is a distinct legal personality. See *Salomon vs Salomon & Co Ltd* [1897] AC 22 where it was held that, “However, the veil of incorporation may be lifted where necessary in order to prove who determines or who is responsible for the activities, decisions and control of a company.”

In deciding whether or not to lift the corporate veil, LORD DENNING’S comments in *Wallersteiner v Moir* [1974] 3 ALLER 217 (CA) at 238 are apposite. He stated;

“... I would assume, too, that they were distinct legal entities, similar to an English limited company. Even so, I am quite clear that they were just the puppets of *Dr Wallersteiner*. He controlled their every movement. Each danced to his bidding. He pulled the strings. No-one else got within reach of them. Transformed into legal language they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures for whose doings he should be, and, is responsible.

In *Sibanda & Anor v Sibanda* 2005 (1) ZLR 97 (S) at page 103D-104D it was stated as follows:

“Indeed, the evidence of the respondent was that the appellant registered all properties he acquired in the name of companies to keep them from the reach of his many creditors. JLF was, as I have stated above, cited as a party in these proceedings but did not enter an appearance to defend. The conclusion is irresistible that the appellant controls JLF.”

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The principles governing the lifting of the corporate veil were discussed in numerous cases. The following are some of these cases; *Deputy Sheriff, Harare v Ecoplastics (Pvt) Ltd* 2011 (2) ZLR 104 (H) at 104E-F, where GOWORA J (as she then was), held that:

“The court does not have a general discretion to simply disregard a company’s separate legal personality whenever it considers it just to do so, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it.

Proof of fraud, dishonesty or other improper conduct might justify piercing the corporate veil ... Generally, though, there would have to be an element of fraud or other improper conduct of the company affairs; similarly where the separate corporate identity can be said to be a device, stratagem, cloak or sham, the corporate veil might be lifted.”

PATEL J (as he then was) added the following comments in *Deputy Sheriff v Trinpac Investments (Pvt) Ltd & Anor* 2011 (1) ZLR 548 (H) at 548H-549C,

“While the cardinal principle of company law is that a company is a separate entity distinct from its members, there are well established exceptions to the principle, grounded in policy consideration. When the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association. When the corporation is the mere *alter ego* or business conduct of a person it may be disregarded. Where the corporation is organised or maintained as a device in order to evade an outstanding legal or equitable obligation, the courts, even without reference to actual fraud, refuse to regard it as a corporate entity. Where fraud, dishonesty or other improper conduct is found, the need to preserve the separate corporate identity would have to be balanced against policy considerations which arise in favour of piecing the corporate veil. The court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie.”

In applying these principles to the facts *in casu*, I need to first examine the nature of 1st defendant’s cause of action vis-à-vis Rubin Mansions. What should be stated from the outset is that the 1st defendant did not plead as her cause of action that the immovable property was acquired by the spouses through the 2nd defendant and that there are justifiable grounds for

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piercing the corporate veil in order to achieve justice between the divorcing spouses. Instead, she attested in her synopsis of evidence that she will lead evidence to show that ownership of Rubin Mansions was registered in the name of the 2nd defendant by the plaintiff in an attempt to deprive her of her share over the property – see par 2, p 48 of pleadings.

It is trite that in the absence of a cause of action, the plaintiff faces the daunting task of justifying the piercing of the corporate veil because of the failure to disclose the basis for lifting the veil. The 1st defendant did not plead fraud nor did she plead any facts which demonstrated the presence of manifest injustice. See *Sports and Recreation Commission v Nhera & Ors* HH-72-09.

The 1st defendant's pleadings and her oral evidence in court shows that she was trimming her sails to the wind by adjusting and changing the nature and basis of her claim in respect of Rubin Mansions as the proceedings progressed. This is clearly evidenced by the following:

- (a) Initially she averred that after the 2nd defendant purchased Rubin Mansions, ownership thereof was registered in the name of the plaintiff who clandestinely transferred ownership to the 2nd defendant in order to defeat her claim over the property. When she so claimed, she was not aware of the document trail on p 89-125 of 2nd defendants' bundle of documents which shows when and by whom Rubin Mansions was purchased, and the conveyancing process that was done by Calderwood Bryce-Hendrie & Partners who erroneously registered the title deed to the property in the name of plaintiff resulting in another conveyancing process transferring the property from the plaintiff to the rightful purchaser the 2nd defendant.
- (b) After realising how the property was purchased and transferred, she changed and started alleging that she is a shareholder in 2nd defendant. She also attacked all company documents of the 2nd defendant indicating that there are other shareholders apart from her and plaintiff as fraudulent and invalid. However, the 1st defendant could not produce a share certificate as proof of her shareholding in 2nd defendant. She only relied on the one

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share she once held as a nominee of the plaintiff at the time the 2nd defendant was purchased as a shelf company in 1995. Despite the undeniable fact that 1st defendant was a “nominal” shareholder, she somehow argued that she held 50% of the shareholding in the 2nd defendant. Surprisingly, she could not explain why if she considered herself a shareholder in her own right in the 2nd defendant, she did not in her pleadings make any claim regarding the value of her alleged shares in the 2nd defendant.

- (c) Further, 1st defendant could not explain why if Rubin Mansions was purchased by herself and the plaintiff she did not include the property as part of the matrimonial assets of the spouses when she applied for a provisional order interdicting the plaintiff from disposing matrimonial assets pending the divorce proceedings and placing a caveat on the title deed to the matrimonial home. The application for the provisional order was granted under case number HC 3226/04 on 19th August 2004 when the agreement of sale in terms of which the 2nd defendant purchased Rubin Mansions is dated 8 July 2004. See page 89 of the 2nd defendant’s bundle of documents.
- (d) Under cross-examination by counsel for the 2nd defendant, 1st defendant shifted her position again, this time claiming that she believed that her appointment as one of the directors of the 2nd defendant in 1995 that position gave her a stake in the assets of the 2nd defendant and she should not have been removed from the directorship without her consent. According to her, the 2nd defendant was a family company owned by herself and the plaintiff.
- (e) First defendant could not explain what was clandestine about the transfer of ownership of Rubin Mansions from the plaintiff’s name to that of the 2nd defendant in light of the document trail.

In the circumstances, I find that the 1st defendant’s evidence in its totality did not support her pleaded cause of action in respect of Rubin Mansions. She concentrated on allegations of a conspiracy against her by the plaintiff and his family members to deprive her of her share in Rubin Mansions. The problem with her evidence is that it revealed a lot of prevarication. By contrast the plaintiff and his niece, Nonhlanhla Tshuma gave clear and straightforward evidence

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on the affairs of the 2nd defendant and on how Rubin Mansions was purchased. This evidence was corroborated by a clear and authentic document trail showing the shareholding in the 2nd defendant from the time it was purchased in 1995 as a “shelf company” and the subsequent allotment of shares to other shareholders who are reflected in the current CR2 form filed on the 19th of February 2007. All 1st defendant could allege was that these transactions were null and void because she had been excluded from running the 2nd defendant unlawfully in contravention of provisions of the Companies Act.

First defendant argued that the plaintiff and herself were the only directors and shareholders. Her removal from the post of director was done unprocedurally so was the allotment of shares to the plaintiff’s family members. She further argued that because of the numerous violations of the provisions of the Companies Act, the 2nd defendant was merely the *alter ego* of the plaintiff and for this reason the corporate veil should be lifted thereby allowing the immovable property known as Rubin Mansions to be dealt with as a matrimonial asset.

I am not persuaded by the argument that the allotment of shares to the plaintiff’s relatives was simply a ruse and subterfuge by the plaintiff to deprive the 1st defendant of her share in Rubin Mansions. The evidence shows that although plaintiff is the majority shareholder, the 2nd defendant is certainly not his *alter ego* as there are 8 other shareholders. A lot of reliance was placed by the 1st defendant on plaintiff’s admission that he was “running” the 2nd defendant as the majority shareholder. The point is that, the fact that plaintiff played a leading role in managing the affairs of the 2nd defendant does not *per se* amount to improper conduct in the establishment or use of the 2nd defendant. There is no evidence of the existence of fraud or denial of manifest justice in the allotment of 2nd defendant’s shares. On the evidence, it is apparent that the 2nd defendant is a family business wherein the 1st defendant is neither a shareholder nor a director. The 1st defendant’s grievance about her removal from the position of director of the 2nd defendant or the allotment of shares of the 2nd defendant are issues that should not be dragged into the divorce proceedings as 1st defendant can still pursue those matters after the divorce. In the totality of the circumstances, I find that the 1st defendant has failed to

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discharge the onus on her to prove that circumstances exist which justify the piercing of the corporate veil. Accordingly, 1st defendant's claim on her pleadings as regards Rubin Mansions must fail.

However, in my view, it would be just and equitable applying the criteria set out in section 7 (3) (4) *supra*, to take into account the plaintiff's value of the shareholding in the 2nd defendant as part of "his" assets for purposes of distribution upon divorce. This is so because although 1st defendant did not directly contribute in monetary terms to the acquisition of Rubin Mansions, she did so indirectly. It is common cause that the plaintiff holds a substantial stake in 2nd defendant. I do not agree with the formula suggested by counsel for the 1st defendant in ascertaining the extent of plaintiff's shareholding. The fact that the other shareholders are the parties' children does not diminish their rights as shareholders. In the circumstances, I take the view that the 1st defendant be awarded 50% of the value of plaintiff's shareholding in the 2nd defendant.

Accordingly, it is ordered that:

- (i) A decree of divorce be and is hereby granted.
- (ii) The custody of the 2 minor children namely, Nandipha Tshuma (a female) born on the 10th April 2000 and Lubelihle Yenziwe Tshuma (a female) born on the 6th December 2005 be and is hereby awarded to defendant with plaintiff being granted reasonable access to the children.
- (iii) That the maintenance order registered at the Magistrates' maintenance Court shall regulate the issues relating to the maintenance of the 2 minor children, namely Nandipha Tshuma (a female) born on the 10th April 2000 and Lubelihle Yenziwe Tshuma (a female) born on the 6th December 2005.
- (iv) That each party be and is hereby declared the sole and absolute owner of the movable assets in their respective possession at the date of these presents.

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- (v) That the property being stand 15558 Bulawayo Township of Bulawayo Township Lands also known as 5 Shaw Close, Sunnyside, Bulawayo, be and is hereby declared the property of plaintiff.
- (vi) That plaintiff shall pay to defendant in full and final settlement the sum of US\$20 000,00 representing 1st defendant's share of 5 Shaw Close, Sunnyside, Bulawayo.
- (vii) That plaintiff shall pay to 1st defendant the said sum of US\$20 000,00 within 6 months of the court order, failing which 1st defendant be and is hereby authorized to execute this order.
- (viii) That the 1st defendant's counter claim in respect to the 2 immovable properties be and is hereby dismissed.
- (ix) That the plaintiff shall pay to the 1st defendant 50% of the value of his shares in 2nd defendant within 6 months of the court order, failing which 1st defendant be and is hereby authorized to execute this order.
- (x) That each party shall bear its own costs of suit.

Webb, Low & Barry, plaintiff's legal practitioners
Calderwood, Bryce Hendrie & Partners, 1st defendant's legal practitioners
James Moyo-Majwabu & Nyoni, 2nd defendant's legal practitioners