

SHINGISAI MARYLN NYAMUKUSA

versus

GILBERT KARENGA MASWERA

HIGH COURT OF ZIMBABWE

UCHENA J

HARARE, 21, 22 May, 26 June, 3, 6, 9, 10 July, 14, 15 September 2015,
and 14 January 2016.

Civil Trial

Miss. *V. A. Dzingirai*, for the plaintiff from 15 to 22 May 2015

Thereafter plaintiff was a self-actor.

S. Mugadza, for the defendant.

UCHENA J: The plaintiff started off as the defendants' girlfriend. They thereafter had a child Rosely Mufaro Maswera born on 12 March 2007 graduating her to his small house. The defendant was old enough to be her father. He was 58 and she was 23 when they had their first child. The defendant was a married man and was at the beginning of the affair staying in Umwisdale where the plaintiff was also staying. The defendant said she knew he was a married man as she used to come to his Umwisdale plot to buy vegetables and to grind her maize at his grinding mill. She disputed that but his story is strengthened by her witness her own brother who said she stayed in Umwisdale till 2005. She claimed that the affair started in 2003, meaning they lived in the same vicinity for two years during the affair. She therefore cannot be telling the truth when she says she did not know that he was married. The plaintiff later admitted that she knew he was married.

The defendant eventually divorced his wife. He then customarily married the plaintiff by paying lobola for her in May 2010. The defendant says he soon after paying lobola took her to Masvingo where he asked her to sign an ante nuptial contract. She refused saying she will in the event of their divorce want a settlement similar to what the defendant had given his former wife. The defendant said he realised that she was not marriage material and on returning to Harare took her back to her parents to advise them that he no longer loved her.

She however came back with him claiming that she had nowhere to go. He made two other attempts to take her back to her people, but she as before came back with him insisting she had nowhere to go. He had to live with her against his will in a dilapidated cottage in Mandara till he built another cottage on the property into which he has now moved leaving her and their two children in the dilapidated cottage. During their alleged strained cohabitation they had another child Cherielyn Maswera born on 19 January 2014. The defendant says this was a result of temptations she placed in his way. He alleged she would dress in a sexually tempting manner which weakened his guard leading to their having sex despite the strained relationship. The plaintiff says that is evidence that they were then happily married and were in a tacit universal partnership.

The plaintiffs' claim is for the distribution of property on the basis that they were in a tacit universal partnership and that the defendant will be unjustly enriched if she does not get her share of what they acquired during their cohabitation and customary union. The defendant counter claimed for the plaintiffs' eviction from the Mandara property.

When the defendant closed his case on 15 September 2015 the plaintiff tendered what she called a summary of her closing statement. Mr *Mugadza* for the defendant, promised to file his written closing address by 18 September 2015 which he did. The plaintiff promised to file her reply by 21 September 2015. She has to date not done so leaving me with no option but to prepare my judgment without her reply.

During the trial the parties agreed on the distribution of some property which the plaintiff brought into the customary union, or the defendant bought for her and the property the defendant brought from his former marriage. The plaintiff agreed that the defendant should be awarded a bed and the Mercedes Benz he was awarded in the divorce settlement with his former wife. The defendant agreed that the plaintiff be awarded the following;

- (i) The white leather lounge suit.
- (ii) 2 plate stove
- (iii) One door small fridge
- (iv) The single bed
- (v) Television set
- (vi) Glass casserole dish
- (vii) Stainless steel pan
- (viii) Sunbeam Blending machine.

The parties have not agreed on the distribution of two immovable properties Lot 14A Mandara and No 60 Gletwyn Township, and the following movables;

- (1) 2 Double Beds
- (2) 18 goats
- (3) 20 herds of cattle
- (4) Golf Cart
- (5) Isuzu Single Cab
- (6) 1 Russell Hobbs microwave
- (7) Thermofan oven
- (8) Big 2 door upright fridge.
- (9) 12 Road runner Chickens.
- (10) 2 small door fridges.

The plaintiff claims the abovementioned property on the basis that there existed a tacit universal partnership between her and the defendant. She claims that they during cohabitation and thereafter the customary union pooled their resources together for their common good, and complimented each other in acquiring assets. The plaintiff further said that the defendant will be unjustly enriched if she does not get her share of the property they acquired during their cohabitation and customary union.

The defendant denied there ever being a tacit universal partnership between them. He infect said he took her to Masvingo where he asked her to sign an ante nuptial contract, which she refused to do. He had to cancel their three day booking and came back to Harare after the second day. He on returning to Harare took her to her parents to formally announce the end of their customary union, but she came back with him claiming she had nowhere to go. He denies ever contemplating a tacit universal partnership with her as he wanted her out of his life. Her staying with him was through her refusal to go back to her parents and against his will.

A claim based on tacit universal partnership will have to establish the elements mentioned by Garwe J (as he then was) in *Mtuda v Ndudzo* 2000 (1) ZLR 710 (H) at p 716 F to G where he said;

“What amounts to a tacit universal partnership has been considered in several decisions of the courts in this country and in South Africa. The four requisites for a partnership may be summarised as follows;

- (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. See *Muhlmann v Muhlmann* 1981 (4) SA 632 at 634; *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219.”

The plaintiff’s claim can therefore only succeed if it satisfies these prerequisites.

Unjust enrichment is easier to prove as, all the plaintiff has to prove is that she contributed something which if not shared equitably, will leave the defendant enriched at her expense. In the case of *Industrial Equity v Walker* 1996 (1) ZLR 269 (H) at 296 G-H to 298D and at 302 F-G Bartlet J (as he then was) said;

“I have already found that a general enrichment action providing relief where just, according to the principles expounded by de Vos, in cases of unjustified enrichment not covered by any existing enrichment action, exists.”

At p 298 C-D Bartlet J commented on the prerequisites for a general enrichment action which I summarise as follows;

1. The enrichment of the defendant,
2. At the expense of the plaintiff who should have been impoverished by the defendant’s enrichment.
3. The enrichment must be unjust.
4. Classical enrichment actions should not be applicable and
5. There should be no positive rule of law against the plaintiff’s enrichment action.

See also the Supreme Court’s comments on general enrichment action in *Walker v Industrial Equity* 1995 (1) ZLR 87 (S) at p 100 B to E

The plaintiff’s claims will be closely examined to determine whether or not she contributed towards the acquisition of the assets she claimed and such contribution meets the above mentioned prerequisites.

The plaintiff struggled to prove that she had a tacit agreement with the defendant to go into a universal partnership with a view to making profit for their common good. The evidence led does not prove that there was any joint venture or business they conducted as partners from which any profit was made which they subsequently used to purchase the claimed property. The plaintiff’s evidence established that the plaintiff and the defendant had their own independent personal businesses from which she claims they raised money. She claims she gave to the defendant the money she raised from her businesses for purposes of buying assets for the family. That evidence does not prove a tacit universal partnership but may, if substantiated prove unjust enrichment.

The Gletween and Mandara properties.

The plaintiff's own evidence established that she did not have the capacity to make the direct contributions she claimed she did. She included in her bundle of documents receipts from her tailoring business which proved that she was not making any profit. Through cross examination it was established that her income was far less than her expenses which means instead of bringing money into the union she was an obvious liability to the defendant. It was demonstrated that she on occasions made so little that she had no money left for her own transport to and from work, let alone for paying her workers. She as an explanation said she did not issue receipts to all her customers. This is not convincing as it was only mentioned when she realised the embarrassing deficits she had at the end of each month. When she was asked why she brought the receipts to court she said "to prove that she was making money". This was before it dawned on her that according to those receipts she was not making any profits. She claimed to have been making US\$10 000-00 per year from a market gardening venture she was running at the Mandara property. This was proved false by the evidence of her own brother who said he only saw a bed of tomatoes about seven meters long by about one meter wide. That could not have raised US\$10 000-00 per year. It was also established that they do not have their own water at the Mandara property. They rely on borrowing water from a neighbour. It was therefore not possible to run a flourishing market gardening venture under those circumstances. The plaintiff claimed to have raised money from the forever living project and selling of second hands clothes but proffered no proof of her income from these alleged ventures. Her say so cannot be relied upon as she openly lied on several occasions. She is not a reliable witness. She for example lied about the Mercedes Benz being bought from a local garage using funds they had pooled together. When it was put to her that it was imported she conceded saying that it was imported through that local garage. The motor vehicle was purchased in 2009 and was awarded to the defendant in the divorce settlement with his ex-wife. She had sought to mislead the court that the motor vehicle was purchased from that garage when it was imported. As if that was not enough she tried to mislead the court into believing that it was bought from pooled resources. This was a lie because in 2009 she was merely the defendant's small house. When she was confronted with proof that it was merely being slooped with a Mercedes Benz the defendant got from the divorce settlement with his former wife she conceded that it was so and changed from having made direct contribution to having indirectly contributed because the defendant would though married to his former wife also come to her. She had the following exchange with defendant's counsel;

“Q. The defendant will say he got the Mercedes Benz as part of his divorce settlement with his ex-wife (Reg No 13320 See the court order dated 13 May 2010 Do you dispute it?

A. No I will not dispute it.

Q. Do you dispute the authenticity of the document?

A. No.

Q. Agree it's the one he swooped to get the other motor vehicle?

A. Yes

Q. Realise this is at variance with your saying you acquired it together. You did not contribute?

A. I believe I did.

Q. In what way?

A. It comes under complimentary effort as when he was with his ex-wife he was also with me.

Q. He would go to his wife and also come to you?

A. Yes

Q. Now agree he had a wife?

A. Yes

Q. From whom he would run away and come to you?

A. I believe Yes.

Q. Also agree you were his small house?

A. I would say yes.”

The plaintiff eventually abandoned her claim to the Mercedes Benz

She again lied in her evidence in chief when she said that, their customary union had not been dissolved yet in her further particulars (p 10 of her bundle of documents) it is clearly stated, “The unregistered customary law union has been dissolved”. She told several other lies which are on record. This level of dishonesty disqualifies her from being the witness whose word can be relied on without it being supported by other reliable evidence. It is therefore not believable that the plaintiff could have made any contributions towards the purchase of the immovable and movable assets she is claiming.

The defendant is as per common cause evidence a business man who the plaintiff admits had a stand in Glen Lorne he got as part of his divorce settlement. He produced evidence on how he sold it and used the proceeds to buy No 60 Gletween. He produced agreements of the sale and purchase of the two –properties. The defendant’s divorce settlement from his former wife under case No 5975/10 stamped by the Magistrates court on 13 May 2010 and produced as exh 1 confirms that the defendant was awarded Stand 2609 Umwisdale. Exhibit 2 is the agreement of sale of that stand to Muedzo Nebarwe dated 12 December 2010. Exhibit 3 is an agreement of sale through which Benjamin Hore sold No 60 Gletween to the defendant on 26 August 2010. The defendant explained that he had negotiated with the seller for a delayed payment from proceeds of the Glen Lorne property he was going to sale. This is evidence proving that the defendant had capacity to buy the Gletween property. He is a businessman who even without the proceeds of stand 2609 Glen Lorne would have had the capacity to buy the stand. According to exh 4 the defendant sold the Gletween stand to Kezina Sibanda on 28 November 2011 for \$110 000-00. Exhibit 5 is a sale agreement through which the defendant purchased Remainder H of Lot 14A Mandara from Interworks Enterprises (PVT) LTD on 14 December 2011 for US\$70 000-00. He had just sold No 60 Gletween for US\$110 000-00. There is no doubt that the defendant purchased the Mandara property through the sale of his divorce settlement stand No 2609 which he sold to buy No 60 Gletween which he subsequently sold to buy the Mandara property. He had substantial sums of money at his disposal.

On comparison the plaintiff who according to the evidence of her brother and the defendant had been working at Cream in Borrowdale till 2007 and had just been assisted by the defendant to start the tailoring business which according to her receipts was not doing well, could not have by any stretch of imagination contributed half of the purchase price of the Mandara property. The Gletween property, was purchased from proceeds of the defendant’s Glen Lorne divorce settlement stand. The plaintiff made no contributions towards its purchase. It was sold on 28 November 2011 long before the plaintiff issued summons on 29 August 2013. The court cannot distribute none existent property. The plaintiff was until she was shown the agreement of the view that it still belonged to the defendant. She did not know that the defendant sold stand 2609 Umwisdale, to fund the purchase of No 60 Gletween. This demonstrates that they were not in a tacit universal partnership because if a partnership existed the plaintiff would have known that the Gletween stand had been sold. It also proves that the defendant was doing as he pleased with his assets, without her

involvement. The plaintiff who the defendant said was then living with him against his will was obviously being ignored and not told what the defendant was doing because she was by then a divorced customary law wife who was refusing to go back to her people.

I have considered the possibility of the plaintiff having been impoverished through indirect contributions which could have unjustly enriched the defendant as was commented on by Gillespie J. (as he then was) in *Jengwa v Jengwa* 1999 (2) ZLR 121 (H) at 130 B to D where he said;

“Whenever the general law applies to a relationship and a wife has contributed to the marital weal, either by her financial contributions or by suppressing her income-earning capacity in favour of home-making and relieving her husband to accumulate capital, it should be recognised that she did so in order to promote the family’s wealth and with a view to sharing in it. By her selflessness, she incurs personal impoverishment in favour of communal enrichment. She risks future impoverishment in the event of divorce. That she does so without any contractual protection or exigency merely highlights, rather than excuses, the injustice of denying her a share in that wealth when the family is sundered by divorce. To permit such an injustice to remain is offensive.”

The evidence led excludes such a possibility because the defendant raised the status of the plaintiff from a young girl who was an employee of Cream Inn to a businesswoman who ran a tailoring shop mostly at his expense. I say it was mostly at his expense because he was paying the rentals for the shop at US\$150-00 and later at US\$350-00 per month and subsidising her in many other areas as demonstrated by the analysis of her tailoring business as exposed through her cross examination. He was also paying rentals for her flat. The following exchange took place between her and defendant’s counsel after several monthly deficits were exposed;

“Q. When did you earn US\$ 500-00 per month?

A. Not according to receipts.

Q. Transport is US\$44-00 so had minus \$39-00?

A. Yes

Q. Appreciate I have not factored in food at home and at work?

A. Yes.

Q. Also appreciate those expenses had to be paid by someone else?

A. Yes.”

I therefore find that the plaintiff's claim for the Mandara property has not been proved.

Distribution of Livestock.

The plaintiff claimed 9 goats 10 herd of cattle and 6 road runner chickens. She claimed that they acquired them through joint contributions. The defendant disputed that the plaintiff contributed towards the purchase of livestock. He said he acquired them before the plaintiff came into his life. He told the court that she was not involved with the operations of his A2 farm in Nyabira.

When the plaintiff was cross examined on how they acquired the goats she had difficulties in explaining how they were acquired. The following exchange took place between her and the defendant's counsel;

“Q When were they purchased?

A In 2011

Q From whom?

A Not sure who sold but we bought them

Q. For how much

A -----I was told estimate—let me remember it's a long time ago (looks up and down) Price was between \$15-00 and \$20-00 I believe.

Q Believe

A I know.”

On the other hand the defendant told a straight forward story of how he bought them before she came into his life.

The plaintiff had similar difficulties on how and from whom the cattle were purchased. She took long to answer simple questions. She said the 10 herd of cattle were purchased at between \$250-00 and \$300-00 each. She then said she contributed \$200-00, but wanted a half share of those cattle and their progeny. When asked why she wanted half of the 20 herd of cattle when she only contributed \$200-00 when the 10 herd of cattle were bought she said because they increased. The following exchange took place between her and defendant's counsel;

“Q. How much contribute?

A. ----- (works out on paper)- for goats \$100-00, started with 5 goats.

Q. Price per goat?

A \$25-00.

Q So bought the goats by yourself and he only contributed \$25-00?

A. We also bought cattle (works out)

Q. Don't have to work it out

A. -----(continues to work out) I contributed \$200-00

Q. How many cattle bought?

A. Roughly 10

Q. Don't know no of cattle bought?

A. They were roughly 10

Q. If they were 10 and you contributed \$200-00 how much was each?

A. \$250-00 to \$300-00

Q. So contributed for less than 1 cow

A If you look at it that way

Q. Why asking for 10 herd of cattle

A. I should get a share

Q. Asking for half but did not contribute 1 cow that's greedy?

A. No I don't feel that I am greedy I contributed towards food and salaries of workers who took care of goats and cows.

Q. Why not say so in chief

A. I would contribute cash

Q. Appreciate the problem you are in?

A. Yes maybe.”

The exchange demonstrates the unreliability of the plaintiff as a witness. She had earlier said the goats were costing \$15-00 to \$20-00 each, but changed to \$25-00. She had to work out answers instead of speaking from what she knew. She twice said roughly 10 herd of

cattle were bought because she was not sure of how many cattle the defendant bought because she did not take part when they were bought.

She due to the confusion arising from having to work out answers instead of speaking from what she knew fell into the error of saying she contributed \$100-00 for the 5 goats which were costing \$25-00 each and \$200-00 for the 10 herd of cattle which were costing \$250-00 to \$300-00 each. This demonstrates she did not contribute towards the purchase of the cattle and goats.

Her story about the cattle is not convincing. She failed to prove that she contributed towards the purchase of the cattle and goats.

On the chickens she was even confused on their number. She in evidence said they were 19. When she was referred to her summons she then changed to say they were 12. She gave the impression of a greedy woman who is seeking to get as much as she can from the defendant by exaggerating the assets to be shared. She failed to prove her entitlement to the cattle goats and chickens.

The Isuzu.

The plaintiff conceded that the defendant bought the Isuzu with his own money. She conceded that it is registered in his name but claims he bought it for her use. She later changed and said he bought it for her. The defendant said he bought the Isuzu for use by his company and is being used by the company. The plaintiff admits that it is being used by the company. She again gives the impression of a claimant who is claiming for the sack of self-enrichment at any cost instead of entitlement.

The Golf Cart and Russell Hobbs Microwave.

The plaintiff admits that the golf cart belongs to the defendant who bought it with his own money, but she wants a share of it as his customary law wife. She also admits that the defendant won the Russell Hobs microwave at a Golf tournament, but says it should be awarded to her because she cooked for him before he went to the tournament. She seems to be mistaking her entitlements to those of a wife under a registered marriage as provided in terms of the Matrimonial Causes Act [*Chapter 5; 13*]. She seems to forget that her claim is based on tacit universal partnership and unjust enrichment. Her claims over these assets cannot succeed.

The Thermofan oven.

The plaintiff told the court that it was acquired by the defendant in early 2013. She does not know how he acquired it but she claimed it. As there is no universal partnership nor unjust enrichment she is not entitled to the thermofan oven.

Big 2 door upright fridge.

The plaintiff also claimed a big 2 door upright fridge. The following exchange took place when she was cross examined about it;

- “Q. Big 2 door upright fridge when was it acquired?
A. In ----- 20---11.
Q. For how much
A. I do not remember estimate at around \$300-00.
Q A big 2 door fridge costing \$300-00 you are ignorant of reality?
A. It’s a 1 door fridge
Q. You are the plaintiff?
A. Yes
Q. The summons authored at your instance?
A. Yes
Q. So its correct. If you dispute yourself how do we know the truth?
A. Its an error of 2 instead of 1.”

The exchange shows the plaintiff was in agreement about there being a big 2 door fridge. She only changed the number of doors when her estimated price was questioned. It seems she was adjusting her description of the fridge to the price she had mentioned. That coupled with her hesitant response to the question on when the fridge was bought betrays a claim to an asset she knows the defendant has but has no clue as to how it was acquired. She cannot succeed as she will not be impoverished if the defendant is awarded the big 2 door upright fridge.

2 small door fridges.

The plaintiff in her declaration had offered the small 2 door fridge to the defendant. She under cross examination had the following exchange with the defendant’s counsel;

“Q. The two small door fridges?

A. This is the second of the two it was a small 1 door fridge.

Q. Not claiming it.?

A. I am claiming it. There are two fridges I am not claiming the small one.

Q. Departing from your declaration?

A. No they said 2 by error there are two fridges one big one small”.

If the plaintiff is not claiming the small fridge and it is the one she had offered to the defendant no issue arises.

The Graniteside Stand

The plaintiff, sought to make an un-procedural belated claim against the defendant’s company premises in Graniteside. She did not make a claim against it in her declaration. In her evidence she lied that she had amended her claim, but her then legal practitioner said no such amendment was granted. A party cannot introduce a new claim during evidence without first amending her summons.

The defendant’s counter claim.

The defendant counter claimed for the plaintiff’s eviction from the Mandara property. In view of my finding that the plaintiff has no justifiable claim to the Mandara property, he could have easily justified her eviction. The issue of eviction is however not just between him and her but involves the welfare of their children over whom this court is the upper guardian and has in terms of s 81 (2) and (3) of the Constitution a Constitutional mandate to protect and ensure that their best interests are served.

The defendant said he is already paying maintenance of US\$500-00 to the plaintiff for the maintenance of the children. He offered to pay an additional US\$200-00 for the plaintiff and the children’s alternative accommodation. The quarrels between the plaintiff and the defendant should not adversely affect the children’s rights. Section 81 (1) (d) and (f) protects the children’s rights to parental care and shelter. It provides as follows;

“(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—

- (a) to equal treatment before the law, including the right to be heard;
- (b) to be given a name and family name;
- (c) in the case of a child who is—

- (i) born in Zimbabwe; or
- (ii) born outside Zimbabwe and is a Zimbabwean citizen by descent; to the prompt provision of a birth certificate;
- (d) to family or parental care, or to appropriate care when removed from the family environment;
- (e) to be protected from economic and sexual exploitation, from child labour, and from maltreatment, neglect or any form of abuse;
- (f) to education, health care services, nutrition and shelter;”

As upper guardian of the minor children I asked the defendant how the children will be accommodated if the plaintiff is evicted. The defendant offered US\$200-00 for their accommodation. The plaintiff said that amount is not enough for her and children’s accommodation. In his address Mr *Mugadza* for the defendant suggested that the plaintiff can apply for variation if what the defendant offered is not enough.

This court as upper guardian of the minors will not gamble with their right to parental care from the defendant and their right to shelter. It cannot evict the plaintiff and the children in the hope that they will be able to find appropriate accommodation with the US\$200-00 the defendant offered. The eviction of a former spouse who has children should not be lightly granted. The provision of shelter to him/her and the children must be given serious consideration. That consideration must include the appropriate parental care offered by the parent seeking eviction. The children currently stay in Mandara. They are children of a businessman who in his evidence said money was not a problem. They should be accommodated at the standard they are used to and within the means of the responsible person. The defendant when asked whether the US\$200-00 was enough said the plaintiff should contribute. That was an irresponsible attitude bearing in mind that it had been demonstrated that the plaintiff had no means of her own. He had even under his cross examination told her that she totally depended on him and without his support she would die of hunger.

I cannot therefore evict the plaintiff from the Mandara property in the absence of adequate arrangements for the plaintiff and children’s accommodation. The defendant’s counter claim must be dismissed.’

In the result

By consent of the parties the following property is awarded to the parties as follows;

1. The plaintiff is awarded the following; the white leather lounge suit, 2 plate stove, one door small fridge, the single bed, television set, glass casserole dish, stainless steel pan, sunbeam blending machine.
2. The defendant is awarded a bed and the Mercedes Benz.

3. The plaintiff's claim on Lot 14A Mandara Stand and the rest of the movable assets is dismissed.
4. The defendant's counter claim for the plaintiff's eviction from Lot 14A Mandara is dismissed.
5. Each party shall bear his or her own costs.

Thondhlanga & Associates, plaintiff's legal practitioners
Madanhi Mugadza & Company, defendant's legal practitioners.