

SITHEMBINKOSI NDLOVU  
**versus**  
KAMURAI MOYO  
And02  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 31 MAY 2017 AND 22 JUNE 2017

### **Civil Trial**

*G Nyathi* for the plaintiff  
*V Majoko* for the defendants

**MOYO J:** The plaintiff in this matter instituted litigation against the defendants claiming:

- a) an order declaring the existence of a tacit universal partnership between plaintiff and first defendant.
- b) An order declaring that house number 4196 Nketa 7, Bulawayo was jointly acquired by the plaintiff and first defendant.
- c) An order that house number 4196 Nketa 7, Bulawayo be sold to best advantage and the net proceeds shared equally between plaintiff and first defendant on the basis of unjust enrichment.
- d) An order that first defendant pays the costs of suit at an attorney and client.

Plaintiff gave evidence on her own behalf. She told the court that in 2011 she started a relationship with first defendant and that in 2013 they bought a property together namely stand 4196 Nketa 7 in Bulawayo. She said they bought that house before they started staying together. They moved in together in September 2013, they then developed the house from a three roomed to a seven roomed. In October 2014, they had a son. In February 2015, she was chased away by the first defendant from their house. She told the court that the house being the subject matter of

this dispute was bought in July 2013. She said at the time she did not live with the defendant but they assisted each other to buy the house. She paid \$2000-00 as first defendant had advised her that a deposit of \$5500-00 was required to purchase the house. She gave him the money on 9 May 2013. She sold goods at the flea market to raise income.

First defendant on the other hand admitted that plaintiff was his girlfriend from sometime in early 2013 until December 2013 when she moved in with him as they commenced a customary law union until March 2015 when he decided to part ways. He bought the property in July 2013 with the assistance of his wife Euvencia Sithole who contributed \$2000-00 as he already had \$6000-00. He borrowed \$2000-00 from a friend and paid the whole purchase price of \$10000-00 in cash. He did the improvements from income he earned on certain projects he would do related to his work. Euvencia Sithole corroborated first defendant's account.

First defendant also tendered a copy of the agreement of sale dated 5 July 2013 which is also signed by Euvencia Sithole as a witness and whom he alleges was his wife at the relevant period. I now turn to assess the issues. The issues to be determined are as contained in the plaintiff's pre-trial conference memorandum and are as follows:

The first one is whether or not there was a tacit universal partnership between the plaintiff and the first defendant.

It is my considered view that to successfully plead and prove a tacit universal partnership or a joint enterprise by parties plaintiff must provide the court with precise facts on the circumstances from which such a partnership can be inferred. What I mean is that it is my belief that there must be evidence on the day to day aspects of the parties, their day to day duties and obligations as well as the intended benefits. It is my considered view that to prove the existence of a tacit universal partnership a party must tell the court the full parameters of such a relationship including both her direct and indirect contributions in order to succeed.

The plaintiff tells us that she fell in love with defendant in 2011. We are not told the parameters of this love relationship. We are not told the day to day engagements of these two lovebirds for the court to be able to discern from such facts the tacit conduct to pool and share resources. We are only told that in May 2013, the parties who were living apart save for that they were in a love relationship, then amassed some money to buy stand number 4196 Nketa 7 with plaintiff contributing \$2000-00. Other than this alleged contribution nothing is said about

any other conduct from which the court could infer a partnership more so that the parties lived apart. We are just told of an occasion when first defendant gave plaintiff some money to start a cross boarder business. We also have on the court record the uncontroverted evidence of the first defendant that at the material time he was married to Euvencia Sithole. We are told Euvencia Sithole did contribute to the purchase of stand 4196 Nketa 7 and an agreement of sale was produced where she is a signatory as a witness.

A tacit universal partnership by definition is an agreement in terms of which all the parties' movable and immovable assets, both present and future, form part of the assets of the partnership between them. It is an express or silent agreement between two parties who choose to live together in a permanent relationship. They then share the same responsibilities and obligations as a married couple per: the US online legal dictionary.

The plaintiff does not tell us much about this tacit universal partnership or customary law union. All she tells us is that first defendant once gave her money to order stuff, that she paid \$2000-00 when the house was being bought and that she sometimes used his car while he was in the UK although first defendant says this was not as per agreement. The immediate question that arises on the existence of the tacit universal partnership prior to the parties' moving in together is what form did it take? Was it at that stage a customary law union or a husband and wife scenario? This would be difficult to say as clearly per plaintiff's own testimony the parties moved in together in the last quarter of 2013. I take note of the fact that sometimes people can conduct a "husband and wife" relationship whilst staying apart but we are not even told if this was so.

The other question that immediately arises is would the plaintiff and first defendant be in a tacit universal partnership in the form of a customarily law union prior to moving in together in light of the third party being Euvencia Sithole, who corroborates first defendants' testimony that in fact from 2011 to December 2013 he was in a customary law union with her? The sale agreement also corroborates the part that indeed Euvencia Sithole was in the picture at the material time. For this court has no reason neither has plaintiff given one for it to throw out the agreement of sale.

The question that immediately arises then is, would first defendant live with Euvencia Sithole as husband and wife but be in a tacit universal partnership in the form of a customary law

union with plaintiff? I believe not. I hold the view that plaintiff failed to discharge the onus on her to prove the existence of a tacit universal partnership and the form it took prior to her moving in with first defendant. There is no evidence to support the contention that there was a customary law union between two people who lived separately and are having a spouse with whom he was planning and doing things. One would have expected plaintiff to even call her relatives to tell the court when the customary rites were performed. Surprisingly she also does not even mention it herself. Plaintiff herself does not provide well grounded facts to establish the existence of such a partnership at the time she alleges she paid the \$2000-00 deposit. Again her evidence on the amount paid for the property especially how payment was to be effected is not supported by the sale agreement tendered by the first defendant. Again she could not refute the sale agreement as being the agreement that was prepared when the property was purchased because she says she was not involved beyond giving first defendant the \$2000-00.

I am unable to find for the reasons stated herein that plaintiff has proved on a balance of probabilities that a tacit universal partnership in the form of a customary law union did exist in July 2013 when the property was allegedly purchased. Neither am I able to find as a matter of fact that plaintiff discharged the onus that she contributed \$2000-00 in whatever capacity for the simple reason that the evidence by the first defendant and Euvencia Sithole balances the scales in this matter. The plaintiff has not managed to tilt the scales so much so that she has proven that fact on a balance of probabilities.

It is my considered view that for plaintiff to have proved this point, it goes beyond her mere say so, she must have adduced evidence that tilts the scales in her favour, evidence that the defendant case would not succeed in countering by coming up with a version that makes it difficult for the court to find that what the plaintiff told the court is the only thing likely to have happened. We do not have such evidence, for the agreement of sale, first defendant's averments, and Euvencia Sithole's averments dent the plaintiff's case so much so that the court cannot make a factual finding in plaintiff's favour. This is bearing in mind that plaintiff has the burden of proof in this case.

Again, on the existence of a tacit universal partnership during the year 2014, plaintiff does not tell us that what transpired between September 2013 when she started living with first defendant and February 2015 when she allegedly left. She should have told the court her precise

contributions on the improvements that were made. What exactly did she herself contribute? She told the court that she would go and buy part of the property when the house was being renovated into a bigger property. One would have expected her to tell the court, even if she no longer has documentary proof, what exactly she purchased. Even if she could not remember all the building items that she purchased, this court would have expected her to at least point out to some of the items. Most building materials are by nature bulky items so much so that when a person buys timber, or cement or bricks or quarrystone or sand, they are most likely to remember what transpired because the whole process is involving. I do not find that where a house was extended from three rooms to seven rooms, a person who actively participated in the acquisition of the building materials concerned would not tell the court at least part of the items they specifically purchased. Plaintiff bears the onus to convince the court that she actively participated in the building of the property and how does she do this? By taking the court through the precise details of her participation. We do not have such evidence in the court record and yet the plaintiff had the burden of proof. How does this court sit here and find that plaintiff contributed towards the improvements of this house when plaintiff herself does not tell us exactly what she did? I am unable to find that plaintiff made any contributions to the purchase of the building materials, neither can I find that plaintiff performed any other duty in this household as she simply does not tell us so.

We must hear that from the plaintiff herself in laying the foundation for her case and proving the allegations that she is making. The court also takes note of the fact that these parties lived together for a period slightly over a year so much so that the duration of their union does not leave the court with the impression that they did invest their lives together and worked together to amass wealth. I say so for where parties would have lived together for say 5, 10, 15 years the court is enjoined to find that the duration of the union is such that they must have expended their energy towards a common goal to build an estate for the future. However, even a plaintiff who claims a tacit universal partnership of 15 years should still precisely detail her contributions therein otherwise the claim would still be dismissed.

As such the duration would only batress the plaintiff's case where plaintiff has adduced concrete evidence of her involvement in the partnership over the years. Where plaintiff has adduced no such evidence even the duration might be of no use to the court. I thus hold the view

that plaintiff has failed to prove her case on a balance of probabilities and as a result it should fail.

On the law, it is trite that in a civil case the plaintiff has the burden of proof. Such burden of proof is discharged on a balance of probabilities.

I am persuaded by the words of Lord Hoffman in a family case of *Re B* 2008 UKHL 35 wherein he answered the question of what is a balance of probabilities as follows:

“If a legal rule requires a fact to be proved (a fact in issue) a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule of fact that one party or the other carries the burden of proof. If the party who carries the burden of proof fails to discharge it, a value of zero is returned the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened”.

In the English case of *Miller v Minister of Pensions* 1947 2 ALL ER 372, DENNING J said the following:

“If the evidence is such that the tribunal can say we think its more probable than not, the burden is discharged, but if the probabilities are equal then it is not.”

I have already shown in this matter how it becomes difficult to make a factual finding that a tacit universal partnership existed at the time stand number 4196 Nketa 7 was purchased.

I have also shown how it is difficult to make a factual finding that it is more probable than not that plaintiff paid the \$2000-00 to the first defendant. I have also alluded to the contributions she alleges she made to the improvements of the house after she moved in. There is absolutely no concrete evidence of such contributions not only is documentary evidence lacking, but even concrete factual averments on what she specifically contributed towards the improvements are not there.

In the case of *Nyamukusa v Maswera* HH 35/16 UCHENA J dismissed a claim for livestock where in the plaintiff was claiming entitlement on the basis of a tacit universal partnership as the plaintiff could not give concrete evidence on the acquisition of the claimed cattle and goats.

I accordingly for the reasons given herein dismiss the plaintiff's claim with costs.

*Sansole and Senda*, plaintiff's legal practitioners

*Majoko and Majoko*, 1<sup>st</sup> defendant's legal practitioners