

MILLICENT NYARAI MEZA  
versus  
CECIL MADONDO

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 08 December 2016

### **FAMILY LAW COURT**

*K. Maeresera* for plaintiff  
*M. Kamdefwere* for defendant

CHITAKUNYE J: The plaintiff and defendant met in 1993 and got married under an unregistered customary law union in 1994. Their union was blessed with four children. The union was dissolved in 2007.

After the dissolution of the union plaintiff retained custody of the children whilst defendant left the matrimonial house.

On the 21<sup>st</sup> December 2010 the plaintiff sued defendant seeking, *inter alia*, custody of the minor children, maintenance for the children, a 50:50 sharing of house no. 101 Coronation Avenue, Greendale; a 50:50 sharing of a stand in Chisumbanje, Glen Lorne area and a sharing in equal shares of cattle and goats which she said had been acquired during the subsistence of the union.

The summons and declaration did not initially clearly disclose the cause of action relied upon. The plaintiff later amended the declaration by adding a paragraph alleging that the parties were in a tacit universal partnership.

The defendant in his plea disputed the plaintiff's claim. Whilst admitting getting into an unregistered customary law union from which four children were born, he denied that they ever entered into a tacit universal partnership. As far as he was concerned each party was doing their own thing with nothing suggesting that this was a partnership.

On the 5<sup>th</sup> March 2014 a pre-trial conference was held between the parties. At the end of the conference most of the issues between the parties were settled. Only two issues were referred to trial. These were:-

1. Whether or not a tacit universal partnership existed between the parties, if yes;

2. What proportion of 101 Coronation Avenue and /or its value should be awarded to the plaintiff?

A reading of the pleadings as well as a consideration of the evidence adduced by both parties reveals that a number of issues are common cause.

The following facts are common cause:-

When the parties married under customary law the defendant was employed as a chartered accountant under Ernest and Young while plaintiff was a trainee hairdresser. Plaintiff did not have a complete ordinary level certificate. She had to do some of the subjects during the subsistence of the union.

The defendant already owned a house in Hatcliff, Harare. Upon getting married they moved into defendant's house in Hatcliff.

In 1997 the Hatcliff house was sold for Z\$350 000-00 and proceeds there from were used to deposit the property now in dispute; that is no. 101 Coronation Avenue, Greendale, Harare. This house was acquired in 1997 and it is registered in defendant's name under Deed of Transfer No. 7829/97.

The purchase price of the Greendale property was Z\$650 000-00. After paying the initial sum of Z\$350 000-00 using proceeds from the Hatcliff house, defendant obtained a loan facility from CABS Building Society for the balance of the purchase price. The loan repayments were deducted from defendant's salary.

At the time the property was acquired it only had a cottage which the parties moved into after the sale of the Hatcliff house. The parties later built the main house. It is at this property that the parties stayed for the subsistence of their union. They however lived in the cottage and not in the main house.

All in all the union subsisted for about 13 years. During the union plaintiff furthered her education. She completed her ordinary level education and also attained a qualification as a bookkeeper.

It is further common cause that during the subsistence of the union both parties were gainfully employed. The only dispute on this aspect was on the periods plaintiff was in employment.

It was never the less agreed that plaintiff worked for Crocodile Security Company as cashier and accounts clerk, Graham and Douglas Real Estate (Pvt) Ltd as Accounts clerk/Cashier, and Almadale Investments (Pvt) Ltd as an Assistant Tax Consultant

The plaintiff also worked as the General Manager of Linewave Investments (Pvt) Ltd. This is a company which plaintiff said was a family business whilst defendant contended that it was solely owned by him and a third party to the exclusion of plaintiff. He nevertheless agreed that plaintiff was appointed general manager for this company

The plaintiff now works as a tax consultant whilst defendant runs his own company, Tudor House Consultant. It was agreed that the property was developed during the subsistence of the union in that a main house was constructed.

Issues for trial

1. Whether or not a tacit universal partnership existed between the parties.

Before delving into the above issue it is appropriate to consider the circumstances that have led the courts to recommend the application of common law principles in cases of the unregistered customary law union.

In terms of customary law a wife would normally be entitled to property known as *mawoko* and nothing else. Upon realising the injustice of the system especially where a wife would have contributed immensely to the wealthy of the family, courts agonised over the appropriate remedy to the injustice. It was recognised that a mere assertion of the existence of an unregistered law union on its own would not found a cause of action. It is in this regard that the application of general law principles was found suitable.

In this regard a party is required to plead to a recognised cause of action such as tacit universal partnership, unjust enrichment or joint ownership.

The choice of the cause of action to rely on varies from case to case depending on the circumstances of each case.

In *Chapeyama v Matende & Another* 1999(1) ZLR 534(H) CHINHENGO J had occasion to agonise over the challenges faced by women in unregistered customary law union at the dissolution of the union. After considering various inroads that had been made by the legislature into the rights of spouses in unregistered customary law unions on the demise of one of the spouses he lamented the absence of similar inroads on the rights of women at the dissolution of such unions. At page 551B-C the learned judge opined that:-

“The situation of a spouse, the wife in an unregistered customary law marriage is worse off upon dissolution or termination of the marriage than upon the death of the husband or during his lifetime....”

The learned judge proceeded to advocate for the use of principles in s 7 of the Matrimonial Causes Act on unregistered customary law unions.

In *Jengwa v Jengwa* 1999(2) ZLR 121(H) GILLESPIE J also had the agony of pondering on how best an equitable distribution of property can be done in such unions. He considered the principles of tacit universal partnership and unjust enrichment. At p 130 B-G he concluded thus:

“The road to an equitable division of marital property in a customary union might take this route. Whenever immovable property is involved, a finding might be made that the general law applies, since custom, as it is presently understood, recognises no ownership in immovables. In other cases, the choice of law is to be made on other grounds. 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. It promotes a discrimination against certain class of woman on the basis of gender. It treats various classes of women differently, denying some women rights in property which others enjoy. It wreaks unfairness between a husband and wife. The existing remedies of a claim for a tacit universal partnership, or based on individual proprietary rights are inadequate. ...”

The learned judge went on to state that:-

“Where she has made a contribution that impoverishes her and will leave the husband enriched at her expense under the existing law, then I would suggest that there be extended to her an action based upon that unjust enrichment.”

In *Mtuda v Ndudzo* 2000(1) ZLR 710(H) at 717F GARWE J (as he then was) after considering a number of cases on the subject came to the conclusion that:-

“The cumulative effect of the various judgments emanating from this court is that a wife in an unregistered customary union who is disentitled to a share in the matrimonial property on dissolution should be afforded protection, taking into account relevant considerations such as her level of contribution, duration of the union, etc. to do otherwise, would be to promote an injustice that has been occasioned by traditionally accepted notions of the gender roles of a husband and wife.”

The above views show the fact that the courts have for a long time recognised the injustice occasioned to women purely on the basis that their marriages were not registered. The non- registration of their unions disadvantages them as if they were the authors of such unions to the inconvenience of their husbands. Going by the traditional dynamics of marital power the fault for the non registration may be with the husband or family relatives desiring the fulfilment of certain aspects of the union to their selfish satisfaction.

The first task that befalls a spouse in deciding to sue at the dissolution of an unregistered customary law union under the general law is to choose an appropriate cause of action.

Each cause of action has its own special requirements which must be met for the proper assessment of what a spouse is entitled to.

*In casu*, the plaintiff was a self actor from the issuance of summons to the close of pleadings. In the summons she was not very clear on the cause of action she was relying on. She however did allude to aspects of equity in her proposal on how the assets acquired during the union should be distributed. When she made amendments to her pleadings she now stated that:-

“During the subsistence of their union, the parties lived in a tacit universal partnership, with each party contributing to the welfare of the union and its children and also to acquisition of property both movables and immovable.

The Plaintiff’s claim is therefore founded under the general law concept of a tacit universal partnership and this court has the jurisdiction to determine the issues in contention.”

The defendant’s plea to this aspect of the amendment was an obvious denial that they ever entered into a tacit universal partnership.

It is my view that in opting for tacit universal partnership, the plaintiff as a lay person may not have been properly advised. She put herself within the dictates of the specific cause of action without ascertaining whether her circumstances met the requirements for such a cause of action.

I reached this conclusion because during her evidence, even though she was now legally represented during the trial not much was said about whether she had proved the basic requirements for the establishment of a tacit universal partnership.

In *Mtuda v Ndudzo* (supra) at 716 E-G GARWE J aptly stated that:-

“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.”

It is clear from the above requisites that an ordinary unregistered customary Law union on its own would not constitute a tacit universal partnership.

*In casu*, both the pleadings and the evidence adduced did not evince agreement by the parties to form a partnership with an objective of making a profit. No evidence was adduced that they had agreed expressly or tacitly to engage in any business or commercial activity for purposes of profit.

The failure by plaintiff to establish the requirements of a tacit universal partnership is epitomized in the closing submissions by her legal practitioner. On the issue of whether or not a tacit universal partnership existed between the parties, counsel submitted that:-

“Our courts have now accepted that despite the inapplicability of the Matrimonial Causes Act[Chapter 5:13] in cases like the instant one, a woman or man married according to an unregistered customary law union can institute a claim for sharing of assets of the parties at the dissolution of the union under the common law principles of unjust enrichment, tacit universal partnership or joint ownership.(see *Zimmat Insurance Company v Chawanda* 1990(2)ZLR 143(S); *Mashingaidze v Mashingaidze* 1995(2)ZLR 219(H); *Feremba v Matika* 2007(1)ZLR 337(H).

Therefore there is no doubt that the plaintiff’s cause of action under the common law principle of tacit universal partnership is well founded in *casu*.”

This is all counsel could say on the issue of whether or not tacit universal partnership had been established.

The challenge counsel faced was that plaintiff’s evidence did not show that there was any stage the parties agreed to form a partnership. There was also nothing to indicate that the parties intended to operate as a partnership. There was simply no *animus contra hendi*.

Though plaintiff failed to show the existence of a tacit universal partnership I am of the view that court is still enjoined to examine the evidence and ascertain if there is any basis for awarding her anything.

In this regard I take comfort in the words of GARWE J in *Mtuda v Ndudzo (supra)* wherein at p 719 the learned judge said that:-

“Although there is no specific claim in the plaintiff’s declaration for the payment of the sum representing her contribution during the subsistence of the union, this was identified during the pre-trial conference as one of the issues for determination at the trial. The extent to which plaintiff, and the defendant for that matter, contributed was fully canvassed during the trial. In these circumstances, it is permissible for a court to determine such an issue.”

See *Vos v Cronje & Duminy* 1947(4) SA 873(C).

Thus were the evidence adduced is adequate for court to exercise its discretion and make an award court should not shy away from making the award.

In *casu*, though in her amendment plaintiff alleged they were in a tacit universal partnership, the reality of the case as per her declaration and evidence in court is that she was

simply seeking a just and equitable sharing of the assets based on her contribution to the family for the duration of the union. She clearly felt that to allow defendant to benefit from her contributions in labour and otherwise to her exclusion would be to unjustly enrich defendant whilst impoverishing her. Such would not be fair and equitable.

In paragraph 6 of her declaration she clearly stated that it is equitable that house no. 101 Coronation be shared 50:50 between the parties.

The basis for seeking a share in the property, as stated in her evidence, was her alleged contribution, both directly and indirectly, to the family's welfare, and to the acquisition and development of the property.

In a bid to show that she contributed to the wealth of the family plaintiff tendered documents showing her employment record. Thus after marrying defendant as trainee hair dresser it was her evidence that she was earning a salary. In the years 1995 -1997 she was now a qualified hair dresser and earning a salary as such. In the period 1997 – 1999 she was employed by Crocodile Security Company. A letter confirming such employment was tendered as exhibit. In 1997 she had also worked part time as an Assistant Tax Consultant for Almadale Finance Company. In the year 2000 to 2003 she worked for Graham and Douglas Real Estate (Pvt) Ltd. Thereafter she worked for the family company Linewave Investments (Pvt) Ltd till 2007 when the union came to an end. As a General Manager she was in receipt of a salary.

It was the plaintiff's evidence that she used her income towards the needs of the family hence enabling defendant to utilise the freed resources on capital developments for the family. She further said she also made direct contribution towards the construction of the main house by supervising the builders, buying the required material when defendant was not available.

Plaintiff produced shop account statements in her name showing that she was buying clothing and furnishings for the family.

She also tendered documents in her name for the purchase of building material. On building materials she said on many of the occasions she would use money provided by defendant and on some occasions she would use her own money especially when the defendant was not available and the builders wanted some materials bought in order to carry on their work.

The defendant disputed that plaintiff made the above mentioned contributions. I, however, did not hear him to suggest that the statements from clothing and furniture stores

were forged. His bone of contention was mostly on the invoices and receipts for building materials. In this regard he suggested plaintiff may have forged the documents.

The defendant's denial of plaintiff's contribution is without merit. For instance on the question of employment the documents tendered by plaintiff show clearly that for most of the years she was in gainful employment yet defendant could not readily accept that. He at the same time could not dispute the authenticity of the documents tendered on this aspect.

I am of the view that plaintiff did contribute in her own way to the needs of the family during the 13 years of the subsistence of the union.

The question is on the quantum of such contribution and the extent to which defendant maybe unjustly enriched and plaintiff impoverished if plaintiff is not granted a share of the property in question.

From the evidence by the two parties it is clear that the house no. 101 Coronation Avenue is not the only property acquired during the subsistence of the union. In the pleadings there is indication of a property in Chisumbanje, Glen Lorne area, the property in Nyanga comprising a shop and a bottle store for which plaintiff was the general manager and a farm in Macheke. These were alleged to be owned by defendant. According to defendant plaintiff acquired for herself a house in Tafara, Harare and two cars. These he believes should be adequate share for her.

In their pre-trial conference minute the parties merely indicated that the parties settled all other issues including the demands by the plaintiff of movable assets without disclosing the details of such settlement. In *Moore v Moore* 2012(1) ZLR 476(H) I alluded to the need for parties to provide details of any settlement as this may be necessary in deciding on the remaining issues. As it is, it is not clear whether the settlement involved a trading of assets allegedly owned by either party or some of the assets were deemed not available for consideration. The situation was exacerbated by the fact that the legal practitioners did not refer to the settlement in the leading of evidence and in their closing submissions. I wish to reiterate that whenever parties reach a settlement on any aspect of their case the details of such settlement must be recorded so that the trial court is better informed as, in some instances, the settled issues may in fact need to be made part of the court order in order to bring finality to the issues as between the parties. In *casu*, it is not possible for court to make the settlement part of this order as the terms thereof were not disclosed. The only aspect discernible from the pleadings is that plaintiff will have custody of the minor children with defendant exercising reasonable access.

In the interest of justice I will take it that each part remained with what was alleged they owned.

After a careful analysis of plaintiff's contribution towards the purchase and development of 101 Coronation Avenue as alluded to above, I am of the view that such contribution was minimal in terms of value. That contribution must however be availed to her so that defendant is not unjustly enriched to that extent. I am of the view that an award of about 15% share in 101 Coronation Avenue will be adequate. In arriving at this percentage I have considered that plaintiff already has a house and two motor vehicles acquired during the subsistence of the union. She had come into the union with virtually nothing.

Defendant shall be given the option to buy out plaintiff's share within a reasonable period failing which the property may be sold for the parties to realise their respective shares. Accordingly it is hereby ordered that:-

1. Plaintiff be and is hereby awarded a 15% share in immovable property namely house no. 101 Coronation Avenue, Greendale, Harare with the defendant retaining 85% share.
2. The property shall be valued by a mutually agreed valuator within 30 days from the date of this order. Failing such agreement the registrar is hereby directed to appoint a valuator from his list of valutors within 30 days from the date of such request from the parties.
3. The defendant be and is hereby granted the option to buy out plaintiff's share within 6 months, or such other longer period as the parties may agree from the date of receipt of the valuation report.
4. Should defendant fail to buy out plaintiff's share within the above stated period or such longer period as the parties may agree, the property shall be sold to best advantage by an estate agent agreed to by the parties or one appointed by the Registrar should the parties fail to agree on such agent.
5. Plaintiff be and is hereby awarded custody of the minor children with defendant excising reasonable rights of access as agreed to by the parties in their settlement.
6. The net proceeds shall be shared in the ratio 15: 85 as per their respective shares.
7. Each party shall bear their own costs of suit.

*Chibune & Associates*, legal practitioners for the plaintiff  
*Muringi Kamdefwere*, legal practitioners for the defendant