

**REZIMOSI DUBE**

**Versus**

**SANDRA FARAI DUBE**

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 28 & 29 MAY 2009; 2, 3, 4, 8 & 9 JUNE 2009 & 7 APRIL 2011

*Ms N. Ncube* for plaintiff

*D. Muzawazi* for defendant

Civil Trial

**KAMOCHA J:** The parties in this matter agreed, at a pre-trial conference that their marriage had irretrievably broken down, consequently a divorce be granted by consent. They also had agreed that the custody of the children would be shared between the parties during the school holidays with the plaintiff continuing to meet all the children's expenses i.e. payment of school fees and all related expenses. Before the full trial commenced the parties further agreed to divide their household goods and effects between them and a consent paper was filed of record, recording their agreement.

Three issues to be determined by this court were these:

- (a) Whether or not both parties contributed to the construction of the matrimonial home i.e. stand 499 Accacia Crescent – Victoria Falls and the division thereof;
- (b) Whether or not plaintiff's companies form part of the matrimonial estate and the division thereof; and
- (c) Whether or not the defendant is entitled to be paid personal maintenance by plaintiff.

In his testimony the plaintiff told this court that he was a business man of 11 years standing who was aged 45 years. He resides at the matrimonial home 499 Accacia Crescent, Victoria Falls which he believed did not form part of the matrimonial estate. His belief was based on his claim that the funds that were used to purchase building materials were drawn from his companies. He stated that he got a piece of land and started building from foundation with no contribution from the defendant. He alleged that she had not assisted in building the house at all.

He used various contractors but the main one was one called Kingstone which had a qualified builder who needed no supervision to do his work. The construction took about 3 years and when it was in progress the defendant was running a business known as Mosi Flora Florist and Boutique. She was

also running a chicken project at Victoria Falls Airport and was cross border shopping for goods to be resold back home.

When the construction of the matrimonial home was completed the defendant started to run a restaurant in the industrial area. The restaurant was called Kwa Mai Raz Kitchen. She was assisted to set it up by plaintiff who supplied the equipment, tables, chairs and even staff from his restaurant known as Mama Africa which he used to run at the time. A chef from Mama Africa used to go there and cook. He however, did not assist in buying stock for the restaurant.

He also allegedly assisted her in setting up Mosi Flora Florist and Boutique. He used to give her foreign currency as part of her capital to buy stock for the boutique. Most of the time he went out of the country on business trips he used to travel with her either by road or by air. He used to meet all expenses using funds drawn from his companies.

The defendant never accounted to him for proceeds of the boutique. He did not even know what she did with the money.

It was his evidence that he assisted her in her initial cross border shopping trips. He gave her money to assist her to buy goods when she went to Dubai. He provided a company vehicle when she made shopping trips to Botswana.

He also assisted her in setting up the poultry business at Victoria Falls Airport. That chicken business was known as Rain Forest Chickens.

The background to that business was as follows. Prior to 2000 he was involved in a partnership in a company called WILTI (Pvt) Ltd. The company had a lease agreement with Hwange Rural District Council. It is the company which set up Rain Forest Poultry Project. Sometime in 2000 plaintiff and his partner decided to cede the project to Learmonth Investments whose funds were used to construct the project to its current position.

In 2004 the couple ran into marital problems. The major concern from the wife's camp was that plaintiff did not involve her into his businesses. In order to cater for the concerns of his wife he allowed her to utilize the facility for the purpose of rearing chicken. She was allowed to use it as a fully fledged business.

The business sits on a piece of land measuring 100m x 100m with a diamond mesh wire around it and electrified. There is approximately 90 metres of a building block which is subdivided. To the left is a cottage and next to it is a storeroom. Thereafter it is partitioned into fowl runs with a capacity to hold 3 000 chickens at any one time. On entering the premises of the project there is a three bedroom farm house. There are four mounted water tanks. The only facility she put is a small open kitchen.

In order to run that project smoothly he availed her use of Mazda B1800 truck and fuel to do the 20 kilometre run from Victoria Falls town to the airport – 40 kilometres per day. The plaintiff took care

of the running costs of the motor vehicle *id est* fuel and maintenance through Binga Wild Life Safaris which was one of his companies also known as Dingani Tours.

To further support the project he instructed his kitchen Mama Africa to buy chicken produce from her. All she did was to buy the chicks and feed.

He alleged that despite all the assistance he gave her in setting up her business she never accounted to him what she did with the proceeds therefrom. He never knew what she did with whatever money she realized from all her businesses.

### **Matrimonial home**

It was plaintiff's evidence that the funds for the construction of the house came from Binga Wild Safaris trading as Dingani Tours and Delicacy Investments trading as Mama Africa. Defendant did not contribute towards the construction of the matrimonial home despite the fact that she generated income from the businesses he helped her to set up. He believed that she could have been using the money to buy clothes because she did not even look after her own parents or plaintiff's parents. He had to provide for them on monthly basis with allowances until he stopped doing so for her parents at the beginning of 2008.

The house was initially registered in the plaintiff's name but was later transferred into the name of a family trust known as Raz Dube Family Trust on 6 October 2006 which was set up in 1999 with the defendant's knowledge and approval as the couple had no marital problems then.

The trust was set up by plaintiff's accounting firm known as S.G. & Company led by one Stanford Gwanzura. At the time the idea of setting up a trust was being mooted by S G & Co, Gwanzura allegedly travelled to Victoria Falls with the relevant documents in order to explain them to the couple. It was explained to them that a family trust would take care of their children in the event of the parents' death. Their assets would be transferred into the name of the trust. The main beneficiaries would be the couple's children although all family members were income beneficiaries of the trust *id est* plaintiff Rezimosi Dube, defendant Sandra Farai Dube, son Raz Wilson Dube and daughter Tadiwanashe Dube also known as Rhoda Dube.

The plaintiff filed of record the Raz Dube Family Trust Deed whose trustees were Razimosi Dube, Stanford Gwanzura the plaintiff's accountant and Joseph Chanyu Mahamba – plaintiff's lawyer who has since been replaced by Urayayi Mazengeza another accountant. Plaintiff also filed a deed of transfer reflecting that the matrimonial house was transferred into the name of Raz Dube Family Trust. Plaintiff saw no reason why it should be removed from the trust and concluded by saying that he had no authority to sell the house.

### **Companies**

The plaintiff gave a detailed account of the genesis of the companies owned by him. His evidence was that he had been working in casinos but quit in June 1997 after he had obtained a licence

from National Parks to conduct leisure cruises in the upper Zambezi River. With that licence, he approached a friend of his known as Gail van Jaarveldts who had an interest in seeing him in business. He approached her so that she could connect him with a partner. The partner had to be a financier since he himself had no capital to start operating such a business. He held a couple of meetings with her culminating in her taking interest in going into a venture with him.

A meeting was held at J D Kennedy where Stanford Gwanzura was a partner whereat the directors of Binga Wild Safaris agreed to offer him 40% in Binga Wild Safaris which was on loan account.

The first operation started in December 1997. Since his partners were not sure of his knowledge in the business of tourism they made him go into partnership with another company known as Africa Eagle Victoria Falls. But after trading for about a year it turned out that he was pulling in more business than the African Eagle partnership. Consequently, he convinced his partners that they pull out of the African Eagle partnership.

The assets then were a 56 seater boat cruiser, a kombi Toyota Haice, two Mazda trucks – a B1800 and B2200. The business was so successful that they were able to buy another 56 seater boat cruiser and a Toyota Coaster bus which was much bigger than what they had before.

That business boom was short lived as the tourism business hit a snag when tourist arrival went down at the height of farm invasions. His partners who were white became insecure. Through the assistance of Gwanzura their accountant in other companies the plaintiff clinched a deal to secure the other 60% to make it 100%. That came to fruition in 2001 at a cost of six million Zimbabwe dollars which he had to pay over a period of time. He then ran the company on his own and acquired more buses and kombis.

Due to the good working relationship that he had with Gail van Jaarveldts and a Mr Konnot they offered him an opportunity to buy Delicacy Investment trading as Mama Africa. Payment for that business was as and when he got money as he operated it.

That arrangement however, did not work well due to low purchases. He ran short of money to purchase the business and even to run it. That state of affairs compelled him to call Mr Stanford Gwanzura to run the company and even to pay the plaintiff's domestic workers. Gwanzura did so from year 2002 up to the year 2007 injecting in excess of 2.5 billion Zimbabwe dollars. Plaintiff did not know where Gwanzura got the funds from.

On realizing that it was not possible for him to come out of the debt owed to Gwanzura he held a meeting with him whereat it was agreed that Vivstan (Pvt) Ltd through the funds it had injected could take 50% share holding in Learmonth (Pvt) Ltd. A further reason for giving 50% equity to Vivstan (Pvt) Ltd was that the plaintiff felt it was only fair to do so due to the long period he had worked with Gwanzura.

Initially Learmonth (Pvt) Ltd was a shelf company but later became a trust holding company for Binga Wild Safaris Trading as Dingani Tours, Delicacy Investments trading as Mama Africa; and Rain

Forest Chickens. The Raz Dube Family Trust held a 100% shareholding in Learmonth (Pvt) Ltd. Following the above, the current position is that The Raz Dube Family Trust and Vivstan (Pvt) Ltd have a 50% each share holding in Learmonth Investments (Pvt) Ltd which is the holder of 100% share holding in Delicacy Investments (Pvt) Ltd and Binga Wildlife Safaris (Pvt) Ltd. These two companies generated foreign currency. Plaintiff stressed that defendant was never involved in those companies. She never worked for them and was not a share holder.

However, in the year 2004 the couple's marriage ran into problems as the wife felt that her husband did not involve her into his business activities. As a compromise he listed her as a director for both Binga Wild Life Safaris trading as Dingani Tours and Delicacy Investment trading as Mama Africa. He further permitted her to use the Rain Forest facilities – the chicken project at the Victoria Falls Airport. The plaintiff told the court that he went further and bought his wife a RAV4 motor vehicle worth US\$7 000 and registered it in her name. He also bought her a Nissan truck in 2007. All that was done in order to accommodate the defendant and save the marriage.

Plaintiff alleged that it was made clear to the defendant as one of the directors of the two companies that the companies belonged to the Raz Dube Family Trust.

It was his testimony that they ran separate estates. While he ran the companies mentioned above, she for instance ran a company known as Mosi Flora Florist & Boutique (Pvt) Ltd whose directors appointed on 19 November 1998, were the defendant herself Sandra Farai Dube, the couple's children – the son Raz Wilson Dube and daughter Tadiwanashe Rhoda Dube. Defendant was the principal director. He contended that although defendant had been made one of the directors of Learmonth Investments (Private) Limited as far back as 18 March 1999 the company did not have anything then. It only became active after the Raz Dube Family Trust was formed as the Trust assets had to be loaded into it. Hence Learmonth Investments (Pvt) Ltd is owned by the family trust.

After the parties had separated in 2008 he discovered that defendant had tampered with documents relating to Learmonth Investment. The CR14 had been altered to reflect that he had resigned from Learmonth as a director. It also reflected that S. G & Company had resigned as secretary of the company and Sandra Dube the defendant had been appointed as secretary. The couple's son Raz Wilson Dube was appointed director replacing his father the plaintiff.

The plaintiff reported the matter to the Criminal Investigation Department (CID) Bulawayo. The defendant and her accountant were facing criminal charges.

### **Defendant's claim for personal maintenance**

During the subsistence of the marriage he never used to give the defendant money for her personal maintenance. He only used to give her money for the household groceries. He always paid the children's fees from crèche to date without any assistance from the defendant. The defendant used to maintain herself from proceeds from her flourishing businesses which she still ran. She was, therefore, not entitled to any personal maintenance. She has all proceeds from her businesses to herself alone.

The plaintiff was cross-examined at some great length. He reiterated that the defendant did not need any personal maintenance since she had the capacity through her flourishing businesses to enjoy all the luxuries that she was used to during the subsistence of the marriage. It came out under cross-examination that she had moved out of the matrimonial home in 2008 and had never returned. She left the children with the plaintiff. He denied ever pooling resources with her for the purpose of constructing the matrimonial home. Neither did she meet part of the household expenditure. He emphasized that he never knew what she did with the money she generated from her businesses including cross-border trips as she was never accountable to him.

Plaintiff vehemently denied the suggestion that the couple ran a joint estate. Instead he told the court the two invested separately as each of them ran his or her businesses. He asserted that through their actions it was clear that there was an element of wanting to be independent by each party and that they did not want to be accountable to each other. They never sat down as a couple to discuss how resources from their business empires were going to be utilized. They ran separate bank accounts with various banks.

He reiterated under cross-examination that the trust was set up for the purposes of securing property for the family as a whole especially for the children. Although the defendant was not consulted when it was being set up she was fully informed about what was going on. She was given documents relating to the setting up of the trust. The documents were fully explained to her and she appended her signature without demur. Knowing her as he did she would not sign a document she did not understand and agreed with.

While denying that the defendant made any form of contribution direct or indirect towards the construction of the house he conceded it was the couple's matrimonial home. When asked by this court what his offer to her in the matrimonial home would be he offered 20%.

When it was suggested to him that the defendant should continue running the chicken project at the airport after the divorce his response was that she could not benefit from the trust after the divorce.

The sad picture that came out of cross-examination was that the plaintiff was never the head of his family. The defendant had a superiority complex because she was a holder of a bachelor's degree while plaintiff was only 'O' levels. Right from the beginning of their marriage she made it known to him that he should realize that she was more educated than he was.

When he told her that he was not happy with her employment at United Touring Company the answer he got was that she had come to Victoria Falls to work not to be told what to do by a man. When she went into partnership with a Mr Chiwandire, he queried that but was told that he was jealous of her success. Further her cross border activities date back early into their marriage. Despite the fact that he had indicated his displeasure of such activities due to the moral reputation attached to them, she insisted and continued to undertake the trips. His disapproval of the trips was of no consequence to her. He had no control over her during the subsistence of the marriage. She did her own thing while he

did his. He concluded by saying that he stayed into the marriage for 18 years just for the sake of the couple's two children.

The plaintiff called his accountant Mr Stanford Gwanzura – "Gwanzura" to testify in support of his story. Gwanzura has been a chartered accountant for over 20 years and runs an accounting firm called S.G. & Company.

The circumstances in which he met the plaintiff were that the plaintiff was dealing with his clients who owned Binga Wild Life Safaris. In order to protect the interests of his clients Gwanzura encouraged the plaintiff to set up the Raz Dube Family Trust. He alleged that the setting up of the trust would also benefit the plaintiff as follows:

1. Minimization of income tax;
2. Less interference in the event of the death of the settlor;
3. To ensure that in the event of the death of both husband and wife the children could be looked after by the trust;
4. The settlor would get instant advice from the trustees who are normally professionals;
5. It was also easy to attract other investors as shareholders because of its security id est being run by professionals;
6. It also minimized death duties; and
7. At death ones estate remains intact. It is not fragmented.

The deed of trust was set up for estate planning purposes. Hence in the event of the plaintiff's death the defendant would be appointed settlor in his place. He explained fully in 1999 to both plaintiff and the defendant the nature and purpose of the trust and how it works when they purchased Learmonth (Pvt) Ltd which was to be the holding company for the trust. It was the holding company which was to do the trading as the trust itself was not allowed to trade. RAZ Family Trust had a 100% share holding in Learmonth (Pvt)Ltd whose directors were Rezimosi Dube and Sandra Farai Dube in 1999 but were joined by Stanford Gwanzura in 2002. They appended their signatures on the share certificate as directors on 6 April 1999 in Gwanzura's office.

The first asset for the trust was a donation from the settlor in the sum of \$5 000. Presently the trust holds two assets namely Learmonth Investment (Pvt) Ltd and the matrimonial home of the couple 499 Accacia Crescent. The house was registered under the family trust on the advice of Gwanzura.

The witness detailed the involvement of the plaintiff in Learmonth Investments. It was his evidence that plaintiff initially got 40% for which he did not have cash. He, however, had a boat trading licence while Gwanzura's clients had a boat, mini bus and a truck but had no trading

licence. He then negotiated that the plaintiff be given 40% of the company in exchange of the trading licence. The balance was put on a loan account.

According to Gwanzura the balance was supposed to have been paid through trading. It was, however, never paid as it was written off because the plaintiff brought value to Gwanzura's clients. He did not disclose to the plaintiff that the balance had been written off as the plaintiff did not even know how much value he had brought to Gwanzura's clients. His clients who owned shares in Binga Wild Life Safaris are Gail Christine van Jaarsveldt, Kevin Richard van Jaarsveldt and Harley Knoth. They became nervous about keeping businesses in this country. At the height of farm invasions during the years 2001 and 2002 they thought businesses would not be spared and started making arrangements outside the country. Harley Knoth actually lost a farm in Chiredzi. They sold most of their assets and retained only three companies. Gwanzura persuaded them not to liquidate Binga Wild Life Safaris. Thereafter he persuaded the plaintiff to make an offer in respect of Binga Wild Life Safaris. He, too, was nervous but only did so after being assured by Gwanzura that he (Gwanzura) would remain the accountant of the company. [His clients finally left the country as the tourism industry in Victoria Falls was no longer viable]. He persuaded the plaintiff by assuring him that he would assist the business by injecting funds on a monthly basis into it for running it. He did so from 2002 up to 2007 and filed of record a document reflecting funds injected into Binga Wild Life Safaris by Vivstan (Private) Limited which is a company owned by his trust S. Gwanzura Family Trust owning 50% of Learmonth Investments (Pvt) Ltd after the parties had agreed at an Annual General Meeting of Learmonth Investments (Private) Limited that Binga Wild Life Safaris and Mama Africa were unable to repay the funds injected into them by Vivstan (Private) Limited it should take 50% shareholding in Learmonth. Gwanzura told the court that his involvement in the plaintiff's business was investment.

Gwanzura found it very difficult to understand the suggestion that defendant had not met him in 1999 because she was employed by his clients in one of their companies as a shop manager from 9 January 1999 on the strength that plaintiff was a director in Binga Wild Life Safaris. He emphasized that defendant had never been a shareholder in Binga Wild Life Safaris, Delicacy and Learmonth.

Finally, the witness said he was aware of the case wherein defendant allegedly tempered with company documents which was pending in the courts and the trial had been scheduled for 10 June 2009. The tempered documents reflect Gwanzura and plaintiff having been resigned from the holding company and appointed the son who was a minor as a director. That was not proper as directors can only be removed through death, resignation or shareholders removing them. But none of that happened in this case. Gwanzura claimed to have warned plaintiff about under invoicing and externalizing of funds. He made sure that the



plaintiff did not use the money from the under invoicing for his personal use. The externalized funds had to come back in the form of assets such as boats and motor vehicles which were bought outside the country and brought in. Building materials were also brought into the country.

The witness was cross-examined but was not shaken. He said the suggestion that defendant only met him in 2004 could not possibly be true unless she was denying that she had been employed as a shop manager by his clients from 9 January 1999.

It emerged in cross examination that although the defendant had documents to reflect that plaintiff and Gwanzura had resigned she had not tempered with the shareholding.

In relation to the trust deed the witness was asked why he did not have an input from the defendant. His reply was that there was no input from her because she was just an income beneficiary the input only came from the settlor who is the plaintiff. He did not consult beneficiaries when setting up deeds of trust but only consulted settlors.

He emphasized the three trustees were in control of the trust. To that extent, therefore, it was not possible for one trustee to dispose of trust property without the consent of the other trustees. The property can only be disposed of for the benefit of the family. He went on to tell the court that the two children were the capital beneficiaries of the trust as the property belongs to them in the end.

When asked in re-examination, to explain why he only took instructions from the settlor his explanation was that when forming a trust the holder of the assets is the settlor who donated those assets into the trust for his benefit and the benefit of his loved ones. He always looked at it as an open will of the settlor. The plaintiff donated \$5 000 Zimbabwe dollars and 40% of Binga Wild Life Safaris shareholding. The plaintiff's case was closed after the evidence of this witness.

### **Defendant's case**

The defendant had no witnesses to call in support of her story which was as follows. She told the court that she was 39 years old and had been married to the plaintiff for 18 years having been married on 9 August 1991 at Marondera Magistrates' Court. It was her evidence that she did not agree with the testimony of the plaintiff in many respects which she needed to correct. She alleged that there was no truth in the suggestion that they did not work together as a family throughout the subsistence of the marriage which was 17 years old at the time summons was issued. Her assertion was that plaintiff was in fact the head of the family. They planned things together and acquired property together. Their matrimonial estate was a joint

estate. When they got married in 1991 they did not have businesses and matrimonial home but these were acquired during the subsistence of the marriage.

### **Matrimonial house**

She testified that she regarded the house at number 499 Accacia Crescent – “the house” as their matrimonial home as they built it together during the subsistence of the marriage.

There is a cottage on the property which was constructed between 1995 and 1997. She contributed towards the construction of the cottage. She was a cross border trader and was running a company known as Mosi Flora Florist and Boutique. She was also employed by the United Touring Company. The plaintiff was working in the casino as a croupier. She was therefore bringing in more income than plaintiff.

It was her evidence that the main house was built in stages but she could not recall when the slab was done but proper construction took place in 2004. During that period she was running the chicken project supplying chicken and eggs to most hotels in Victoria Falls such as Elephant Hills, Victoria Falls Hotel and Victoria Falls Safari Lodge. She also supplied the Spar Kasane in Botswana and various supermarkets in Victoria Falls and Hwange with eggs.

She alleged that her businesses were doing very well and claimed that she gave the proceeds therefrom to her husband. The two then sat down as husband and wife to decide on what to do with the money some of which was channeled towards the construction of the house. The money was used to buy plumbing material and cement from Victoria Falls. Tiles, bath tabs and sinks were bought from South Africa. Some of the money was used for fuel.

She dismissed the suggestion by plaintiff that all her money was used to buy clothing and other luxuries as sheer exaggeration.

As far as she was concerned the house was matrimonial property not trust property. She alleged that she had been contributing towards the house for all her working life. She complained that plaintiff should have consulted her before registering the house under the name of the trust since the house was jointly owned. She should have been told. She was allegedly shocked and believed that plaintiff had something sinister when he registered the house under a trust deed without her knowledge. She was not even aware as at 30 March 2008 that the house was registered under the trust deed. She then suggested that upon divorce either (1) she be allowed to stay in the house with the children; or (2) the house be sold and each party receives 50% of the net proceeds.

The defendant told the court that she did all her usual domestic chores. She prepared food for her husband. They had a maid who she supervised. The maid used to prepare lunch for him but defendant always prepared supper for him.

### **Maintenance**

Defendant was claiming a total of \$1 290,00 as personal maintenance which she alleged was in fact inadequate to meet all her requirements. She said the amount did not include transport and clothing. She said she also needed to support her parents whom plaintiff had been looking after but had since stopped due to these divorce proceedings.

She averred that plaintiff looked after her financial needs as his wife. It was not proper for him to now say she does not deserve any maintenance more so when she looked after him when he did not have any money during 1997 and 1998 when he was servicing his loan after going into business with Van Jaarsveldt.

She painted a good picture of how plaintiff used to look after her. He gave her whatever she wanted. Whenever she wanted something she would ask for it and would get it.

She told the court that she and her husband went for holiday on several occasions. They toured Europe in January 2006. In August 2007 they went on shopping trips to Dubai and he gave her US\$2 000 to spend. They visited South Africa several times and also Namibia. All visits and tours and spending money were sponsored by the plaintiff.

She complained that she was now living in a 2 roomed house which was not the type of accommodation she used to enjoy with her husband. She had been reduced in status and the \$1 290 although inadequate would be of some assistance in maintaining the standard of life she had been accustomed to. The figure was broken down like this.

Breakdown of maintenance expenses for dependent

	<b><u>USD</u></b>
Maid	\$60,00
Gardner	\$60,00
Security guard	\$200,00
Groceries	\$200,00
DSTV subscription	\$70,00
Airtime	\$100,00

Upkeep allowance (pedicure, manicure, massage, hair dressing)	\$100,00
Rent	<u>\$500,00</u>
Total	<u>\$1 290,00</u>

She contended that if the plaintiff could pay her the above amount and allow her to run the poultry project at Victoria Falls Airport, she would resuscitate her businesses which had closed down. The \$500 for rent would be sufficient to find suitable accommodation for her and the two children.

### **The Trust**

The defendant complained bitterly about the Raz Dube Family Trust – “the trust”. In the first place she alleged that she was not consulted when the family trust was initiated. Gwanzura did not explain the trust to her in 1999 which she felt was no way in her favour. It is to benefit the settlor and the children. She had never received any income from the trust as an income beneficiary of the trust.

Secondly she said plaintiff was a self confessed externalizer of money by doctoring figures, hence her lack of faith in the figures coming from the company.

Thirdly Stanford Gwanzura who is one of the trustees was involved in the formation of the trust and is also a business partner with plaintiff. Both have interests in the company and accordingly the trust is biased against her. In the event of a divorce the settlor can change the trust deed to whatever he wants. In that event she would not get any benefit as an income beneficiary. She alleged that she would never be given the correct figures reflecting the company performance. Her expectation was a once off payment to avoid her going back to plaintiff.

### **Companies**

#### **Rain Forest Chicken Project**

Defendant’s testimony was that she started running that project in 2003 and had made structural improvements to it. She built a kitchen and eating area for the workers. She furnished the servants quarters. She acknowledged the fact that it was the plaintiff who had started building it. When she started running the project the plaintiff allegedly gave her certain documents and said the project was under Learmonth Investments as reflected in the lease agreement entered into with Hwange Rural District Council filed of record at page 19 of her bundle of documents. She also filed a letter by the Chief Executive officer of Hwange Rural District Council dated 19 June 2000 addressed to the Ministry of Local Government, Rural and

Urban Development requesting the lease document for WILTI Private Limited to be amended to Learmonth Investments (Pvt) Ltd.

She denied that Learmonth was a holding company for other companies. As far as she was concerned it was the company for her chicken project which she said was the only income generating and viable project at the moment and would like to continue running it. She offered to reimburse the US\$600 paid by plaintiff to Hwange Rural District Council.

Mosi Flora Florist & Boutique (Private) Limited was not operational. She alleged that she had lost a lot of equipment to thieves who had broken in twice. The rentals had also shot up. She felt insecure because of the burglaries to her business. She stopped running the kitchen known as Kwa Mai Raz because socially she could not live in Victoria Falls. A friend of hers was now running it.

**Binga Wild Life Safaris and Delicacy Investments (Private) Limited**

Defendant told the court that she was entitled to a share in each of the above companies because of the contribution she made. She allegedly helped him to set up the businesses. Her contribution was to ensure that food was available at the table and she clothed everybody in the family. Further when she first met the Van Jaarsveldts on the boat cruise belonging to her employers United Touring Company she promised them that she would help her husband to run Binga Wild Life Safaris. It is on that basis that she felt she was entitled to a share in that business.

Under cross-examination she told the court that she was an independent person who had been in business well before she was married to the plaintiff. Her business was cross border trading and a hair salon. She contended that cross border trading was a profitable business which she was still engaged in and alleged that the proceeds from there were ploughed into the construction of the matrimonial home. When asked why she wanted money for personal maintenance when cross border business was profitable she said plaintiff used to give her money when she was doing it she saw no reason why he should not continue to do so now.

She denied that her husband did not approve of her cross border trips. She also denied that her husband did not like her to work for United Touring Company.

It was her evidence under cross-examination that Mosi Flora Florist and Boutique and the cross border business had the same bank account while Kwa Mai Raz and the Rain Forest Chicken business had no bank accounts. The plaintiff was not a signatory to the bank account although she claimed the businesses belong to the joint estate. Her explanation for that was that plaintiff did not make an issue of that as long as the money was accounted for.

When asked to produce proof for payment towards the construction of the matrimonial home she merely said she gave money to her husband and went on to state that she was shocked to hear her husband telling the court that they ran separate estates. When it was put to her that it was not true that she was shocked because the husband said so from the onset as reflected in paragraph 8 of his declaration her response was that he was merely trying to run away from the idea that the couple acquired assets together. Moreover, when they got married they never discussed whether or not they were going to run businesses separately. That was never an issue. They did not have any assets before they got married. All assets were acquired during the 18 years of marriage.

Although she admitted that plaintiff was not made director of any of her companies and was not a signatory of any of her accounts and neither did she sign on any of his accounts she still claimed that they ran joint estates and he was happy with that type of arrangement. It was, however, clear that she had no shares in the plaintiff's companies and neither did he hold shares in her companies.

She was unable to furnish a satisfactory explanation why her companies did not use S. G. & Company (Pvt) Ltd as their accountant if they ran a joint estate because the companies ran by the plaintiff used that accounting firm.

She admitted that Witli (Pvt) Ltd ceded all its rights, title and interest in lease number CL 51492 at Lupinyu Township, Hwange District to Learmonth Investments (Private) Limited in which she held no shares. She contradicted herself on whether or not the trust was explained to her. Initially she had said the trust was only explained in 2004 but changed in cross-examination and denied that it was ever explained to her.

After her testimony defendant had no witnesses to call and closed her case.

### **Personal maintenance**

The court finds as a fact that the defendant is an independent modern business woman who has been in business before she got married to the plaintiff. She continued with her businesses during the subsistence of the marriage. She is more sophisticated than the plaintiff as she is a holder of a Bachelor of Arts degree. It was her evidence that her businesses were doing so well that she raised enough money to contribute in the region of 50% towards the construction of the matrimonial house. She no longer has small children to look after. Both children are at colleges i.e. Falcon and Girls College respectively. She and the plaintiff are not very old. She is 41 years while plaintiff is 47 years. She is able to re-marry after the divorce. As was stated in *Chiomba v Chiomba* 1992(2) ZLR 197 at 197F-198B.

“Marriage can no longer be seen as providing a woman a bread ticket for life. A marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.

Young women who worked before marriage are able to work and support themselves after divorce will not be awarded maintenance if they have no young children. If a young woman has given up work she will be awarded short term maintenance to take her over until she finds a new job.

Middle aged women who have devoted themselves for years to the management of the household and care of the children should be given “rehabilitative” maintenance for a period long enough to enable them to be trained or retrained for a job or profession.

Elderly women who have been married for a long time and are too old to now go out and earn a living and are unlikely to remarry will require permanent maintenance.”

The defendant in the present case is a middle aged independent modern business woman who at one time ran no less than four flourishing businesses. She admitted that two were still flourishing. The plaintiff has taken the responsibility of all the children’s education requirements and other related expenses. In the result it seems to me that the defendant does not require any personal maintenance for herself.

### **Joint estate**

What is common ground from the evidence adduced in this court is that the defendant ran four businesses during the course of the marriage namely (a) the cross border trading; (b) Kwa Mai Raz restaurant; (c) The Rain Forest Chicken Project; and (d) Mosi Flora Florist and Boutique. The plaintiff runs Binga Wild Life Safaris trading as Dingani Tours and Delicacy Investments trading as Mama Africa Restaurant. Learmonth Investments (Private) Limited was introduced into the picture and family for purposes of the trust and both plaintiff and defendant appeared as directors in 1999.

It is common cause that the plaintiff assisted defendant in setting up the chicken project at Victoria Falls Airport despite the fact that she was an independent modern business woman. He supported all her businesses. He gave her foreign currency for her cross border purchases. He helped to equip her restaurant. He ordered one of his companies to buy chickens and chicken products from her chicken project.

It is clear that the parties went into serious business simultaneously both leaving formal employment. They each ran their companies separately. Neither of the parties was a shareholder in the other’s companies. The plaintiff was not a signatory to any of the company

accounts of companies ran by defendant and neither was she to those ran by plaintiff. She did not even make him a director to any of her companies. The plaintiff, however, in 2004 instructed his accountants to make her an honorary director to both his companies – Delicacy Investments and Binga Wild Life Safaris. The sole reason for doing so was to save their marriage. There was no other reason for so doing other than make the defendant feel secure. The plaintiff's evidence was uncontroverted in that regard.

The parties' marriage seems to have had problems at an early stage because when the man attempted to assert his authority as the head of the family by telling her to stop some of her activities she told him in his face that she had gone to Victoria Falls to work and make money and not to be told what to do by a man. The plaintiff had suggested that she should give up her job at United Touring Company. The plaintiff did not approve of her cross border trading but had to accept it. She was at liberty to choose her own accountant for her businesses despite the fact that there was a family accountant.

While defendant would want companies run by plaintiff to be declared part of the joint estate she does not want the same to happen to those she runs. Apart from her honorary status as a director in the companies of the plaintiff she had no direct involvement or participation in the decision making process. She had no idea of what plaintiff was doing except what he told her. There would be no basis for treating the plaintiff's two companies as part of the joint estate of the parties in the light of the evidence before the court. What is just and equitable is for the plaintiff to keep what he worked for and for the defendant to do the same. The Rain Forest Chicken project belonged to the plaintiff although he had allowed the defendant to use it during the subsistence of the marriage. It must go back to the companies under the direct control of the plaintiff.

### **The matrimonial house**

The parties own house number 499 Accacia Crescent, Victoria Falls which was built during the subsistence of their marriage. They started living on the property when there was only a cottage. The main house was constructed while they lived on the property. The main house is a double story building and has all the features of a modern house. The parties have lived on the property for the entire 18 years of their marriage. They each consider it their matrimonial home.

Their point of disagreement is on the level of contribution each one made towards the construction of the house. The plaintiff's stance was that the defendant made no contribution at all towards its construction. He challenged her to produce proof of her contribution.



Defendant on the other hand told the court that using money realized from her businesses she purchased materials such as tiles, bath tubs, cement, special bricks and many other things. While plaintiff would want this court to believe that he constructed it single handedly he also did not produce proof to show that that was the case.

Apart from the direct contribution that she made there was of course indirect contribution made by her. When asked by the court how much he was prepared to offer her for her contribution he came up with 20%. Although the property had initially been registered in his name before it was transferred to the trust his 20% is far from being fair and equitable. It seems to me, that there is no reason to disentitle her a 50% share in the property. I accordingly hold that the defendant is entitled to a 50% share in the property known as 499 Acacia Crescent, Victoria Falls.

Having made a finding that the matrimonial house was jointly built by the parties and belongs to them jointly it follows that before it was transferred to the trust both parties had to be in agreement to do so. The defendant told this court that she was not even consulted when that was being done let alone being in agreement. The plaintiff's attitude was that he did not need to consult her or seek her consent as he felt she had nothing to do with it. He fell into error.

The court finds that the plaintiff transferred to the trust an asset which was jointly built and jointly owned by both parties unilaterally. It ought to be transferred out of the trust so that the parties can receive their respective 50% shares in it.

### **The Trust**

In the light of the finding that the matrimonial home should be transferred out of the trust the assets remain in it are those previously owned by the plaintiff which the court has held that he can keep.

The defendant's testimony was that the trust did not benefit her in any way. She even believed that it had been set up to disinherit her as she had not been consulted when the selection of trustees was being made. One of the trustees was Stanford Gwanzura a business associate of the plaintiff and his accountant. She said she could not rely on the benevolence of such trustee to protect her interests more so when as settlor the plaintiff said he could dissolve the trust as and when he pleased. She complained that in order to disentitle her of the matrimonial assets she was made an income beneficiary but had never received any income from the trust since its formation in 1999 despite the fact that the companies had been generating externalized funds.

In the light of the foregoing it seems to me that plaintiff would be at liberty to continue with the trust after transferring out of it the matrimonial home number 499 Accacia Crescent, Victoria Falls or after paying her 50% share of the property.

In the result the order of this court is as follows:-

1. The consent paper signed by both parties on 29 may 2009 becomes an order of this court, in its entirety;
2. The matrimonial home house number 499 Accacia Crescent, Victoria Falls shall be transferred out of the trust and each party shall be awarded a 50% share in it with any of the parties being allowed to buy out the other within 3 months of the date of this order;
3. Each party shall keep its companies and businesses *id est* plaintiff shall keep Learmonth Investments, Binga Wild Life Safaris trading as Dingani Tours and Delicacy Investments trading as Mama Africa restaurant and the Rain Forest Chicken project while defendant shall keep Kwa Mai Raz Restaurant, Mosi Flora Florist and Boutique and her cross border trading;
4. The plaintiff shall keep the trust after transferring out of it matrimonial house number 499 Accacia Crescent, Victoria Falls for the parties to receive their 50% shares as stipulated in paragraph 2 *supra*;
5. There shall be no order for personal maintenance for the defendant; and
6. Each party shall bear its own costs.

*Lazarus & Sarif* plaintiff's legal practitioners

*Mtombeni, Mukwasha, Muzawazi & Associates*, defendant's legal practitioners