TARIRO MANDUVI
versus
ALEXANDER TARASANA GUNI

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, November 28 2016, February 20, 2017 and 4 January 2018

Civil Trial

M Mangwiro, for the plaintiff
A Mambosasa, for the defendant

CHITAKUNYE J. On the 27th May 2014 the plaintiff issued summons out of this court seeking a sharing of immovable and movable properties she alleged were acquired during the subsistence of an unregistered customary law union with the defendant.

The defendant denied that what they had was a customary law union. He described it as an unusual relationship devoid of any courtship, devoid of any performance of any traditional marriage rites in terms of Shona custom and that there were no marriage negotiations involving a go between and the plaintiff's parents. He contended that plaintiff was simply given to him by their religious leader who claimed that the Holy Spirit had ordered that the two should stay together as husband and wife. As a consequence of the religious leader's 'prophecy' plaintiff and defendant co-habited together in the manner of husband and wife from about 25 June 2011 to February 2014 when defendant brought the relationship to an end.

The defendant is a medical practitioner who commenced practice in about 1993. He had worked in government before starting his own medical practice/surgery. The plaintiff on the other hand had no professional occupation. In her previous marriage she had been a housewife. After the dissolution of that marriage she had not undertaken any gainful employment or engagement.

When the two commenced living together defendant continued with his medical practice whilst plaintiff remained home. At home there were domestic workers employed and paid for by the defendant. These comprised a Maid and a gardener. They also stayed with

defendant's three children from his previous marriages though the two elder children were at boarding school for most of the time. Their union was blessed with one child.

During the subsistence of the relationship the defendant acquired an immovable property namely the Remainder of Stand 10 Vainona Township of Vainona also known as Number 12 Glenelg Avenue, Vainona , Borrowdale, Harare in about September 2011 and obtained title deeds in 2012. Some renovations, mostly retiling and repainting, were effected to the property. The parties also acquired some movable property such as household goods. These were all paid for by the defendant as the only party in gainful engagement.

After the termination of the relationship the plaintiff instituted this action. In instituting this action plaintiff was not clear on the appropriate cause of action. In *Chifamba* v *Mutasa & Ors* HH 16/08 (unreported) MAKARAU JP (as she then was) aptly stated that:-

> "Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter so that what they plead is what the law requires their clients to prove to sustain the remedy they seek---------. Litigation in the High Court is serious business and the standard of pleadings in the court must reflect such."

In *casu*, it is apparent that upon being instructed by client counsel dashed to put pen to paper without digesting the facts of the matter so as to ascertain the choice of law and the appropriate cause of action. In the circumstances summons were issued on behalf of the plaintiff wherein plaintiff claimed a' sharing of immovable and movable properties' that was acquired by the parties during the subsistence of a customary law union. On the summons, the basis for the claim is captured as follows:

> "On the basis of unjust enrichment and tacit universal partnership that existed during the time the parties were customarily married."

Paragraph 6 of the plaintiff's declaration states that:-

> a) Plaintiff's claim for sharing of the matrimonial assets is on the basis that during the subsistence of their union the parties through joint and complimentary efforts acquired the listed properties for their common good; and/or
>
> b) Defendant will be unjustly enriched at plaintiff's expense if he retains all the properties."

The manner in which the basis of the plaintiff's claim has been pleaded clearly shows that the legal practitioner did not apply his or her mind to the appropriate cause of action but had a rudimentary idea that in cases of unregistered customary law unions one has to plead a recognised cause of action under general law and the two she/he could recall at the time were unjust enrichment and tacit universal partnership hence the two were cited conjunctively. This

court has stated in a plethora of cases the need for legal practitioners, when faced with such cases, to apply their minds to the choice of the law; where general law is deemed appropriate then a most appropriate cause of action must be pleaded based on the facts of each case. See *Mautsa* v *Kurebgaseka* HH106/17, *Feremba* v *Matika* 2007(1) ZLR 337, *Jengwa* v *Jengwa* 1999(2) ZLR 121(H), *Mtuda* v *Ndudzo* 2000(1) ZLR710 (H).

In deciding on the choice of law and the appropriate cause of action the plaintiff's legal practitioner did not apply his mind to the nature of the relationship. In the summons and declaration plaintiff alleged that the plaintiff and defendant entered into a customary law union which aspect the defendant disputed.

The circumstances of the case include that the plaintiff and the defendant were members of an apostolic church; this is where they met. Plaintiff had come out of an abusive marriage or union that had lasted for about 10 years. The defendant on the other hand had had two previous unions that had failed. Whilst the parties were not agreed as to how they came to 'marry', what is clear is that there was no normal courtship. The plaintiff alleged that defendant proposed to her through some elderly church women and she agreed. The defendant on the other hand contended that the leader of the church told him that the Holy Spirit had told him that plaintiff and defendant should marry as that was the will of God. Being religious he believed that prophecy and took on plaintiff as his wife.

As regards the marriage rites expected in a customary law marriage there was no dispute that such were not conducted according to custom. The marriage rites of payment of lobola were apparently presided over by a church leader without any relative of the defendant. Plaintiff said that only her uncle was there. This was clearly a unique union that was akin to a private arrangement without the participation of members of the parties' families as is normally expected under customary law.

In *Moyo* v *Chidumo* HB 42/13 NDOU J stressed the need to adhere to traditional practice in forming a valid unregistered customary marriage. Even if money exchanges hands from the 'would be' groom to a representative of the 'would be' bride secretively such a union would not qualify to be termed an unregistered customary law marriage.

Further, in *Hosho* v *Hasisi* 2015 (1) ZLR 772 (H) at 778E-F TSANGA J noted that:-

> "The process of paying *roora/lobola* and the ceremony itself involves key representatives from both families, as well as other people who can attest to the process having taken place. Furthermore, in today's reality there is also often documentary evidence in the form of a book of record kept by the receiving and paying families respectively of what has been paid and what remains owing."

It was evident from the pleadings that the above requisites for a valid customary law marriage were missing in this case. Key representatives of both families were not part to the *roora* payment or even negotiations thereof. This was a private church arrangement. Clearly the assertion that parties entered into a customary law marriage/union was misplaced.

At a pre-trial conference held before a judge on the 8th April 2015 the issue of a tacit universal partnership seemed to have been abandoned as the issues referred to trial were couched as follows:

1. Whether or not defendant was unjustly enriched by Plaintiff's contributions to the upkeep of his estate in light of the length of the union.
2. Which assets if any should be given to the plaintiff should the court find that the Plaintiff is entitled to property?
3. Whether or not Plaintiff should be ordered to return Defendant's Jeep Cherokee motor vehicle.

When the parties appeared before me for trial plaintiff's counsel confirmed that plaintiff had abandoned the issue of *tacit universal partnership* and that the plaintiff had returned the defendant's motor vehicle. What remained to be determined was essentially whether the defendant was unjustly enriched by Plaintiff's contribution to the upkeep of his estate in light of the length of the union? If so which assets if any should be given to the Plaintiff?

The plaintiff also reduced her claim from 50% to 20% share of the immovable and movable properties.

The plaintiff gave evidence and tendered documentary evidence including a video recording in which defendant was purportedly making some offers to the plaintiff. That recording was transcribed and translated and was tendered as exhibit 6.

The evidence led showed that the parties cohabited together in the manner of husband and wife from June 2011 to February 2014. One child was born during their cohabitation.
The plaintiff's evidence was to the effect that during the period of the union she contributed to the estate of the defendant such that if defendant did not pay her a 20% share in value of the immovable property he would be unjustly enriched whilst she would be impoverished. The 20% share she was now claiming was based on the purchase price of the immovable property 12 Glenelg Avenue Vainona. That property had been bought for USD340 000. 00 in 2011. According to her evidence the 20% would have been a sum of USD68 000-0 as the property was bought for USD340 000. She however asked for USD70 000-00.

The defendant thereafter gave evidence in which he basically contended that no case of unjust enrichment had been made against him. He contended that plaintiff was not entitled to the 20% share as she had not made any meaningful contribution either directly or indirectly. She in fact had not been impoverished in any way. If anything she had benefitted from the short-lived relationship.

In as far as the plaintiff s claim was based on unjust enrichment, it is important to ascertain whether such was proved. The requirements for the general unjust enrichment action are that:-

a) the defendant must be enriched;
b) the enrichment must be at the expense of another, in that the plaintiff must be impoverished and there must be a causal link between the defendant's enrichment and the plaintiff's impoverishment;
c) the enrichment must be unjustified;
d) the case should not come under the scope of one of the classical enrichment actions; and
e) there should be no positive rule of law that refuses an action to the impoverished person.

See *Industrial Equity Ltd* v *Walker* 1996(1) ZLR 85 and *Goncalves* v *Rodrigues* HH 197/03.

The contribution which impoverishes a woman in an unregistered customary law union has been recognised as not only a tangible contribution but intangible contributions as well. See *Ntini* v *Masuku* 2003(1) ZLR 638(H) at 642C-F.

In *Mtuda* v *Ndudzo* (*supra*) at 717 and 718 GARWE J (as he then was) aptly observed that:-

> "In *Jengwa* v *Jengwa supra*, Gillespie J found that an action founded on unjust enrichment would be sustainable if the facts of the case established such enrichment. He approached the matter this way. If a wife has contributed, either through financial contributions or by suppressing her income-earning capacity in favour of home- making and relieving her husband to accumulate capital, she incurs personal impoverishment in favour of communal enrichment. She risks future impoverishment in the event of divorce. Therefore, where she has made a contribution that impoverishes her and will leave the husband enriched at her expense, an action for unjust enrichment should be extended to her. I agree that in a proper case a wife in a customary law union can base her cause of action on unjust enrichment."

In *casu*, the relationship between the parties was not a customary law marriage but simply concubinage under the guise of a church union without the fulfilment of customary law marriage dictates. The onus is on the Plaintiff to prove unjust enrichment in the circumstances.

To effectively do this she had to show that during the period of cohabitation she made contributions which would leave defendant enriched at her expense. It was upon her to show that in so contributing she suppressed her income earning capacity for the good of the cohabitation such that she would be impoverished if she is not awarded a share in the defendant's estate.

The plaintiff's evidence on her contribution was to the effect that when the parties started cohabiting in June 2011 defendant was living in rented accommodation. Thereafter defendant identified a house he wanted to buy. He asked for her opinion of which she said she liked the house. The defendant bought the property without plaintiff's financial contribution. The property was thereafter renovated. The renovations included retiling and repainting the house. It was during the renovation that plaintiff said she contributed by overseeing contractors who were doing the renovations as defendant was busy at work. She would go with the contractors to buy materials for the renovations. The plaintiff was however unable to state the value of the renovation.

The defendant disputed that plaintiff supervised contractors as plaintiff is unskilled. He also alluded to the fact that the contractors did the work on his instructions and not plaintiff's. It may be noted that even from plaintiff's evidence not much contribution could be ascribed to her as her role was at the most peripheral as a wife at the residence. If at all she accompanied contractors when they went to purchase materials, her role would have been to witness the purchasing or to merely pay for what the contractors wanted. As someone who had no funds of her own whatever money she paid with was from the defendant. In such circumstances it is not easy to appreciate the quantum of her claim.

The other aspects she alluded to as contribution included driving the defendant's children to a school bus pick-up point when schools opened, and fetching one of defendant's children from boarding school on one occasion when the child fell sick. Though these tasks were disputed by defendant, it is in my view that even assuming that she undertook these tasks; such would not justify the extent of her claim. The plaintiff was unable to explain how such tasks enriched the defendant or impoverished her as she was not required to give up on anything.

The plaintiff also testified that at one time she went to collect defendant's mother from the rural area in Chivi when the mother fell sick and she had to drive at night. As with the single

trip to school to fetch a sick child, the plaintiff did not give up on anything in order to undertake this trip. The trip did not add any value to defendant's estate

The plaintiff further testified that she had contributed to the construction of a house at defendant's rural area which construction was ongoing at the time the cohabitation came to an end. She was not the builder but merely a spectator as the builders went about their work. At the most she went with the contractors to purchase some of the building materials with money provided by the defendant. This was for a period of not more than a week. . I am of the view that the extent of her contribution was not anything beyond what a 'wife' in her position would be expected to do. She did not have to suppress or sacrifice anything of her own in order to perform such a task.

It was common cause that during the 32 months of cohabitation plaintiff was adequately provided for by the defendant. The plaintiff testified that her lifestyle in fact improved during the subsistence of the relationship to an extent that she did not have to demand anything as defendant was providing her all she needed. She further testified that the defendant had in fact empowered her by enabling her to obtain a driver's licence.

Though at some point the plaintiff alleged that defendant had prevented her from pursuing a nursing career, this was clearly not true. As stated by the defendant, the plaintiff did not have the academic qualifications for such a course. In any case he only met her a year after she had come out of an abusive marital relationship for 10 years and during that period she had not sought to do the course. For the one year she was not in any relationship plaintiff had not sought to enrol for any training in preparation for gainful employment or engagement. Clearly the assertion that defendant had prevented her from pursuing a nursing career was fabricated to embellish her claim.

In my view this is not a case where it can be said that plaintiff subdued or suppressed her income earning capacity in favour of homemaking. There was virtually nothing that plaintiff gave up for the good of the family.

In the circumstances I find that the plaintiff has lamentably failed to prove that the defendant would be unjustly enriched at her expense if she was not awarded US$70 000.00. The evidence adduced did not show that she made any meaningful contribution directly or indirectly to the acquisition or renovation of the property whose share she craves for. It was not established that she was impoverished in any way. The property that plaintiff seeks a share of was acquired from savings made by defendant prior to cohabitation. The other properties acquired were from defendant resources.

The plaintiff sought to rely on the video recording(exhibit 6) as proof that defendant appreciated her contribution and was in fact prepared to pay her US$ 50 000 at the termination of their union. Unfortunately as this is a court of law there must be a proven cause of action if plaintiff is to succeed. The circumstances of the recording of that discussion were disputed such that reliance on it as proof of contribution is unsafe. Clearly the plaintiff made no meaningful contribution to the estate of the defendant. The defendant can out of his own benevolence decide to give her any amount of money or any asset for the time they enjoyed cohabiting together and that would not equate to her level of impoverishment and unjustly enrichment of the defendant. The plaintiff can accept the offer made during the trial and in closing submissions of the stove, kitchen utensils and the bedroom suit they shared during period of cohabitation.

I am of the view that this is a case parties should have been encouraged to settle on their own instead of insisting on a trial when clearly there was no evidence to sustain the cause of action pleaded let alone the quantum of the claim.

Accordingly I hereby grant an absolution from the instance with each party to bear their own costs of suit.

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Gambe & Partners legal practitioners, for the plaintiff.
Mambosasa Legal practitioners legal practitioners, for the defendant.