

TOFARA PARIRAI
versus
MAGRET MARUFU

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 7 July & 15 September 2022

Civil Appeal

MAXWELL J: This is an appeal against the decision of the magistrate's court sitting at Harare on 23 February 2022.

BACKGROUND

Defendant, who was the plaintiff in the lower court, issued out summons against the appellant seeking 50% share of stand number 1992 Granary Park, its development and 10 000 loose bricks thereon and costs of suit on a legal practitioner and client scale. She claimed that the property was jointly acquired. After the filing of pleadings, the matter was referred to trial on the following issues; -

1. Whether the parties were in a tacit universal partnership
2. Whether the plaintiff made any contribution to the partnership
3. Whether the plaintiff made any direct and indirect contributions in the purchase or development of stand number 1992 Granary Park.
4. Whether the plaintiff is entitled to a share in stand number 1992 Granary Park, its Developments and the 10 000 loose bricks thereon.
5. Whether or not defendant will be unjustly enriched if he retains full ownership of the stand, its development and the bricks lying thereon.

The matter went to trial.

JUDGMENT OF THE LOWER COURT

The lower court observed that there was joint effort to cater for the upkeep of the family and both parties participated in the acquisition of the stand in question. It was apparent to the lower court that although the memorandum of the agreement of sale in respect of the stand shows Tofara Parirai as the purchaser, Magret Marufu signed as a witness therefore there is a high probability that they jointly acquired the stand and could have decided to have the defendant cited as the purchaser as the head of the family. The lower court stated that all documentary exhibits put together point to the fact that the parties were in a universal unregistered customary union were they jointly acquired their property and made contributions jointly. It concluded that giving the one party 100% or more than 50% share of the stand will amount to unjust enrichment. It therefore granted the plaintiff 50% share in stand 1992 Granary Park, its developments and 10 000 loose bricks.

Appellant was aggrieved and noted an appeal.

GROUND OF APPEAL

The appeal was noted on three grounds.

1. The court *a quo* erred and grossly misdirected itself at law and fact in finding that there was a tacit universal partnership between the appellant and the respondent when the later was unable to prove the partnership she relied upon and its terms.
2. The court *a quo* erred and grossly misdirected itself at law and fact in awarding the respondent a 50% share in the immovable property namely stand 1992 Granary Park, its developments and 10 000 bricks without giving due weight to the evidence before it.
3. The court *a quo* erred and grossly misdirected itself at law and fact by completely disregarding documentary evidence tendered during trial in finding that respondent earned above the appellant at some point during their union.

Appellant prayed for the setting aside of the judgment of the lower court and its substitution with the dismissal of the claim with costs. In the alternative, appellant prayed for an award of 30% share in the immovable property in question to plaintiff whilst he gets a 70% share.

SUBMISSIONS BY THE PARTIES

In heads of argument, appellant submitted that the lower court grossly erred in a manner that resulted in a miscarriage of justice. He alleged that the conduct of the parties during their union was that there was no community of property as each party purchased its own assets. Further that respondent failed to prove the financial responsibilities of each partner in the alleged partnership. He referred to the case of *Mtuda v Ndudzo* 2000 (1) ZLR 710 in which the requisites for a partnership are summarized as:-

- “(a) each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether it be money or labour or skill;
 - (b) the business to be carried out should be for the joint benefit of the parties;
 - (c) the object of the business should be to make a profit; and
 - (d) the agreement should be a legitimate one.
- In addition, the intention of the parties to operate a partnership is also an important consideration.”

Appellant referred to various other cases and concluded that the lower court did not evaluate the evidence properly resulting in it reaching an erroneous conclusion. He pointed out that the responsibilities which respondent said she performed in her evidence, which included cooking and cleaning in the partnership, were essentially domestic contributions or chores expected of a customary law wife. He further pointed out that the respondent did not do the domestic chores regularly since there was a maid. Appellant also referred to Hlalo in *South African Law of Husband and Wife*, 4th edition page 290 where it is stated that

“there must be something to indicate that the parties intended to operate as a partnership.....Unless it can be shown that she made a substantial financial contribution or regularly tendered services going beyond those ordinarily expected as a wife in her situation, the courts will not be readily persuaded to imply a partnership agreement,”

He argued that the lower court fell into error in failing to appreciate that a tacit universal partnership is indistinguishable to a marriage in community of property. He further argued that the courts in South Africa and Zimbabwe have stated that in order for the partnership to be classified as a universal partnership, the parties must agree to put in common all their property, both present and future. He accused the court *a quo* of relying on conjecture and not proven facts. Appellant also argued that the lower court failed to fully canvass the extent to which the parties contributed and therefore failed to distribute the disputed property in proportion to the contributions made.

Respondent submitted that appellant is the architect of a classic attempt to swindle his ex-spouse of the fruits of her hard labour. She pointed out that both parties were gainfully employed with appellant working as a patrolman for City of Harare while she was employed as an Executive Assistant by the Public Service Commission. She submitted that the stand in question was the only meaningful property acquired by the parties. Respondent submitted that the grounds of appeal are invalid as they do not comply with Order 31(i)(4)(b) of the magistrates court (Civil) Rules, 2019, which requires that the grounds of appeal state concisely and clearly the findings of fact or ruling of law appealed against. On the merits, respondent submitted that the court is being asked to interfere with the discretion of the lower court but there is nothing outrageous or defying logic in the lower court's reasoning to warrant interference. She prayed for the dismissal of the appeal with "an exemplary order of costs".

ANALYSIS

PRELIMINARY POINT

Respondent submitted that there was no compliance with Order 31(i)(4)(b) of the magistrates court (Civil) Rules, 2019. Appellant submitted that there was substantial compliance. Where there is failure to comply with the rules of court, the court has a discretion to condone such failure where the court is satisfied that there has been substantial compliance and that the failure will not unduly prejudice the defendant. In *Trans Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 AD at 278, SCHREIVER JA said of technical objections:

"Technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious, and if possible inexpensive decision of cases on their real merits."

This court was satisfied that there was substantial compliance with Order 31 (i)(4)(b) of the magistrates court (Civil) Rules, 2019. Though the grounds of appeal could be phrased in a better way, this court was of the view that they state the findings appellant considers wrong and why he is of that view. In the first ground, he attacks the finding that there was a universal partnership on the basis that respondent did not prove the partnership and its terms. In the second ground, appellant attacks the award of 50% in the immovable property, its development and 10000 bricks and accuses the lower court of not giving due weight to the evidence before it. In the third ground, appellant accused the lower court of disregarding the documentary evidence tendered

during trial and finding that earned above him at some point during their union. There was no allegation that the respondent was prejudiced in the preparation of her response as a result of the manner in which the grounds of appeal were crafted. The preliminary point raised by the Respondent was not upheld on that basis.

The First Ground of Appeal

Appellant argued that a tacit universal partnership and its terms was not proved in the lower court. In response respondent outlined its requirements and some of the evidence on record that proved its existence. The requirements of a tacit universal partnership are stated in *Ntini v Masuku* 2003 (1) ZLR 638. They are

- a) Each of the parties must bring something into the partnership, or must bind him/her self to bring something into it, whether money, labour or skill. The lower court found that the fact that both parties were gainfully employed and purchased goods for their joint benefit satisfied this requirement.
- b) The business to be carried out should be for the joint benefit of the parties. The record of proceedings indicates that in cross-examination, appellant indicated that the stand in question was bought when they were staying together and that it was for the family. See p 84 of the record. The requirement of joint-benefit was therefore fulfilled.
- c) The objective of the business should be to make profit. The very existence of the property at the centre of the dispute is evidence of the profit that resulted from the union.
- d) The agreement should be a legitimate one. There was no allegation that the parties were engaged in any illegal activities.

Despite the fact that the lower court did not set out and analyse each requirement, there is no misdirection in its conclusion that a tacit universal partnership existed. For that reason the first ground of appeal fails.

The Second Ground of Appeal

Appellant accused the lower court of not giving due weight to the evidence before it resulting in an improper award. In heads of argument, appellant argues that the lower court did not fully canvas the extent to which each party contributed and therefore failed to distribute the

property in proportion to the contribution made. He referred to the case of *Marange v Chiroodza* 2002 (2) ZLR 171 in which it is stated that; -

“In Roman Dutch Law, there is no presumption of equality of shares in a partnership, but the share of each partner is in proportion to what they have contributed.”

Appellant highlighted several issues in which he alleges evidence was not considered. Firstly, that it is on record that his salary fluctuated from US\$700 to US\$1500 whilst respondent's particulars of claim stated that she contributed US\$350 per month. Secondly, that respondent's case was that she contributed US\$700 out of the US\$6000 towards the purchase of the stand, therefore he contributed 89% of the purchase price. Thirdly, that he did the developments which cost around US\$6000 whereas respondent alleged that she contributed US\$400. Fourthly, that respondent's loans amounted to US\$1200 yet his amounted to over US\$7015, and lastly, that he single handedly purchased the 10000 bricks, paid for developer administration charges, rates, Zesa, medical bills, credit cellphones, school fees, transport for the children, car insurance and registration.

In response, respondent submitted that the court exercised its discretion and did not need to match and marry where every dollar each party contributed went to or which asset it related to. respondent referred to the case of *Maware v Chiware* HMA I/19 in which the court stated; -

“Redistribution of assets in a matter like this is not a matter of metaphysics. A plaintiff cannot be required to establish with some mathematical precision the causal link between his or her contribution, in cash or kind, to the acquisition of the assets and their subsequent appreciation or depreciation in value. After all is said and done the matter calls for a sensible retrospective analysis of what would probably have been the contribution of each party, what would be expected to occur in the ordinary course of human affairs.”

She argued that the lower court was not wrong in finding that she had discharged her onus of showing her direct and indirect contributions to the union. She further argued that there was nothing so ludicrous to be said to be an affront to common sense in awarding 50% to a gainfully employed wife.

From case law referred to by the parties, it is clear that the contributions each party made are considered in determining what share of the property she gets. In this case, it is clear from the record that the parties' contributions were not equal. There was therefore a misdirection in equating their contributions. Had the lower court considered that, it would not have concluded that the parties' contributions were equal. For that reason the second ground of appeal succeeds.

The Third Ground of Appeal.

Appellant faults the lower court for finding that at some point respondent earned above him when no evidence was tendered to that effect. He submitted that the lower court disregarded bank statements and pay slips on record. In response, respondent submitted that there was no error on the part of the lower court as the figures she stated in her evidence were not disputed. She referred to pp 26, 27 and 47 of the record. On p 26, Counsel for the appellant objected to the reliance of 2021 earnings when the property was acquired in 2013. On p 47 respondent was asked to confirm that she had produced the pay slips to show that she earned more than the appellant. Her response was that that is not what she said. On p 49 she repeated to say "I did not say I earn more than him." It is not clear how the lower court was able to conclude that "at some point the plaintiff from the evidence on record earned slightly above the income of defendant and defendant also at some point earned slightly above the income of plaintiff". This is against the fact that in para 9 of her Particulars of Claim, respondent stated; -

"Plaintiff and defendant are both civil servants with defendant earning slightly more than the plaintiff in monthly salary."

The conclusion by the lower court is therefore not supported by the record of proceedings. The third ground of appeal therefore succeeds.

It is trite that where a lower court mistakes the facts or does not take into account some relevant consideration, an appeal court can interfere with its discretion. See *Barros & Another v Chimphonda* 1999 (1) ZLR 58.

The Relief Sought

Appellant sought the setting aside of the judgment of the court *a quo* and its substitution with either the dismissal of the plaintiff's claim with costs or an award of 30% share in the immovable property in question to plaintiff whilst he gets a 70% share. In para 4.65 of his heads of argument, appellant stated; -

"Had the court *a quo* done a robust assessment of the evidence it would have appreciated the differences in the contributions made by each party and proceeded to share the property accordingly."

This is an indication of an appreciation that respondent is entitled to a share in the property. The dismissal of the respondent's claim is therefore not appropriate in the circumstances. Section 31

of the High Court Act, [*Chapter7:06*], sets out the powers of this court on appeal in civil cases. On the hearing of a civil appeal this court has power to confirm, vary, amend or set aside the judgment appealed against or give such judgment as the case may require. It is appropriate to vary the judgment of the court *a quo* in the interests of justice. The alternative prayer is accordingly granted.

DISPOSITION

1. The preliminary points be and are hereby dismissed.
2. The appeal partially succeeds. The first ground of appeal be and is hereby dismissed. The second and third grounds of appeal be and are hereby upheld.
3. The judgment of the court *a quo* in case number 924/21 be and is hereby set aside and substituted with the following,

“The plaintiff be and is hereby awarded a 30% share in the immovable property namely Stand number 1992 Granary Park whilst the defendant retains a 70% share.”
4. Each party bears its own costs.

TSANGA J.....Agrees

Kamusasa and Masendo, appellant’s legal practitioners
Wilmot & Bennett, respondent’s legal practitioners