PORTIA MHURUSHOMANA
versus
GARIKAI SIGAUKE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 16, 18, 22, 23, 31 May & 3 July 2017

Trial

C. Ndlovu, for plaintiff
V. Chinzamba, for the defendant

MUNANGATI-MANONGWA J: The discovery of diamonds at Chiadzwa in Marange District brought fortunes to some families based in the eastern parts of Zimbabwe. The parties herein being a good example. Theirs is a "rags to riches" story where they moved from occupying a single rented room to ultimately buying a house in a plush suburb in Mutare as well as owning thirteen (13) motor vehicles among them top of the range.

The parties married under customary law rites in 2007 and never solemnized their union. Two children were born of the union and they are all minors. The parties parted ways in 2016 when the defendant paid the traditional token of "gupuro" to the plaintiff and the plaintiff and the two minor children were evicted from what had become the "matrimonial home." The plaintiff instituted action in court seeking distribution of the assets acquired during the subsistence of the "marriage". She relied on the existence of a tacit universal partnership as between the parties.

The following facts are common cause. That the parties met in 2003 when the plaintiff was a teacher in Mount Darwin. They moved in together in 2004 and their first child was born in 2005 with the last one being born in 2010. It is common cause that the plaintiff has been a teacher throughout the parties' life together and remains so as at the date of trial. It is also not in issue that from 2003 which is the time the parties met, to the time of hearing, the defendant has never been in formal employment. It is given that a property no. 12 Tayler Avenue Morningside, Mutare was acquired when the parties were together although it is

registered in the defendant's name. Neither is it in dispute that the parties at one time owned 13 motor vehicles and that the defendant bought his parents a Nissan double cab which they still own.

Most crucial, the parties agree that they were in a tacit universal partnership which started when they 'married' and ended when the plaintiff was given a "divorce token". What therefore remained for determination at trial was:

> "What is a fair and equitable distribution of properties acquired during the partnership."

Plaintiff's case

The plaintiff gave evidence to this effect. She met the defendant when she had just qualified as a teacher and was teaching in Mount Darwin. The defendant was not employed. She took the burden of maintaining him from the onset and when their first child was born she saw to all her needs. She then transferred to a rural school in Manicaland in 2006 and the parties rented a room in Mutare. The plaintiff paid rentals for the room and supplied food for the defendant. She would visit during pay days to attend to those obligations. In essence she was sustaining the family. It was her evidence that when she had pitched up pregnant, the defendant's family was hostile to her and the defendant himself was not in good books with his family. Her own family was not supportive as they were against her decision to marry an unemployed man. Despite this, she remained with the defendant due to her love for him.

Evidence shows that she devoted her entire salary to the livelihood of the family and at one point she was so overburdened to an extent that her land lady reduced her rentals on compassionate grounds. It was her evidence that she engaged in income generating projects by going to South Africa and getting orders for workmates, and selling to communities close to her school. Although not much money was generated, the income sustained the parties.

The reason she let the defendant reside in town was to have him capitalise on work opportunities. She tried to start up the defendant in the business of selling and buying cellphones by injecting proceeds from her annual increment in salary to no avail as the business fizzled out. She thus continued to bear the burden of looking after the family on her own. The plaintiff then engaged in another enterprise which is popularly known as "burning cash". This entailed transferring cash to clients from her account, getting United States dollars and in turn changing that currency and getting a profit. These transactions she facilitated through her bank, Agribank. She produced a bank statement with entries from January 2007 to June 2008. Same was accepted as exh 1.

When diamonds were discovered in Chiadzwa, Marange, the defendant expressed a desire to be involved in the buying and selling of diamonds as his friends there were into it and were doing well. The plaintiff agreed to the idea and gave the defendant US$4 800 that she had saved as capital and ZW $200-00. This, according to her evidence, was a turning point as the defendant successfully engaged in the diamond business. He would bring money which she would keep. Amounts ranged between US$50 000 to US$80 000-00 and at one time she held US$180 000. The parties' life changed and they moved to stay in Murambi a low density suburb, in a 4 bedroomed house. The defendant was now paying rentals and both were supporting the family. She continued buying and selling. The parties acquired 13 cars amongst them a Mercedes Benz, Toyota Landcruiser, Toyota Hilux double cab, a BMW and several others.

Of note was her evidence that the defendant bought her a Toyota Corolla bubble shape which he gave to her as a gift for standing by him all throughout their customary marriage when she sustained the family. It was her evidence that her relatives and the defendant's relatives were appraised of this development.

As the diamond business thrived she was the one doing "books of accounts" and would keep record of the amounts the defendant would have taken to buy diamonds, the profit and a rough record of the amounts used by the family. The husband also tried the transport business but was not successful. They had acquired two haulage trucks but the trucks had problems and the defendant no longer had cash to maintain them as security to Chiadzwa had been tightened.

In 2008 the parties bought a house from Dr Tatira and the purchase price consisted of US$80 000-00 cash and a motor vehicle. She states that she did not go to the estate agents for the conclusion of the sale agreement but had given the defendant her national identity card in anticipation of inclusion on the sale agreement. She was happy to leave everything to her husband because of the trust between the parties and she believed there was transparency between them.

The husband had advised her that their lawyer was to keep the title deed. It is only after separation and after the institution of the proceedings that she got to know that she was left out in the title deed.

The plaintiff insisted that she equally contributed to this partnership, carrying the family single handedly, providing capital for the defendant which then brought in the income that propelled parties into a better life. All this she did up and above of doing her wifely

duties, looking after the children and working as a teacher and enterprising. She insists on 50% of the value of the house and replacement of a Toyota Caldina (which replaced her Toyota bubble defendant sold) or its value of US$ 4500-00.

Under cross-examination the plaintiff insisted that it was because of her efforts of raising $4 800-00, the capital that resulted in diamond profits that led to all the parties acquisitions. Further she continued teaching and earning money through other enterprises hence a 50% share is justified. A lot of briefing was going on between the parties and she knew the buyers and other dealers that the defendant dealt with e.g. Mtulisi who sought help from the defendant and she even did his books. She insisted that she did the books but because she sincerely believed that parties were doing the business for the family, they kept records as a formality so as to just know as per her words "where we were going and where we were coming from and if I had foreseen that there would be a problem I would have kept the records, I thought this was for us and there were no signs".

Defendant's case

The defendant gave evidence that when he met the plaintiff in Mt Darwin Ruya Primary School in 2003, he was in the business of buying and selling clothes and cellphones. At the time he was not staying with his brother but was visiting the brother which he used to do. He denies that at the time he was not in good books with his parents. He had started his business of selling clothes and caps and ordering stuff from Harare to sell at Meikles Park in Mutare. He confirmed that he has never been formally employed nor looked for employment, committing his life to buying and selling items for profit.

He further gave evidence that he progressed into selling fuel which he received from colleagues Bothwell Hlahla, Lazarus Birima and George Mtetwa and as the commodity was scarce at the time he made money by selling it on the black market for profit. For this venture and the cellphone one, he did not need capital as he earned his money from commissions. It was his evidence that he also sold cellphone lines on commission, being supplied by one Ali Bhadhella, the son of the owner of Bhadhella Wholesalers. The defendant alleged that he kept his money in cash and sometimes in cellphones and never practised banking. It was his evidence that he even bought a Mazda 626 out of the profits from the fuel business. All this time the plaintiff would be at work and she would come during month end from the school outside Mutare. He denied knowing Hlahla and Birima during the diamond rush as alleged by the plaintiff. Suffice to say the defendant did not call any of his friends who supplied him with commodities.

The defendant stated that he would pay the family's rent and since the plaintiff had an account at Edgars she would sometimes get clothes. The plaintiff would sometimes pay rent and buy groceries but was not the only one contributing this way.

He explained his involvement in the diamond business as this: In 2006 one Ali Bhai a customer who used to buy phones from him approached him and informed him he was buying diamonds and the defendant could refer anyone with diamonds to him. The defendant had never seen a diamond but it was described to him. His first customer was a friend's aunt who brought a diamond from Chiadzwa and Ali Bhai paid the two with a 50 kg sack full of Zimbabwean dollars. As he was a middleman he did not require any capital. He denied ever getting $4 800 or $5000-00 from the plaintiff expressing his shock upon such allegations. He professed ignorance of the plaintiff's 'cash burning' business and the existence of a bank account exh 1 and insisted the plaintiff could not have saved such an amount.

In 2008 when he got to understanding the value of diamonds, he then started to go to Chiadzwa to buy diamonds rather than wait for people to bring them to Mutare. It was cheaper for him to go to the source. He also acted as a buyer for would be sellers. He moved to Murambi to a bigger house in 2007 when he already owned 11 vehicles and this was before going to Chiadzwa directly. In essence his evidence was to the effect that his fortunes changed for the better before 2008.

As for the money from the sale of diamonds, he indicated that as he needed a lot of cash in the business he kept his money in the wardrobe and the plaintiff knew where the money was. He however, denied that the plaintiff kept rudimentary records of the financial transactions. The defendant indicated that he personally bought no. 12 Tyler, Avenue Morningside, Mutare, the property in issue, from Dr Tatira and did all the negotiations in the plaintiff's absence. He only told her of the purchase well after he had paid for it. Although the agreement of sale indicated the purchase price in Zimbabwean dollars he says he had paid for it in United States dollars and topped up the purchase price with a motor vehicle. He stated that although the plaintiff had a share in the property it could not be 50% but 10%. This is because she did not assist him and also it was his belief under cross-examination that the plaintiff seeks to destroy him by making a claim over the only house he has as a registered owner, further he was worried about his image.

The following points came out of the defendant's cross-examination. That the parties started having marital problems in 2007 and that is when she stopped dedicating her entire salary to the family, stopped cooking and washing for the family and doing all her other

wifely duties. This is despite his admission that they moved to Murambi together in 2007 and moved into the new matrimonial home, the property in 2008, let alone have their second child in 2010. The defendant further sought to say that the tacit universal partnership was only in the beginning and later the wife was doing her own thing so the partnership ended in 2007. He, however, went on to admit that the partnership started when the parties got married and officially ended when he gave her the divorce token. He completely denied knowledge of any of the plaintiff's income generating projects.

The defendant indicated that he once had an account with Beverly Building Society but then proceeded to keep his money in his stock being phones whilst admitting that the diamond business became successful, he averred that since the plaintiff has a profession and he has his own business, she cannot benefit from him as he does not claim any share from her teaching profession.

On the cars, the defendant told the court that the plaintiff was free to use any car as he did not put any demarcations on these assets. On it being indicated to him that this proved the extent of the partnership his response was 'business is business and the way we lived at the house was different'. He disputed that he had bought the Toyota bubble for the plaintiff nor replaced it with a Caldina. He also denied that he has a Toyota Hilux four wheel drive and indicated that he is a pedestrian as the car was taken back by its owners. The defendant could not come up with a clear explanation *viz* the car but stated when parties separated it was still with him. Whilst admitting that the plaintiff participated in furnishing the house he sought to minimize the role of the plaintiff in furnishing the house.

The defendant indicated that he was offering 10% of the value of the immovable property to the plaintiff because she did not make a direct contribution to the property, but they had lived together as husband and wife for 10 years and that he has 2 (two) girls with her.

In answer to questions raised by the court the defendant stated that he sold all the cars and the last one was sold in 2015 and he did not share the proceeds with the plaintiff. As for the Caldina he had bought the car for $4500.00 and he sold it for US$3000.00. Defendant then sought to say he sold most of the motor vehicles to purchase the house and remained with three the Toyota Corolla bubble, a single cab which was stolen in South Africa and a Toyota Land Cruiser. No evidence was led on what became of the Toyota Land Cruiser as to whether or not that is the car sold in 2015.

Analysis

The evidence adduced in this case raised issues such as "burning cash" and clandestine dealing in diamonds which activities were rampant in the years 2007 and 2008. Such activities were often conducted outside the ambit of the law and are generally illegal. However the issue brought before me was not the legality of the practices but a dispute pertaining to division of assets acquired by the parties through their different enterprises. In any event, none of the parties emphasised the issue of legality or otherwise of the activities hence I focused on the issue before me against the backdrop of each party's contribution. With an admission that there was a tacit universal partnership in existence between the parties and concurrence between parties that the issue to be decided pertains to the sharing of the assets of the partnership, the court's tasks is that of apportioning the assets between the parties.

I find that the partnership between the parties commenced when the defendant paid lobola for the plaintiff and the parties started staying together in 2005. The partnership ended in 2016 when a divorce token was given to the plaintiff. Although the defendant sought to limit the partnership to the years 2005 – 2007 I found that to be deliberately meant to limit the period to be considered by the court to exclude the period when the diamond business was at its peak in 2008. The finding that the partnership spun over 11 years is supported by the fact that in 2007 the parties moved together to Murambi where they rented a house and in 2008 they together moved into a house which is the subject of this matter. In 2010 they were blessed with their second child. It is only in 2016 that the defendant terminated his relationship with the plaintiff. The chronicled events clearly show parties who were still together.

As for the plaintiff's contribution from the time parties got together up to the date of hearing she has been in formal employment with a stable income. She chronicled how she single handily maintained the family including providing for the defendant. That her story is true is borne by the fact that she gave evidence of how her own family was unhappy with her being tied down to an unemployed man and how the defendant's own parents initially thought she would be a burden to them when she pitched up pregnant and they indicated that he was unemployed. She struck the court as an honest witness who even admitted that despite her husband failing in other business endeavours, he was successful in the diamond industry and took over the burden of paying rentals and began to provide for the family.

That she engaged in income generating projects is borne by her bank statement which was placed before the court and the financial activity therein explicitly shows how large sums

of money were deposited and withdrawn when she engaged in the activity dubbed "money burning". This evidence was never sufficiently challenged apart from defendant saying he was not aware of it. Suffice to say the period covered is January 2007 to 2008. Whilst the defendant sought to deny that she would also sell clothes and go to South Africa, the court accepts her evidence as being the truth. Given the amounts generated especially from May 2007 as evidenced by deposits into her account up to August 2008, I am persuaded to believe that she indeed financed the defendant by providing capital to start the diamond business. She had the means. The bare denial by the defendant that he was already capitalized in his diamond business cannot stand in the face of this evidence. It is noted from the defendant's submissions that the defendant renders a half-hearted acknowledgement of plaintiff contribution when he states that "she would sometimes pay rent, buy clothes and use her Edgars account and do wifely duties even though she did not contribute directly to the acquisition of the property in question or my business which enabled me to acquire the said properties."

I find the above to be an understatement of plaintiff's contribution given that the defendant has not been formally employed and his informal business activities only prospered in 2007 – 2008 during the peak of the diamond trade. The defendant was contradictory in his evidence as regards his finances. At one time he said he kept his money in stock being the phones he was selling and he never had a bank account. Under cross examination he then said he had a bank account with Beverley but the bank closed down, and in the next instance he indicated that he kept his money at home. If at all his purported business of selling clothes and caps since 2004 when parties met was successful as he wants the court to believe, one wonders why the parties had to stay in a single room up till year 2007? Further, why would the plaintiff "sometimes" pay rent if defendant was so successful. He indicated that he even bought several cars whilst staying in a single room. That cannot be, the evidence shows that their progression to a better life started when he entered /joined the diamond business which could not have been in 2006.

The defendant not having any tangible evidence of his business exploits prior to 2008, he could have called his alleged colleagues whom he dealt with in the business of phones, cellphone lines and fuel, none came to give evidence. This leaves the court with one conclusion that he had no money to start the diamond business with, but only got kick-started by the plaintiff. He could not have been a successful broker of diamonds in 2006 when according to his evidence no-one knew much about diamonds and Ali Bhai had to describe to

him what a diamond looked like. The defendant was not an impressive witness in cross examination he would either refer to his legal practitioner or state that it is up to the court to decide.

It is common cause that the parties would at times in 2008 have between US$80 000.00 to US$100 000.00 in the house. The defendant simply stated that the money was kept in the house with plaintiff's knowledge and he denied that plaintiff kept some form of books of account. I am bound to accept the plaintiff's evidence that given the huge amounts involved in the trade the parties had to keep track of what defendant would have taken out for his orders and what remained and what also came in. As per plaintiff's evidence this was to enable the parties to see where they were coming from and going. Although she no longer has proof, this indeed is a cogent explanation especially given the huge sums of cash and the indications that this was for the family's own good and she had not anticipated that the relationship was to end like this.

Given that it is accepted as between the parties that there is a tacit universal partnership, the ultimate question is, given the plaintiff's contribution as per the court's finding, what is she entitled to as her share of the assets of the partnership.

Regarding the claim for the replacement of the Toyota Caldina, the plaintiff made an alternative claim for its value. The defendant's evidence was to the effect that he bought the car for $4 500-00, but sold the vehicle for $3000-00. He denied that he had bought her a Toyota Corolla bubble and insisted that plaintiff was at liberty to use all cars, hence could not claim the Toyota Caldina which he further argued never replaced the Corolla. I am bound to accept the plaintiff's evidence that the motor vehicle had been given to her as a gift in recognition of the role she played to carry the burden of the family before the defendant was on his feet. This she could not have fabricated, especially when she indicated that her family and the defendant's family were also advised. This is against a background where the defendant also bought a Nissan double cab for his parents as an act of appreciation. Further, the defendant admitted that of the four motor vehicles he remained with, he sold all of them and did not share with the plaintiff.

The defendant in his written submissions called upon the court to award the plaintiff 25% of the value of the immovable property a move from the 10% offered during trial. It is pertinent to note that customary law unions have presented legal challenges at dissolution when it comes to sharing of assets. Several judgments by the Supreme Court and the High Court have pointed to the fact that a spouse seeking sharing of matrimonial assets where an

unregistered customary law union is concerned must plead and prove a recognised cause of action be it unjust enrichment, joint ownership or tacit universal partnership.[1] What has become central is the considerations of justice, moreso where the current Constitution of Zimbabwe outlaws any forms of discrimination[2] GARWE J (as he then was) aptly summed up the line adopted by the courts as follows in *Mtuda* v *Ndudzo*[3].

> "The cumulative effect of the various judgments emanating from this court is that a wife in an unregistered customary law union who is disentitled to a share in the matrimonial property on dissolution should be afforded protection taking into account relevant consideration 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 gender roles of a husband and wife."

Given the above, it is my view that such considerations of contribution in a customary law union set up cannot be any different from aspects covered under s 7 of the Matrimonial Causes Act Chapter 5:13. This I say whilst alive to the contention that s 7 is applicable to valid marriages and cannot be superimposed on unregistered customary law unions due to the specific provision in section 3 of the Customary Marriages Act Chapter 5:07 to the effect that no marriage contracted according to customary law shall be regarded as a valid marriage unless such marriage is solemnized in terms of this Act.

One cannot overlook the fact that where parties have been staying as husband and wife in whatever set up, the indirect contribution inescapably involves looking after the home, caring for the family other domestic duties and any other forms of contribution for the good of the family. The duration of the marriage, the financial obligations, the standard of living of the parties, income earning capacity are aspects which should be considered irrespective of the nature of the marriage. In stating this, I am fortified by the spirit of s 26 (c) of the Constitution which advocates for equality of rights and obligations during marriage and at its dissolution. In any case the recognition of the unregistered customary law union has traversed a journey characterised by judicial pronouncements and legislative intervention to some extent, which developments cannot be ignored. Such progression is evidenced by *Zimnat Insurance* v *Chawanda*[4] *to Mtuda* v *Ndudzo* (cited above) and numerous other cases,[5] and added to that, are legislative provisions like Section 68(3) Administration of Estates Act Chapter 6:01 which recognises an unregistered customary law union as a valid

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[1] Chipeyama v Matende 2000 (2) ZLR 356, Jokonya v Pavarivega HH 52/17
[2] Section 56 (3) Constitution of Zimbabwe Amendment (No. 20) Act 2013
[3] 2000 (1) ZLR 710
[4] 1990 (2) ZLR 143 SC
[5] Mavate v Chibande HC 43/12, Chapeyama v Matande cited supra, Jengwa v Jengwa 1999 (2) ZLR 121 (H)

marriage for the purposes of inheritance, and the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] s 104 (c) which recognises such a union as a valid marriage for the purposes of the crime of bigamy should anyone in such a relationship seek to enter into a monogamous marriage with anyone other than his spouse whilst the union is still in existence. On the international and regional plain both the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Protocol To the African Charter on Human and People's Rights on the Rights of Women in Africa, whilst advocating for ultimate registration of all marriages according to the laws of signatory States recognise *de facto* unions and *the need for equality in family life and in the sharing of assets protected by the law* (my emphasis). Thus depending on levels as demonstrated above, there has been both a salient and in some instances an unequivocal acknowledgment that an unregistered customary law union is a marriage which should be accorded the same protection as that afforded to registered marriages in terms of spousal rights underlined by the need for equality. Thus, unregistered customary law unions are a practical reality which characterise not only the Zimbabwean society but Africa in general hence the stance taken in the above mentioned regional and international instruments for States to strive towards ensuring registration of marriages.

Reality is, an unregistered customary law union is practically to all intents and purposes a marriage as parties get together to form a family, have children, acquire assets and enjoy the privileges of being married and are accepted as a married couple by society but for the marriage certificate. In any case, electing to enter into a customary law union cannot result in prejudice and condemnation for parties, as it is an individual's right to participate in the cultural life of their choice as guaranteed by section 63(b) of the Zimbabwean Constitution.

Of note is the fact that the parties herein whilst in an unregistered customary law union have decided to rely on tacit universal partnership. The facts are clear that the purported partnership was not solely for the purchase of an immovable property but for parties to found a family, work for it and improve on their lives. The plaintiff made direct contribution to the upkeep of the family by putting all her financial resources therein. She also provided the capital for the defendant to engage in the diamond industry. It was from the plaintiff's ingenuity and industry that capital which catapulted the parties into the diamond industry came from. Thus for her, it was not only labour but financial contribution which led to the parties ultimately acquiring the property in issue. From the day parties met the plaintiff

has been "putting" or contributing into the partnership basket from her earnings as a teacher to the various income generating activities. This she did for a duration of 11 (eleven) years whilst looking after the home, raising their two children and also supporting the defendant. The attempt by the defendant to minimise the plaintiff's contribution cannot hold in the light of the evidence In considering the plaintiff's claim for the replacement value of the Toyota Caldina, I take note that, the claimed vehicle replaced that vehicle that had been given to her as a gift. Further, her claim would still succeed given that the parties were in a partnership and plaintiff as a partner was also entitled to a share of the motor vehicles which as admitted by the defendant she did not get. As the vehicle had been in use and susceptible to wear and tear, also given that the defendant's evidence that he sold it for $3000-00 was not challenged, I find no reason why plaintiff should be awarded more than the actual value of the car at the time of disposal. It is therefore just and proper that the plaintiff be entitled to US$3000-00 the replacement value of her motor vehicle which the defendant disposed without her consent.

Guided by the considerations on contribution and duration of the partnership, this is a case where the plaintiff deserves 50% of the value of the immovable property. The defendant's ego regarding what people will think of him when the property is gone cannot come in the way of justice. Equally the offer of 25% would not be just given the above considerations.

In the result it is ordered as follows:

1. The defendant shall pay US$3000-00 to the plaintiff being replacement value of the Toyota Caldina.

2.1 The plaintiff is awarded 50% of the value of stand 1836 Umtali Township of Umtali Township Lands aka No 12 Taylor Avenue, Morningside, Mutare.

2.2 The Registrar shall appoint a valuer to evaluate the aforesaid property within 14 days of this order. The plaintiff and defendant to pay the valuation costs on 50:50 basis.

2.3 The defendant shall pay the plaintiff her 50% share within 60 days of receipt of such valuation report.

3. Upon failure by the defendant to comply with clause 2.3 the Registrar to appoint an Estate Agent who shall dispose the property on the open market at best value for each party to obtain the 50% share.

4. The defendant to pay costs.

Gonese & Ndlovu, plaintiff's legal practitioners
Mugadza Chinzamba and Partners, defendant's legal practitioners