

JEANETTE MOIRA EDWARDS Applicant

and

BRIAN VICTOR EDWARDS Respondent

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 25 APRIL 2002

Opposed Matter

CHIWESHE J: The facts of this matter are largely common cause. The parties were previously married to each other. They were divorced by order of this court on 2 September 1994. Their proprietary rights were to be governed in terms of a consent paper. In terms of paragraph 3 thereof the parties were each to retain a twenty-five per cent shareholding in Glengarry Trading Company (Pvt) Ltd (hereinafter called "the company"). This arrangement was meant to confirm an agreement entered into by the parties during the subsistence of the marriage. The agreement was to the effect that respondent would pass on to applicant twenty-five per cent of the shareholding in the company. Pursuant to that agreement respondent in April 1985 presented applicant with a share certificate purporting to be a company certificate awarding her one share in the company.

At the time respondent advised applicant that this one share represented twenty-five per cent of the shareholding in the company. The certificate was signed

by respondent who was both a director of the company and the company secretary. As

it turned out no shares in the company were transferred to applicant either at the time

the share certificate was presented to her or at any subsequent stage.

In 1999 applicant's legal practitioner wrote to respondent demanding transfer

of the shares in terms of the consent paper. The shares have not been so transferred.

Consequently applicant has approached this court seeking an order compelling respondent to cause half his shares in the company which amount to twenty-five per

cent of the total shares issued in the company to be transferred to applicant, or

alternatively that respondent be ordered to pay to applicant the value thereof as

mutually agreed between the parties or failing which, at a sum determined by an independent valuer. Applicant further seeks an order compelling respondent to provide a full set of accounts of the company from 1st April 1985 to 31st December

1999 and pay to applicant all dividends to which she would have been entitled as a

twenty-five per cent shareholder in the company for that period.

On his part respondent avers that at the time that he issued the share certificate

to applicant he bona fide believed that he was entitled to do so. However, a subsequent perusal of the company's Memorandum and Articles of Association revealed that his action was "ultra vires" paragraph 115 of the Memorandum and Articles of Association. That paragraph according to respondent contains a restriction on the right to transfer and dispose of shares. In terms of that paragraph

should respondent wish to dispose of any portion of his share holding he must first

offer the shares for sale to his fellow director. The fellow director having indicated

willingness to purchase the share holding, it has become impossible for respondent to

transfer any shares to applicant. Consequently the applicant not being a shareholder is

not entitled to receive a dividend. Respondent avers that this position was communicated to the applicant at the time. However the share certificate is dated

1April 1985. If indeed both parties were aware of the impediments described by the

respondent, why would they in 1994 draft and sign a consent paper in which applicant

would retain shares that both parties ought to have known were incapable of transfer?

It appears that respondent's version of what transpired cannot be relied upon. In

entering the relevant arrangement in the consent paper respondent must have intended

to deceive the applicant in order to gain an unfair advantage in the distribution of the

matrimonial assets. He did not act in good faith. The truth of the matter lies in the

version given by the respondent.

In his heads of argument respondent concedes that given the wording of paragraph 115(b)(i) of the Memorandum and Articles of Association of the company,

the defence of impossibility cannot succeed. However in the same heads of argument

respondent introduces a totally new dimension to this matter - that is the question of

prescription. This defence was not raised at all in the papers before the court. It is

belated and only raised from the bar. It is not properly before the court.

Accordingly, the defence is not admitted for consideration.

In the circumstances the court finds in favour of the applicant. An order is

hereby made in terms of the amended draft order filed of record.

Chiweshe J