

SILIBAZISO ZIKWATURE

versus

ELLIOT ZIKWATURE

And

TARIRO ZIKWATURE

And

MILDRED MADZIMURE

And

ZIKWA DRIVING SCHOOL (PVT) LTD

HIGH COURT OF ZIMBABWE

ZISENGWE J

MASVINGO, 10 MARCH, 9 MAY, 13 JUNE 2022, 18-19 MAY & 9 AUGUST
2023

Opposed Application

WT Davira and F Mrehwa, for the plaintiff
T. Kamwemba for the 1st and 4th Defendants

ZISENGWE J: This is an action for divorce and ancillary relief. The parties are married in terms of the Marriage Act, [*Chapter 5:11*] which marriage was solemnised on 30 March 2007. The marriage was blessed with two children both of whom are still minors. Lately, however, the marriage has been rocked by disarming prompting the plaintiff to institute these divorce proceedings alleging infidelity and cruelty on the part of the defendant, and the overall loss of love and affection between them. Shortly the inclusion of the 2nd, 3rd and 4th defendants will be

explained. However, for brevity, the term "parties" will be used to refer to the plaintiff and the 1st defendant who are the main protagonists in what is essentially a matrimonial dispute.

The parties have since agreed that their marriage has irretrievably broken demand and therefore that a decree of divorce be granted. At the Pre-trial conference (PTC) held before Mawadze J on the 15th of October 2021, the parties agreed not only on the dissolution of the marriage as aforesaid but also to a distribution of all the household goods and effects including one motor vehicle, namely a Mercedes Benz A 170. They have also tentatively agreed that custody of two minor children is awarded to the defendant subject to him waving any right to a maintenance contribution from the plaintiff for those two children.

However, the parties remained poles apart on the distribution of the bulk of the assets constituting their sizeable matrimonial portfolio. The word "apparently" is used given the sharply diametrically opposite positions by the parties on the inclusion or exclusion of many of those assets from the distribution matrix. I pause here to point out that the joinder of the 2nd, 3rd and 4th defendants in this suit was necessitated by the fact that some of the assets constituting the subject matter of this dispute are requested in the name of the 4th defendant. The latter is a duly registered company which operates a driving school in Gweru, the 2nd and 3rd defendants are listed in the company documents (primarily the CR 14 document) as directors in the 4th defendant. They also hold share certificates apparently confirming the extent of their shareholding in that company.

Solely for purposes of convenience and ease of comprehension the outstanding assets which form the subject of intense contestation between the parties will be divided into five categories namely,

- (i) The immovable property
- (ii) The motor vehicles
- (iii) The shares in Zikwa Driving School (Pvt) Ltd
- (iv) Cash in South Africa Rand and United States Dollars

The Immovable property:

The following properties were listed in the plaintiff declaration (and subsequently in the PTC referral minute) as being subject to distribution in terms of section 2 of the Matrimonial Causes Act, [Chapter 7:05]

- (a) House No. 8581 Windsor Park Gweru

(b) House No. 2623 Ascot Infill, Gweru

(c) Stand No. 13843 Gweru

The motor vehicles

The following motor vehicles are the subject of much contestation between the parties primarily on account of whether or not for part of matrimonial property (and hence fall for distribution) or they belong to Zikwa driving school, which at law is a separate legal persona (and therefore should be excluded from distribution under section 7 of the Matrimonial Causes Act)

- (i) White Hino F Series Reg No. AEK 4491
- (ii) Silver Nissan March Reg No. ADE 0511
- (iii) Silver Toyota Duet Reg No. ACH 0511
- (iv) Silver Toyota Starlet Reg No. ADE
- (v) Yellow Suzuki Reg No. ABU 4240
- (vi) Blue Nissan March Reg No. AEP 3191
- (vii) Gold Toyota Duet Reg No. AEC 0553
- (viii) Silver Nissan March Reg No. AEJ 2595
- (ix) Lime Green Toyota Vitz Reg No. AEV 5031
- (x) Nissan UD ACC Reg No. ACC 0725

Shares in the 4th Defendant

The main issue here is the award of shares in Zikwa Driving School. Whereas the plaintiff insists on a 50-50 split of those shares between herself and the 1st defendant, the latter on the other hand maintains that the shares be distributed as per the existing share certificates held by the plaintiff and each of the 1st, 2nd and 3rd defendants.

Cash

Here the main bone of contention is whether cash in the sum of R 300 000 and US\$ 2 500 which at some point was kept at Zvikwa Driving School offices was the parties' "family" savings as alleged by the plaintiff or it belonged to the Zikwa Driving School as maintained by 1st Defendant. Also related to this particular issue is the question of whether or not the plaintiff returned the sum of R140 000 which she took from the safe at Zikwa Driving School.

The plaintiff's position is that she is entitled to a half share of the stated sums of money as the same was part of her family saving. The 1st defendant's position on the hand is not only that

the amounts in question belonged to Zikwa Driving School but also that they have since been depleted during the course of the latter's day-to-day business affairs. He also maintains that the plaintiff stole the sum of R140 000 which she has not returned to date and that the 4th Defendant is keen on recovering the same through legal means including through criminal proceedings against the plaintiff.

She indicated that she was deeply immersed in the entire process of purchasing the stand, the acquisition of the building materials and the actual construction of the house she further indicated the property is referred to in both her and 1st Defendants' names.

She rejected the suggestion by the 1st defendant that she be awarded only 30% of the value of that property with the 1st respondent being awarded the rest -insisting as she did on an equal sharing of the same. She further denied assertions put to her during cross-examination that her financial commitments towards her two other children from previous relationships prevented her from making any meaningful contributions towards the acquisition and development of this property. While acknowledging her material and financial support for those children, she would, however, insist that the bulk of the money expended on the purchase and development of the Windsor property came from proceeds realised in the Zikwa Driving School business.

With regards to the Ascot in-fill property, the plaintiff insisted that she is entitled to a 50% share of the developments made to the same. Her evidences in this regard was that at the inception of her relationship with the 1st defendant in 2003 the latter showed her an undeveloped stand which had been donated to him by his father. According to her the very next year they started cohabiting elsewhere and in the interim the construction of the home took place. She described the current structure erected thereon as a 5 roomed home situated in a high-density area which is gated and has a security wall erected around it.

In justifying the 50% claim of the value of the improvements of the stand, she testified that whereas 1st defendant expended his earnings from his job as a driving school instructor on the construction of the house, she would use her earnings from her job as a police officer catering for their rentals and other day to day expenses. She also stated that so great were her financial obligations in minting the household that she ended up disposing of a stand she had acquired through the Ministry of Public Works and National Housing to cater for those domestic demands.

She further testified that she and 1st defendant moved into the property sometime in 2007 despite it being incomplete at that stage.

As with the question of her contribution towards the Windsor Park property, she would deny under cross-examination suggestion that her financial obligations towards the first 2 children, rendered it impossible to make any meaningful contribution towards the development of the Ascot infill property. She insisted that she bear the responsibility of paying rent and buying food.

As far as Stand No. 13843, Mkoba stands (the Mkoba stand) is concerned, it was the plaintiff's evidence that she and the 1st defendant purchased the same in or around the year 2017 (the property was purchased in 2014 as shown by the offer to that effect). She justifies her claim to an equal share of its value on the basis that it is business. Ultimately, however, this property proved non-contentious as the 1st defendant acceded to a 50-50s sharing of its value.

Regarding shares in Zikwa Driving School, the plaintiff's evidence was that she is entitled to a 50% share thereof given her immense contribution toward its establishment traced respectably. She traced the history of the company from its humble beginnings to the respectable enterprise that it is today. She testified that she and the 1st defendant purchased their inaugural vehicle using cash (a Renault 18 Sedan in what she described as a swop and top). This was during a period when the now humble sim card used was much sought after and fetched high prices on the market. Thereafter the company grew from strength to strength culminating in its registration as a private limited company in 2011.

Most significant, however, she indicated that Zikwa Driving School is and has always been for all intents and purposes, a" family "business. "Family" in the sense that its true ownership vests with her and the 1st defendant. According to her, the 2nd and 3rd defendants were only roped in to meet the statutory requirement which obtained them for the existence of at least four directors for the registration of a company.

She therefore branded (without saying so in as many words) mere placeholders who were included in the company registration papers for window addressing or convenience purposes. She indicated in this regard that a decision was taken between her and 1st defendant to include the 2nd and 3rd defendants instead of any outsiders. She further testified that was even though the 3rd and 4th defendants contributed nothing towards this company.

As far as she is concerned not only did the 2nd and 3rd defendants not contribute anything to the establishment of the company but also that they have never been involved at all in any of its operations nor have they been receiving dividends of whatever form therefore. She claims that she would do most of the administrative duties for the company -which clients included attending to clients, receipting payments from clients, attaching to issues with the governing body the Zimbabwe Traffic Safety Board/Council, purchasing fuel and registration of new motor vehicles etc.

Closely related to the above was the plaintiff; evidence regarding the fourteen vehicles listed in the pleadings. Whereas 4 of the vehicles are registered in the name of Zikwa Driving School, the remaining 10 are registered in the 1st respondent's name. f Fore plaintiff the name in which the motor vehicles are registered is immaterial as she lays a claim to 50% of those motor vehicles. As for the 4 motor vehicles registered in Zikwa Driving School she claims to derive that share an account of her shareholding in Zikwa Driving School. As for the other 10 motor vehicles which are registered in the 1st defendant's name, her claim is based on her assertion that the said motor vehicle belongs to the 1st defendant and therefore that they fall for distribution in the ordinary course under section 7 of the Matrimonial Causes Act.

She would dispute that the 10 motor vehicles registered in the 1st defendant's name as a matter of fact belong to Zikwa driving school. She testified that if the 10 motor vehicles registered in the 1st defendant's name are deemed to belong to Zikwa Driving School she would be unduly prejudiced thereby because then the 2nd and 3rd respondents who did not contribute towards their acquisition would be unjustly enriched at her expense. Perhaps most importantly she insisted that her contribution towards the acquisition of those.

During cross-examination, she however conceded that those 10 motor vehicles were sometimes used in Zikwa Driving School as part of its day-to-day operations. She however insisted that they nonetheless belong to the 1st defendant in this private capacity. She insisted that those motor vehicles would be used both at in Zikwa Driving School for personal/private use by the parties.

She would be quizzed under cross-examination as to why none of the decades of motor vehicles is registered in her name if her assertion of equal contribution is to behave. In response

she must that she said nothing wrong with those motor vehicles being registered in the 1st respondent's name.

She would equally dismiss assertions put to her under cross-examination that the written acknowledgement by the Zimbabwe Traffic Safety Council of the use of motor vehicles in the Zikwa Driving School; asset register constituted proof of the latter ownership of the same. As regards the Zimbabwe Traffic Safety Council..... letter, it was the plaintiff's position that the use by Zikwa Driving School of 10 motor vehicles was merely one of convenience and did not in the least mean transfer of ownership. As for the assets register, she expressed ignorance of its existence before it was produced in court during these proceedings.

On the question of why an individual would find it necessary to accumulate such a haul of motor vehicles for private use, she responded that it was simply because Driving School was his personal 'asset'. She would further testify that the motor vehicles were registered in the defendant's name for the simple reason that it was he who would do the actual physical purchase of the motor vehicles from South Africa.

One motor vehicle registered in the defendants' name deserves special mention. That is NISSAN UD truck registration number 0725. Refuting the 1st defendant's position that this motor vehicle should be excluded from the distribution matrix on account of its sentimental value to the 1st defendant, the plaintiff insisted on its inclusion in the distribution matrix. While acknowledging that this truck is the very first truck they purchased for the company, she would nonetheless insist that it was purchased through the parties' collective efforts and cannot, therefore, be excluded from distribution. She is therefore insistent on a 50% share of that asset.

The final portion of her evidence relates to the cash consisting of R300 000 and US \$ 2 500 was in 1st defendant's possession when she left the matrimonial house at the height of the squabbles between them.

When confronted with 1st defendant's version that the said amounts were Driving School property and that those amounts have since been depleted or exhausted in the ordinary course of company business, she responded that the money per se but was company money meant for the purchase of yet another truck.

She would acknowledge having taken the sum of R140 000 from the company's safe when she temporarily left the matrimonial have in a huff on 21 March 2020 at the height of incessant

disarming but claims to have returned it afterwards when the two of them temporarily buried the hatchet and reconciled. She indicated that when she took the money, she left behind a note acknowledging having done so. She would also concede under cross-examination that she did not similarly leave a note when she retired it.

She would be taken to task on the source of the R140 000 she took, it is suggested that it was company money requiring the consent of the directors for it to be taken (which consent she never bothered to obtain). She however deemed that assertion insisting as she did that this money was merely part of the parties' savings *albeit* derived from the company business.

When confronted during cross-examination with the question of the civil suit instituted by the 4th defendant to recover the money, (it being purportedly indicative of the latter's ownership of that amount), the plaintiff stated that this was merely a malevolent ploy to inflict pain on 1st defendants' evidence.

As far as the Windsor Park property the 1st defendant's position is that the plaintiff should only be awarded 30% of its value with him being awarded to remaining 70%. In justifying this ratio, it was the 1st defendant's evidence that he contributed approximately 70% towards the accusation and development of that property. It is his further evidence that the plaintiff who is a police officer contributed marginally. While acknowledging in his evidence that the property was purchased and developed and most exclusively from profits realised from the company, he would refute the plaintiff's evidence that she also rendered work in whatever capacity in the company.

He also referred to his physical efforts in scouting for the property and procurement of binding materials such as bricks and the supervision of builders and related physical and mental exertion as justification for claiming 70% of the value of the Windsor Park property. The 1st defendant also referred to his custody of the two minors' children. As further justification for his claim for Hon's share of the Windsor Park property and that in any event according to him the property was primarily acquired for the children.

Furthermore, 1st defendant indicated that the plaintiff was a man and tight-fisted with her finances and never lent a helping hand towards the acquisition and development of the property. Further, according to him, the plaintiff aids precious little towards the development of the structure on the property. He stated that the plaintiff was in any event preoccupied with finding for her first two children born of wedlock.

While confirming under cross-examination that the property is registered in both his and the plaintiffs' name, he would nonetheless maintain that the plaintiff is only entitled to 30% of its value. He would also maintain under cross-examination that not only did he contribute the bulk of the money needed for acquiring and developing the Windsor Park property but also that it was through his sole physical industry that the fact of developing the same was achieved. Therefore, it was his evidence under cross-examination that despite the presumption of equal ownership of property that arises from joint ownership, the circumstances of this present matter justify him being awarded 70% against the plaintiff's 30%.

Under an award of 70%, the 1st respondent urges the court to allow him to buy out the plaintiff's 30% stake in the Windsor property subject to him being afforded ample time to do so.

Regarding the Ascot in fill property, it was the 1st defendants' evidence that the same was donated to him (he used the ward inherited) by his father Timothy Zvikwature in 2007. He also testified that he took occupation of that property the same year. He indicated in his regard that he received it as a fully completed house from Zvikwature Senior after the latter had acquired it in 2004 before developing it. He also testified that at the time of receiving this donation he and the plaintiff were not yet staying together as they were only in a romantic relationship. According to him therefore it was virtually impossible for the plaintiff to have contributed towards the development of that property.

At one point in his account, he indicated (rather flippantly) that in 2007 he did not even know the plaintiff and therefore that her claim towards the contribution of that property. This then invited questions in cross-examination on how it was possible it was to have sired their first child together in 2006 without even knowing each other. Needless to say, this prompted the 1st defendant to somewhat back track and modify his history of association with the plaintiff prior to sealing their marriage later. Be that as it may, he completely denied that he received the Ascot property as merely an undeveloped stand. He also categorically denied the assertion put to her during cross-examination that whereas his salary went towards the construction of the Ascot property, the plaintiff's income went towards catering for the couple's other day-to-day expenses including rentals and food. Plaintiff's counsel made a meal of the apparent failure of the 1st defendant to challenge the plaintiff's evidence in that regard.

I take a brief “detour” from the 1st defendant’s evidence to highlight his fathers’ evidence which evidence almost exclusively related to the Ascot infill property.

The evidence of Timothy Zvikwature

Timothy Zvikwature is the 1st defendant’s father. He is a retired District Development Fund (DDF) employee. In short, it was his evidence that he acquired the Ascot infill stand from Gweru Municipality in 2003. Thereafter he constructed a house on it before asking the 1st defendant and the plaintiff (who were at that stage elsewhere) to come and take occupation thereof.

He would initially indicate that the property still belongs to him given that all he did was to allow the parties temporarily use it in their time of need, but would make an about-turn and claim that he donated the house to the 1st defendant. He also branded that donation “an inheritance” when asked to reconcile which of the three versions is in fact the correct state of affairs (whether it was a donation to 1st defendant, a donation to the plaintiff and 1st defendant or that the property is still his) Zikwature senior indicated that the simply asked the parties to use the property and that the property still belongs to him.

Be that as it may, he revealed that the parties started staying on the property in 2007 on New years.

Most importantly however it was his evidence that by the time the parties commenced staying in that property, there was a developed house on it (save for a few outstanding minor touch-ups). He indicated under cross-examination that he finished building the home at the end of 2005 and that between its completion in 2007 and the parties taking occupation thereof in 2007, a tenant was using it. He would categorically dispute the plaintiff’s version that when this property was donated it was merely an undeveloped stand.

He would however prevaricate under cross-examination on when the parties started staying together. In one breath he gave the impression that the parties only started staying together prior to their relocation into the Ascot property in 2007 but in the next breath he would indicate to the contrary.

Reverting now to the 1st defendant’s evidence. With regard to the Mkoba property, the 1st defendant readily agreed the parties be awarded equal shares with the plaintiff being given an opportunity to buy off his share should she be so inclined.

As for the hotly contested decision of motor vehicles requested in his name, it was the 1st defendants' position that these unquestionably belong to the company and do not fall for distribution. He referred to the Zimbabwe Traffic Safety Council document dated 15 March 2003 (exhibit x).

The said document reads

"To whom it may concern

This is to certify that the following vehicles are registered under Zikwa Driving School (Pvt) Ltd:

OPERATIONAL VEHICLES

- 1. AEV 5031 Toyota Vitz*
- 2. AEJ 2595 Nissan March*
- 3. AED 3191 Nissan UD*
- 4. ACC 0725 Nissan UD*
- 5. ADI 1998 Mercedes Benz*
- 6. ADX 2270 Isuzu*

CURRENTLY NON- OPERATIONAL VEHICLES

- 1. AEC 5709 Chevrolet Spark*
- 2. ADL 1252 Chevrolet Spark*
- 3. AEK 4491 Hino Series*

The document which is on the Traffic Safety Council Zimbabwe letterhead was signed by one C. Matete its (Given) Regional Manager.

In his endeavour to explain why motor vehicles belonging to the company ended up being registered in his name, the 1st defendant indicate that not only did he find nothing amiss in that arrangement given that he was the Managing Director of the company but also in light of the fact that he was in the interim "testing" the motor vehicles for their suitability to be eventually be used and registered in the name of the driving school. He would further explain in this regard that it was him in his capacity as Managing Director who purchased the motor vehicles in question. He however placed considerable emphasis and reliance on the document from the Zimbabwe Traffic Safety Council to ostensibly buttress the claim that the 10 motor vehicles a matter of fact belong to the company rather than him. Under cross-examination which was quite intense on this issue,

he would insist that the use of the motor vehicle within the company coupled with the said Zimbabwe Traffic Safety Council document was ample evidence demonstrating their ownership by the company. He would equally refute assertions put to him that the registration book was some form of *prima facie* evidence of their ownership by the company.

Finally, in his evidence, the 1st defendant testified about the disputed shareholding structure in the company. The thrust of his account in this regard was that the plaintiff is only entitled to a 15% share as shown by her share certificate and the company registration documents. As a matter of fact, he insisted that the 2nd and 3rd defendants are *bona fide* directors who also hold shares in the company at 35% and 15% respectively.

He would further testify that the 2nd defendant is the company's "buyer" and is strategically based in Harare where he can easily access spare parts for the company; motor vehicles as and when they are needed. He would therefore categorically dispute the plaintiff's assertions that the 2nd and 3rd defendants were mere "dummy" directors. He insisted that when the company was set up in 2011 it had 4 directors namely the plaintiff and each of the 1st, 2nd and 3rd defendants. he would shoot back and assert that as a matter of fact, it was the plaintiff and 3rd of who were "silent" directors who had been roped as a contingency in the case of his or 2nd defendant's untimely death.

Furthermore, he would dispute the plaintiff's account of the events surrounding the birth and establishment of the company branding her account as an embellishment of the role she played. His version was that she merely raised the initial through his savings from his and 2nd defendants'. He would further maintain under cross-examination that the plaintiff as a police officer at that stage lacked the financial wherein that to establish a company of that stature.

Ultimately therefore he vowed to dispute that the plaintiff was entitled to a 50% share of the company's shares insisting as he did that, she was confined to a 15% share thereof.

Though he insisted that the 2nd and 3rd defendants receive dividends from the profits generated by the company, was unable to produce documentary proof thereof.

The evidence of the company's Bonaventura Honzeri related mainly two issues namely the shareholding in the company and ownerships of the disputed decade of motor vehicles. It is to whose evidence I now finally turn. Briefly, Mr Honzeri joined the company at its inception in 2011, firstly as a part-time consultant accountant before assuming a full-time role recently after the institution of the present proceedings.

Regarding the directorship of the company, Honzeri testified that the plaintiff, 1st, 2nd and 3rd defendants were its Managing Directors and had the responsibility of dealing with the day-to-day running of the company. He described the role of the 2nd defendant within the company as consisting of purchasing spare parts for the company's motor vehicles when that was required. He relegated the role of plaintiff and 3rd defendants to mere passivity as "silent " directors.

Under cross-examination, he fell short of disputing the plaintiff's account regarding the establishment of the company. He however gave his own version revolving around 1st defendant purchasing a Nissan HB 11 motor vehicle which as far as he could recall was the company's inaugural motor vehicle.

He disputed the plaintiff's evidence that she was involved in administrative work with the company and stated that such a role fell squarely on his shoulders.

Most importantly however, he insisted in his evidence that as far as he was aware the shareholding structure of the company is exactly as depicted in its certificate of incorporation and the share certificates and that in this regard the plaintiff only holds 15% thereof.

He further estimated that the mere US\$10 000 given what he considered to be the decrepit state of its motor vehicles. He however stated under cross examination that the company has 7 employees, 5 of whom are "instructors".

Regarding the 10 contested motor vehicles, it was his evidence that these belong to the company and that their registration in the 1st defendant's name was only due to oversight on the part of the persons responsible for its functions. Much reliance was placed on the Traffic Safety Council of Zimbabwe document referred to earlier.

On the question of the disputed cash his evidence essentially mirrors that of the 1st defendant. In short, he indicated that the R300 000 included by the plaintiff in her claim was a party of the company's assets and that same has since been expended in the course of the company's business.

He also indicated that part of that sum amounting to R140 000 was unlawfully appropriated by the plaintiff and as far as he could gather from the 1st defendant same is yet to be returned and that legal proceedings have now been initiated (both civil and criminal) for its recover. This is according to information supplied to him by the 1st defendant.

Ultimately the overarching mandate of this court in this matter is to distribute the assets of the parties in such a way as to achieve the broad objective of section 7 of the Matrimonial Causes Act, [Chapter 5:13] namely to

"... endeavour as far as is reasonable and practicable and, having regard to their conduct is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses. "

There is no magic waved or one size fits all formula for such a distribution and every case turns on its own set of facts and the primary objective to achieve a fair division of the assets.

A few cases on the subject are

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Each of the 5 contested items will be considered in turn.

The Windsor Park property

Although the 1st defendant stove to suggest that he is entitled to the lion's share of this property he was unable to satisfactorily justify why that should be so. To begin with, property is registered in both his and the plaintiff's name and it is trite that joint ownership creates a presumption of equal ownership. In *Ishemunyoro (Nee Mandidewa) v Ishemunyoro & Ors sc 374/17*, GWAUNZA JA (as she then was) referred to a passage in *Chapeyama v Chapeyama 2000 (2) ZLR 175* at page 177B where the following was stated:

"In the first place, as already stated, the property was and is registered in the names of both parties. What this means is that Susan has a real right to the undivided half-share of the property. In other words, she is the registered owner of an undivided half-share of the property. "

More pertinently the court stated the following in paragraph 11 of the cyclostyled judgements

*"The title deed in casu does not define the shares owned by the appellant and the first respondent in the property. However, where the property is co-owned, there is a presumption that the parties own the property in equal shares. The position was enunciated in *Lafontant v Kennedy 2000 (2) ZLR 280 (S)* where the court held that;*

*Where two persons own immovable property in undivided shares (as is the case here) must, I think, be rebuttable presumption will be strengthened when (as here) the parties are married to each other at the time ownership was acquired. Thus, *Jones Conveyancing in South Africa 4th edition page 118* states:*

"Where transfers acquire in equal shares it need not be stated in the deed that they acquire in equal shares, as this fat is presumed in the absence of any statement to the contrary. "

In the present matter, the 1st defendant did precious little to rebut the presumption of equal ownership that comes with joint ownership. The contention that he is entitled to a larger share on account of the custody of the parties' two children cannot be sustained. This became such custody can be varied in future and lapses with the children's attainment are final in nature.

Equally unconvincing is the 1st defendant's contention that he contributed more in physical and material times towards the construction of the house than the plaintiff. As a starting premise one must accept that mainly due to entrenched societal gender roles in the household the parties are bound to contribute differently towards the sustenance of that household. Those differences do not always imply a lopsided overall contribution by the parties. For example, the physical or manual exertion by the man say is moulding bricks may for example be equalled by the woman's endeavours in keeping the home clean and habitable and the children tended and disciplined. This explains in part why the court is enjoined by section 7 (4) (e) of the Matrimonial Causes Act, to take into account "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 other domestic duties....."

Ultimately, therefore, as far as the Wino Park property is concerned, I find it fair and equitable to award each party 50% thereof.

The Mkoba 21 property

As indicated earlier, although the parties were initially at cross purposes on its distribution, the 1st defendant ultimately acceded to each party being awarded 50%. An order to that effect will be made.

The Ascot infill property

It is common cause that this particular property was acquired by the 1st before the parties' marriage came into existence. This was a summary from 2007, as per the 1st defendants' fathers' evidence was not meaningfully challenged.

The parties' marriage only came into existence in March 2007. Further by her very own admission, the plaintiff conceded that the house in question was constructed at a time when the parties were merely cohabitating. In this regard, she testified that she was shown this stand in 2003 and construction started the following years. In the course of this, she contributed indirectly

towards its construction. This contribution according to her came in the form of meeting the rental needs at their lodgings then. They only moved into the house in 2007.

What is abundantly clear therefore, even of the plaintiffs; account is to be believed is that the accusation of the stand through a donation by the 1st defendant's father and the subsequent construction of the property took place before the parties were married. The plaintiff's claim therefore strictly speaking cannot fall within the ambit of section 7 of the Matrimonial Causes Act. A direct set of considerations usually apply in circumstances such as the one at play.

More importantly, however, the evidence of the 1st defendant's father, its shortcomings notwithstanding struck me as being credible. His evidence to the effect that he donated the said property to the 1st defendant as a completed structure. He might have been ambivalent as to the current ownership of the house (in one breath he said the house belonged to him and in the next breath he gave the impression that he has since relinquished its ownership having donated it to the 1st defendant) but such prevarication did not in the least detract from the overall cogency of his evidence that he donated this property *inter vivos* 1st defendant as a complete and fully developed property.

There is therefore merit in the 1st defendant's contention that it is of sentimental value to him and will accordingly be excluded from the distribution equation.

The 10 motor vehicles registered in the 1st defendant's name.

Although the plaintiff endeavoured to convince the court that these motor vehicles belong to the 1st defendant in his individual capacity, the evidence is starkly at odds with such a proposition. To begin with, it is trite that the registration book bearing someone's name does not amount to proof of ownership, see *The Sheriff of Zimbabwe & Anor v Local Authorities Pension Fund* HH 585-16, *Enerst Majaji v Michael Madondo & 2 Ors* HH 311-17, *Air Zimbabwe (Pvt) Ltd & nor v Stephen Nhutu & Ors* SC 65/14 & *The Sheriff of Zimbabwe & John Keith Hensman & Arrow Estate Agent* HH 130-18. In the *Air Zimbabwe* case, the Supreme Court endorsed the following passage from a decision of the High Court

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.....

Logic and common sense in my view show that this disputed decade of motor vehicles belongs to the company why on earth would 1st defendant horde such a large number of motor

vehicles ‘for his personal use when he essentially runs a driving school? This is of necessity must be juxtaposed against the fact that the driving school only has 4 motor vehicles in its name.

The probabilities favour a strong inference that these motor vehicles were procured for purposes and were in fact being used as part of the company’s operational fleet. In any event, the plaintiff confirmed under cross-examination that the 10 motor vehicles in question were being used by the company in its operation, such a concession being confirmatory *albeit* indirectly that for all intents and purposes, the motor vehicles belonged to the company.

The confirmatory letter from the Traffic Safety Council Zimbabwe is not without significance. It serves to confirm the use of motor vehicles by the company. There would be no logic in the 1st defendant donating 10 motor vehicles belonging to him in his personal capacity for use in deriving lessons risking not only the wear and tear that naturally accompanies such a hazardous enterprise but also the omnipresent risk of accidents and mechanical breakdown of the said motor vehicles.

Further, if the 10 motor vehicles were “family” assets as opposed to company assets as the plaintiff wants the court to believe then surely some of them would have been referred when named yet none are.

I find credence in e 1st defendant's explanation that he did not find anything amiss with him as the Managing Director registering the motor vehicles in his name. he was responsible for procuring the motor vehicles in South Africa and elsewhere and he simply found it convenient to register the motor vehicles in his name.

The inclusion of the 10 motor vehicles in the company’s assets register provides additional support for the averment by the 1st defendant that they belong to the company.

Shares in Zikwa Driving School

The issue is not so much about the share structure of the company as it is about the non-appearance of the 2nd and 3rd defendants in this suit. Ordinary the plaintiff cannot be seen to demand a percentage greater than the one reflected on her share certificate. The share certificate is proof of one’s shareholding in a juristic entity such as a private limited company.....

The failure by the 2nd and 3rd defendants to some degree presents some challenges though not necessarily immutable. The starting point that a company is a legal persona separate from

members and directors is own property; *Salomon v A Salomon & Co. Ltd* [1896] UK HL 1 [1897] AC.

[extract the relevant positions from *Masiya Cleopas Gonye v Stella Maris Gonye SC* Judgement SC 15/09 reported.

It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible donation from this rule known to our law in those (practice) rare cases where the circumstances justify piercing or lifting the corporate veil. I do not find it necessary to consider or attempt to define the circumstances under whom the court will pierce the corporate veil. Suffice it to say that would generally have to include an element of fraud or other improper conduct in the establishment of complying or the conduct of its affairs.

Essentially the plaintiff, without saying so in terms urges the court to pierce the corporate veil to reveal the true identities of the persons behind the company.

I do not believe that there is justification for lifting the corporate veil in the circumstances of this case. The plaintiff acquiesced and was out of the arrangement wherein the 2nd and 3rd respondents were roped in constitute the minimum quartet of directors purportedly required at that stage to register a company. Showed this have been a façade to mislead the Registrar of Deeds (and ultimately the general public) as to the true shareholding of the company, that management apparently suited the plaintiff and served her well since 2011 when the company was registered. She cannot cry foul because the chickens have come hence to Roosa.

Over and above that I could not find from the evidence, any reason to disbelieve Bonventura's and 1st defendants' evidence that the 2nd defendant was an active participant in the running of the company's affair. This case is therefore distinguishable from that of *Van Nierkark v Van Niekark & Ors* 1991 (1) ZLR 421 (S), *Cattle Breeders Farm (Pvt) Ltd v Veldman* (2) 1973 (2) ZLR 261 and *Gonye v Gonye* 2009 (1) ZLR 232 where the company was no more than the alter ego of the sole director.

Although the failure by the 2nd and 3rd defendants' decision not to participate in the presents proceedings and being content with relying on the evidence of Bonventura Honzeri and the 1st defendant, that the 2nd defendant was actively involved in the affairs of the company and receiving "dividends " for his affairs.

Furthermore from 2011 when the company was registered and the shares therein allocated, the plaintiff being fully cognisant of the purported fictitious but convenient allocation of shares had ample opportunity to rectify that anomalous situation but she did precious little to do so. She cannot have it both ways. She cannot in one breath be content with a contrived arrangement supposedly to circumvent the requirements of the Companies Act and in the next breath seek to profit from he own deliberate improper conduct.

I also find it strange that if indeed it was a requirement of the legislation obtaining then regulating the registration of companies, she would agree to significantly lower shareholding (15%) than those of the fake directors (ie the 2nd defendant who holds 35%). One would have thought that if the 2nd and 3rd defendants had merely been roped in conveniently to fill the required number s same would have been awarded nominal shares. A nominal shareholder by definition is a person who does not have actual ownership right in relation to the company and acts at the direction of the real owner, the beneficial owner of the company with whom has a contractual relationship.

Why would the plaintiff agree that the 2nd and 3rd defendants be allocated a combined 50% of the company's share capital as against her significantly lower shareholding of only 15% of 2nd and 3rd defendants were not *bona fide* shareholders?

Therefore, this is one case where there is a need to pierce the corporate veil but even if one were to do so, one cannot conclude that the "overt" shareholding structure is different from the "covert" shareholding structure.

Ultimately therefore I find that the plaintiff is entitled to her 15% share of the value of the company.

The following order which incorporates all issues including those that were agreed upon at PTC is hereby made:

IT IS ORDERED THAT

1. Divorce

A decree of divorce between the plaintiff and 1st defendant be and is hereby granted.

2. Custody of minor children

Custody of the two minor children namely

a) Tatenda Timothy Zikwature born on 26 July 2016

- b) Vimbai Fortunate Zikwature born 21 October 2011 is hereby awarded to the 1st defendant.
3. Access
The plaintiff is hereby awarded reasonable access to the minor children referred to in paragraph (2) above every alternate school holiday.
4. Maintenance
a) There shall be no order as to the cost divorce spousal maintenance.
b) There shall be no order as to the maintenance of the minor children referred to in paragraph (2) above.
5. DIVISION OF ASSETS
- Movable items
- The following items are hereby awarded to the plaintiff:
- a) Mercedes Benz A170 motor vehicle Reg No. 9473
 - b) 1 set of floral sofas
 - c) 1 DSTV Decoder
 - d) Sonny's home theatre system
 - e) 1x 21-inch TV set (old model)
 - f) 1 wooden coffee table
 - g) 1 glass TV stand
 - h) 1 queen-sized bed
 - i) 1 double bed
 - j) 4-plate Superior stove
 - k) 3-piece metal kitchen unit
 - l) 1 ecco fan
- The following items are hereby awarded to the 1st defendant
- a) 1 set brown leather sofa
 - b) 1 DSTV décor
 - c) 1 open-view decoder
 - d) 1 ecco fan
 - e) 2 double beds

- f) 1 single double bed
- g) 3 wardrobes
- h) 3 shoe racks 1 black bedroom suite
- i) 1 Capri deep freezer
- j) 1 9kg gas tank
- k) 1 kitchen table with 4 chairs
- l) 10-piece dining room suite

Immovable property

- a) House No. 8581 Windsor Park Gweru awarded to the parties equally (i.e. 50% each) with the 1st defendant being granted the option to buy out the plaintiff's 50% share within 18 months of this order.
 - i) In the event of the 1st defendant exercising the buy-out clause the following shall apply
 - a) The property to be valued by an evaluator from a list of registered evaluators and the costs of the evaluation to be done by the 1st defendant.
 - b) Upon full payment of the value of the plaintiff share by the defendant the plaintiff is ordered to sign all relevant papers for the transfer of property to the 1st defendant within 1 month of such payment failing which the Sheriff of Zimbabwe shall be empowered to sign all such papers.
- 2 In the event of the 1st defendant failing to exercise his right to buy out the 50% share, the property is to be sold by private treaty to the best advantage of the parties.
 - b) Houe No. 2623 Ascot infill is hereby awarded to the 1st defendant for his sole and exclusive me.
 - c) Stand No. 13843 registered 1st defendant name is hereby awarded to the plaintiff and 1st defendant in equal shares.
- 6. Shares in Zikwa Driving School (Pvt) Ltd (the 4th defendant)
The plaintiff is hereby awarded a 15% share in Zikwa Driving School
- 7. Cash
There is no cash for distribution

8. Motor vehicles

The following motor vehicles are hereby declared to be to Zikwa Driving School (Pvt) Ltd (ie 4th defendant) in respect of which the order in paragraph 6 above Mutatis Mutandis applies:

- a) White Hino F Series Reg No. AEK 4491
- b) Silver Nissan March Reg No. ADE 0511
- c) Silver Toyota Duet Reg No. ACH 0511
- d) Silver Toyota Starlet Reg No. ADE
- e) Yellow Suzuki Reg No. ABU 4240
- f) Blue Nissan March Reg No. AEP 3191
- g) Gold Toyota Duet Reg No. AEC 0553
- h) Silver Nissan March Reg No. AEJ 2595
- i) Lime Green Toyota Vitz Reg No. AEV 5031
- j) Nissan UD ACC Reg No. ACC 0725

Gundu Dube & Pamachechi, plaintiffs' legal practitioner
Tavenhava & Machingauta, 1st & 4th defendants' legal practitioner