

TINEI MAUTSA
versus
MELODY KUREBGASEKA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE 25 January 2016 and 23 February 2017

Family law –action

T. Zhuwarara, for the plaintiff
D. Sanhanga, for the defendant

CHITAKUNYE J: In 1996 the plaintiff and the defendant were married to each other in terms of customary law. Their marriage was not registered. It was basically an unregistered customary law union.

The union was blessed with four children, two of whom are now adults and the other two are still minors. The union had its fair share of problems leading to the plaintiff issuing out summons in which he sought among other things:-

1. an order declaring the customary law marriage as of no force or effect;
2. guardianship and custody of the minor children and
3. a distribution of assets he termed ‘matrimonial assets’.

The plaintiff did not allude to a recognised cause of action in terms of which this court was being called upon to distribute the assets or to make the declaratory he was seeking. The manner in which the summons and particulars of claim were couched was as if the marriage was legally recognised hence the reference to the irretrievable breakdown of the union and the factors thereof as required under the Matrimonial Causes Act, [*Chapter 5:13*]. This was certainly misdirection on the part of the plaintiff.

The defendant, in her plea, denied responsibility for the breakdown of the marriage. She blamed the plaintiff for the breakdown of the marriage. She also disputed the issue of guardianship, custody and the manner of distribution of the assets as proposed by the plaintiff.

The defendant made a counter claim in which she confirmed that the parties were married in terms of customary law and that the marriage was not registered. She alleged that

the parties were in a tacit universal partnership and in terms of this partnership they acquired various assets, both movable and immovable. She made a proposal of how the assets should be distributed.

It is pertinent to note that the counter claim was based on the general law principle of tacit universal partnership, alternatively, the principle of unjust enrichment.

The defendant asked to be awarded guardianship and custody of the minor children with the plaintiff being granted reasonable rights of access. She also made a claim for maintenance in respect of the minor children

In response to the counter claim, the plaintiff denied that they lived a modern western type of life such as to warrant the application of general law principles to their union. He instead insisted that it was their intention that customary law should apply and so the defendant was only entitled to property that she would ordinarily be entitled to at customary law on divorce.

On the 16th October 2012, a pre-trial conference was held before a Judge in terms of rule 182 of the High Court Rules 1971. The issues for determination were captured as follows:-

1. Whether there was a universal partnership between the plaintiff and the Defendant or an unregistered customary law marriage.
2. Who should be the custodian of the minor children between the parties?
3. In respect of the distribution of immovable assets:
 - (i) whether the Defendant is entitled to a life usufruct over the immovable property known as 25 Coucal Drive, Mandara, Harare; and
 - (ii) whether she is entitled to a half share in the property known as 2 Yardley Close, Chisipite, Harare,
4. In respect of movables properties:
 - i) Whether or not the defendant is entitled to a stove, a pink lounge suite and a dining room suite at the farm;
 - ii) Which motor vehicle(s) is the defendant entitled to over and above the Ford Mondeo that the plaintiff has offered;
 - iii) Is the Defendant entitled to maintenance and, if so, in what sum.
5. It was noted that the Plaintiff is paying school fees and responsible for the school wear for the minor children and that the plaintiff has agreed that the Defendant can retain as her sole and exclusive property all the household goods in Mandara.

Due to a long passage of time from the date of the pre-trial conference to the date of trial, on the date of commencement of trial I sought clarification on the issues for trial from counsel for both parties and in their response they recast the main issues as:

1. Whether or not the defendant is entitled to a share of the property acquired during the existence of the unregistered customary law union in terms of a tacit universal partnership or alternatively, unjust enrichment.
2. The quantum of maintenance payable in respect of the three children borne of the union
3. Whether or not the defendant is at law entitled to maintenance and, if so, the quantum thereof.

The plaintiff gave evidence after which the defendant gave evidence. The plaintiff's evidence was basically to the effect that the parties married in 1996 and that the defendant was a housewife who brought no skill or asset into the marriage. He thus maintained that there was no tacit universal partnership as this was purely a customary law marriage. On the aspect of unjust enrichment the plaintiff argued that the defendant was not engaged in any income generating activity from which she could have contributed to the business or welfare of the family. As far as he was concerned he acquired all the assets without the defendant's contribution.

The plaintiff testified that he acquired number 25 Coucal Drive, Mandara, herein after referred to as the Mandara house, in the year 2000 on his own without the defendant's contribution. In the year 2006 he acquired number 2 Yardley Close, Chisipite, hereinafter referred to as the Chisipite property, on his own as an investment without the defendant's contribution. The position was the same as regards the various movable assets that are in issue.

It is in this light that the plaintiff felt that the defendant should be content with what he was offering her. That offer comprised:-

1. All the household goods in the Mandara house;
2. A Mercedes Benz 300 D or a Ford Mondeo motor vehicle (defendant to choose one)
3. The right to live in the Mandara house, which house is registered in the names of three of their children for as long as she wants.

The defendant's evidence, on the other hand, was to the effect that she entered into a customary law marriage with the plaintiff on the 6th July 1996, the day plaintiff paid roora/lobola for her. It is on that same date she said they entered into a tacit universal

partnership. At that time she was 20 years old with ordinary level education. During the subsistence of the marriage her responsibility as a wife comprised: looking after the home, making sure plaintiff's clothes were clean, food was cooked in time, the home was tidy and children were looked after well.

As regards her contribution to the plaintiff's business it was her evidence that this comprised mainly of giving advice when asked.

When the plaintiff acquired a farm, she expressed interest in the Roses project that was on the farm. In that vein she went to the farm to learn how Roses were grown and tendered. It was her evidence that in the process she would oversee the workers at the farm who were working on the Roses project. This was between 2002 and 2004 when she stopped due to pregnancy.

It was apparent that the defendant did not make meaningful direct contribution to the acquisition of the immovable properties at all. The situation was equally the same on movables. Her contention was basically that as a consequence of the tacit universal partnership and the duties she performed in the home she was entitled to a share in the assets to the extent of her claim as a partner.

The defendant's claim initially included the Mandara house. In her evidence, and upon admitting that that house was in fact in the names of their three children, she abandoned her claim for the Mandara house. Her claim now comprised:

1. A half share of number 2 Yardley Road, Chisipite, Harare;
2. A half share of all the farming implements located at Tama Farm namely;
 - i) 15 tractors
 - ii) 7 Mazda Trucks;
 - iii) Haulage Truck
 - iv) Disc Harrow
 - v) Four grinding mills
- 3 The following motor vehicles:
 - i) Chrysler
 - ii) Isuzu Truck
 - iii) Mercedes Benz E240
 - iv) Ford Mondeo

Whilst accepting all the movable household goods in the Mandara house as offered by the plaintiff, the defendant indicated that the plaintiff had excluded a Sony Radio which she

felt must be included. She also indicated that both the Ford Mondeo and the Mercedes Benz being offered to her were not in working conditions and so such offer was not in good faith.

It was clear from the evidence adduced that both parties were agreed that they married in terms of customary law in 1996. From that time their relationship was of husband and wife till the dissolution of their marriage in 2010. It is common cause that all the assets in dispute were acquired during the subsistence of that marriage. It is from that marriage that defendant contended that they were in a tacit universal partnership, alternatively, that the plaintiff would be unjustly enriched if she only takes the assets offered to her by the plaintiff. She would thus want a substantial share in the assets. The plaintiff on the other hand maintained that as this was a customary law marriage it ought to be governed by customary law. In the circumstances, therefore, the defendant was only entitled to that which customary law dictates *Umai/mawoko* property. This therefore implied that anything he offered her outside the *Umai/ mawoko* property would be out of his benevolence.

Choice of law

From the positions taken by the parties, the first issue to determine is whether general law or customary law should apply.

In this regard Section 3 of the Customary law and Local Courts Act [*Chapter 7:05*] states that:

- “(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires-
- (a) Customary law shall apply in any civil case where-
 - (i) the parties have expressly agreed that it should apply; or
 - (ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
 - (iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
 - (b) the general law of Zimbabwe shall apply in all other cases.
- (2) For the purposes of paragraph (a) of subsection (1)-
“surrounding circumstances”, in relation to a case, shall, without limiting the expression, include-
- (a) the mode of life of the parties;
 - (b) the subject matter of the case;
 - (c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case;
 - (d) the relative closeness of the case and the parties to the customary law or general law of Zimbabwe, as the case may be.”

In *casu*, parties were not agreed as to which law should apply. The defendant contended that general law should apply as the parties maintained a western lifestyle and

were not governed by African custom and practice. In that regard, the defendant contended, *inter alia*, that:-

- a) The parties lived in the low density suburb of Mandara;
- b) The plaintiff was a businessman who was in the business of farming;
- c) The defendant was a housewife who also worked at the family farm;
- d) The parties were blessed with four children who all attend or attended private schools where they are taught and live a western lifestyle;
- e) The parties would go on holidays and shopping trips during the weekends and holidays.

The plaintiff, on the other hand, whilst denying that general law should apply, did not proffer his own basis for seeking that the matter be determined in terms of customary law in view of the lifestyle alluded to by the defendant. He did not, for instance, specifically refute the surrounding circumstances that the defendant identified as indicative of the family's lifestyle.

The plaintiff's position seemed to be informed by a desire to take advantage of the customary law position where by the defendant would only be entitled to *umai/mawoko* property on dissolution of the marriage.

It is my view that the customary law position whereby a wife under customary law is only entitled to *umai/mawoko* property has been found to be unjust in a number of instances. I would also say that to award defendant *umai/mawoko* property in terms of customary law in the circumstances of this case would indeed be unjust and an affront to a modern day democratic society where both locally and internationally calls have been made for equal rights and opportunities. This is a union that lasted 14 years and to expect the defendant to move out with only *umai/ mawoko* property would be the height of judicial injustice.

Besides the submissions by the parties this court is also vested with the discretion to determine whether or not the justice of the case demands that general law or customary law should apply. It is in that regard that I firmly hold the view that the circumstances of this case require that general law should apply.

In *Muringaniza v Munyikwa* 2003 (2) ZLR 342(H) at p 348H-349A wherein NDOU J opined that:

"I am satisfied that the general law should apply, as it is clear that customary law does not apply to the dispute between the plaintiff and the defendant. In terms of section 3, if customary law were to apply, then it would not be possible to extend any relief to a woman in the defendant's position beyond her traditional entitlements of *umai* or *mawoko*

property. In the circumstances, this would have been unjust. The justice of this case requires that the matter be dealt with otherwise than in accordance with customary law.”

In *Chapeyama v Matende & Another* 1999(1) ZLR 534(H) CHINHENGO J bemoaned the injustice suffered by women in defendant’s situation. He aptly observed that the legislature had made some inroads in protecting the rights of women in unregistered customary law unions at the demise of their husbands but such protection had not been extended to women in similar marriages at the dissolution of the marriages or unions.

At p 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 suggested the application of the principles in s 7 of the Matrimonial Causes Act in unregistered customary law union as a way to do justice between parties to such a marriage.

In *Jengwa v Jengwa* 1999(2) ZLR 121(H) GILLESPIE J had occasion to consider the plight of women in unregistered customary law unions at the termination of such union. At p 130B-G he opined that:-

“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 homemaking 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 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 propriety rights are inadequate.”

At p 130F-G the learned judge further stated 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) aptly summed up the trend the courts were taking upon realising the injustices visited upon women caught up in the unregistered customary law unions in these words:-

“The cumulative effect of the various judgements 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.”

In order to come to the protection of women in such unions courts have alluded to the need to base the claim on some suitable general law principles. The invocation of these general law principles has not been without challenges as in some instances the circumstances of the particular case would not be in tandem with the requirements of the chosen cause of action. This has resulted in injustice being perpetrated by denying women appropriate share for their life’s commitment and sacrifice in the marriage.

It is apparent from the above cited cases that the distribution of property at the dissolution of an unregistered customary law union has dogged these courts for many years. Despite the call for legislative intervention to protect the interests of women who stand to be left destitute after having given a portion of their life to a man who has advanced financially as a direct result of the union no legislative intervention has been effected. I wish to add my voice to the call for legislative intervention, just as happened with the situation of surviving spouses at the demise of their husbands in terms of the Administration of Estates Act, [*Chapter 6:01*].

Whilst the efforts by the courts in providing relief to such women maybe commendable, a more decisive and definitive remedy should be provided by changes in the law pertaining to the rights of parties at the termination of such unions. Where parties have met all the customary law marriage rites, a recognition of their marriage albeit unregistered as a marriage for the purposes of distribution of assets acquired during the union would go a long way in eliminating discrimination against women on the basis of the type of marriage contracted.

In terms of article 16 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Zimbabwe acceded, State parties are enjoined to:-

“take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular [to] ensure, on a basis of equality of men and women:

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.”

Further section 26(c) of our Constitution provides that:-

“The State must take appropriate measures to ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution;”

It is thus imperative that appropriate legislative measures be taken to eliminate discrimination based on the type of marriage parties contract.

In the circumstances, I am of the view that general law should apply as applying customary law would result in some injustice to the defendant.

Tacit universal partnership

In casu, the defendant based her claim on tacit universal partnership, alternatively, unjust enrichment. In deciding on a particular cause of action a party must be alive to the need to lay a firm foundation for the chosen cause of action. The facts of the case must be such as would support that cause of action.

The defendant thus had the onus to establish all the requirements of a tacit universal partnership or unjust enrichment.

In *Mtuda v Ndudzo (supra)* at p716 E-G, GARWE J summarised the requirements of a tacit universal partnership in these terms:-

“What amounts to a tacit universal partnership has been considered in several decisions of the courts of this country and 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.”

In casu, the defendant testified that the tacit universal partnership commenced on the 6th July 1996 when the plaintiff paid the bride price to her parents and informed them that the defendant would continue with her education in order that they could work together as husband and wife. The assurance was necessitated by the fact that the defendant’s parents had expressed the view that the defendant was still young and needed to continue with her education. With the plaintiff’s assurance the marriage process was completed.

It was the defendant’s evidence that during the subsistence of the union, whilst the plaintiff built up his construction business, she was responsible for looking after the home,

cleaning, cooking meals for the family and washing the family's clothes. The responsibilities the defendant said she performed in this partnership were essentially domestic contributions or chores expected of a wife. The only notable exception she stated was that the plaintiff would on occasions ask for her opinion or advice in relation to his business. The value of such advice was difficult to comprehend as the defendant had no expertise in the construction business such that if at all such advice was sought it was a lay person's advice as wife and not as an expert or professional.

Besides the above, the defendant also testified that when the plaintiff acquired a farm, through the land reform programme in the year 2002, the family would visit the farm on weekends and through such visits she got interested in the Roses project at the farm. She asked for the plaintiff's permission to learn about Roses and plaintiff agreed. She thereafter was learning about Roses whilst at the same time working in the project. It was her evidence that she worked on the Roses project from the end of 2002 to about mid 2004 when she was forced to stop due to her pregnancy with the fourth child of the union.

The plaintiff disputed this and argued that the defendant asked to learn about Roses and he agreed to that. Her visits to the Roses project were to learn from the workers and not that she was working or even overseeing the workers. She had no knowledge about Roses and as someone learning she could not have contributed to the project in any meaningful way. The plaintiff further stated that the period that defendant was learning about Roses was not that long as she soon found out she was pregnant and her condition did not permit her to continue going into the Roses project.

I am of the view that the defendant, as someone who was learning from employees, could not have been overseeing those training her at the same time. If anything they may have simply given her due respect as the wife to their employer.

In his closing submissions the defendant's counsel argued that the domestic duties defendant performed and the work she purported to have been doing at the Roses project be taken as her contribution as a partner.

The plaintiff's counsel, on the other hand, argued that there was no tacit universal partnership but just a customary law union with attendant reciprocal duties of husband and wife.

In arguing for a finding that a tacit universal partnership had been established, defendant's counsel referred to a number of case authorities in which the application of this principle to unregistered marriages or cohabitation was considered.

In *Butters v Mncora* [2012] 2 ALL SA 485(SCA) the plaintiff and the defendant cohabited for a period of nearly 20 years. The plaintiff alleged that during that period a tacit universal partnership existed between the parties as the plaintiff throughout the 20 year period had contributed all her time and labour to the common household and to making it a family home for the parties and their two minor children. The defendant, on his part, had created a thriving business enterprise and became a wealthy man. The plaintiff made a claim for half the defendant's assets based on the principle of a tacit universal partnership. The High Court had made a finding that the parties were in a universal partnership and proceeded to award plaintiff a share of the assets based on that principle.

On appeal, BRANDA JA, who delivered the majority decision, acknowledged the fact that as the South African Marriage law did not provide a remedy for those who cohabit even for long periods, the plaintiff had the private law remedy of partnership to assert her claim. He alluded to the fact that the plaintiff had to establish that she and the defendant were not only living together as husband and wife but that they were partners.

Though in the *Butters* case(supra) it was a case of cohabitation whilst *in casu*, it is an unregistered union, I am of the view that that distinction is without consequence. The common denominator in both cases is the application of the general law principle of tacit universal partnership to a husband and wife relationship that is not recognised as a valid marriage. The appropriateness or otherwise of the principle in both scenarios is basically the same.

In *Butters v Mncora* (supra) at p 491b-d, BRANDA JA stated that:-

“In terms of Roman Dutch law, there are two types of universal partnerships, the first a *societas universorum bonorum* (also referred to as *societas omnium bonorum*) in terms of which the parties agree to put into common all their property present and future. The second type consists of the *societas universorum quae ex quaestu veniunt* where the parties agree that all they may acquire during the existence of the partnership from every kind of commercial undertaking, shall be partnership property.”

The learned judge alluded to the fact that although it had been previously held that a *societas universorum bonorum* could not be entered into tacitly, he was of the view that it could be entered tacitly. In this regard the learned judge considered a number of authorities in support of his stance after which, at p 492c-f, he opined that:

“In this light our courts appear to be supported by good authority when they held, either expressly or by clear implication that:

- (a) Universal partnerships of all property which extend beyond commercial undertakings were part of Roman Dutch law and still form part of our law.

- (b) A universal partnership of all property does not require an express agreement. Like in any other contract it can also come into existence by tacit agreement, that is, by an agreement derived from the conduct of the parties.
- (c) The requirements for a universal partnership of all property, including universal partnerships between cohabitants, are the same as those formulated by Pothier for partnerships in general.
- (d) Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached.”
(see e.g *Ally v Dinath* 1984(2) SA 251 etc

In casu, the defendant testified that from the time the bride price was paid there was an agreement that the parties would work together for the common benefit of the family. Whilst defendant did not have the money she brought her labour and the plaintiff brought his business acumen. The defendant's main role was to run the household by cooking, cleaning and raising the children whilst the plaintiff went out to run his business in order that he could provide financially for the family.

It was also the defendant's evidence that the plaintiff often said that he was working for the family to improve their lives and he did indeed provide finance for the family.

Counsel for the plaintiff argued that what the defendant was doing was expected in a marriage and there was nothing out of the ordinary. It is however my view that sight should not be lost of the fact that at the time of marriage the defendant was promised empowerment by way of further education, however when in marriage such promise was not fulfilled. Instead defendant was told not to worry as plaintiff would provide. The defendant's role was to look after the home and children. That in my view became a role assignment in their relationship. Due to her performance of that role the plaintiff was able to concentrate on his business. It should thus be accepted that the defendant's contribution did play a part in the success of the business.

Our law has long recognised contribution as including indirect contribution even by looking after the family and performing domestic chores. In *Mtuda v Ndudzo* (*supra*) GARWE J called for the recognition of such contributions. Equally in *Chapeyama v Matende & Another* (*supra*) CHINHENGO J supported the application of the Matrimonial Causes Act in determining proprietary rights of spouses in an unregistered customary law union. This was all in recognition of the value of the contributions, both tangible and intangible, a spouse in an unregistered customary law union would have made during the subsistence of the marriage.

In casu, the plaintiff did not deny the defendant's role and the fact that she played her role well for the duration of the union, at least till much later when problems surfaced. For a

greater part of the union defendant performed her role well enough for the plaintiff to concentrate on building his business and to acquire the assets in question.

It is in those circumstances that counsel for the defendant argued that the parties entered into a *societas universorum bonorum*; the agreement being to put in common all their property present and future for the benefit of the family.

In the *Butters* case, at p 492h-j, BRANDA JA opined that:

“Once it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates, in my view, that the contribution of both parties need not be confined to a profit making entity. The point is well illustrated, I think, by the very facts of this case. It can be accepted that the plaintiff’s contribution to the commercial undertaking conducted by the defendant was insignificant. Yet she spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children. On the premise that the partnership enterprise between them could notionally include both the commercial undertaking and the non-profit making part of their family life, for which the plaintiff took responsibility, her contribution to that notional partnership enterprise can hardly be denied.”

In casu, just like in the *Butters* case the defendant’s financial contributions to the plaintiff’s business venture was insignificant, the defendant spent most of the fourteen years of the marriage putting her effort and energy in promoting the interests of both parties in the home and raising their children. In that way it may be said that their partnership encompassed jointly, the commercial enterprises of the plaintiff and the home –making efforts of the defendant. It is because the two were performed to satisfaction that the family assets in question were acquired. The defendant’s contribution to the partnership must be recognised.

Counsel for the plaintiff further contended that the defendant had not proved all the requirements for a tacit universal partnership. The defendant’s evidence was on her role as a spouse and not a partner thus unless it can be shown that a spouse made a substantial financial contribution or regularly rendered services going beyond those ordinarily expected of a wife in her situation, the court should not accept that a partnership existed. Counsel alluded to the fact that the domestic responsibilities defendant performed were all natural consequences that flow from a customary law union.

This was aptly answered in the *Butters* case (*supra*) at p 493e-g wherein BRANDA JA opined that:

“As I see it, this argument harks back to the model of a partnership confined to a commercial enterprise. Taken to its logical conclusion, it would mean that even a negligible monetary contribution would outweigh an invaluable non-financial contribution to the family life of the parties. In this light I must admit some sense of

relief that, freed from the restraints of regarding universal partnerships as being confined to commercial enterprises, we are now able to evaluate the contribution of those in the position of the plaintiff in its proper perspective. This also accords with a greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families.”

This view resonates well with the views expressed by this court on the injustice occasioned by ignoring the sacrifice made by women in unregistered customary law unions who will have spent a greater part of their lives performing household chores for the common benefit of the family whilst their husbands were busy accumulating wealth.

Further, whilst it may be true that most of the activities such as domestic upkeep, cleaning, washing rearing children looking after the home and providing a warm home environment may be said to be the natural consequences of a marriage, the legislature has deemed it fit to recognise such activities as valuable contribution deserving of a share in the distribution of assets of the spouses in terms of the Matrimonial Causes Act where such customary law marriage has been registered. I am of the view that to recognise the domestic activities of ‘A’ just because her marriage is registered and then fail to recognise those same activities as a contribution by ‘B’ simply because her customary law marriage is not registered appears discriminatory.

Even though B’s marriage despite having undergone all the customary formalities is not recognised as a marriage for purposes of the application of the Matrimonial Causes Act, I am of the view that the activities by B must be recognised as a contribution to the benefit of the union and so deserving of recognition as contribution to the partnership. Failure to recognise such contribution would be a perpetration of the discrimination alluded to by GILLESPIE J in *Jengwa v Jengwa*(supra).

The case for a tacit universal partnership was also alluded to by MAKARAU J (as she then was) in *Marange v Chiroodza* 2002(2)ZLR 171 at 181D-F, when she stated that:-

“The argument in support of the view that an unregistered customary law union establishes a *tacit universal* partnership are similar to the arguments advanced by jurists who favour holding that there is universal community of property between married persons. Marriage itself is a union for life in common household. The common estate may be built by the industry of the husband and the thrift of the wife, but it belongs to them jointly as the one could not have succeeded without the other. As van der HEEVER J put it in *Edelstein v Edelstein NO & Ors*, the husband could not have successfully conducted his trade if his wife had not cooked the dinner and minded the children. It is on this basis that I hold that there existed a tacit universal partnership between the plaintiff and the defendant in the above matter.”

The plaintiff's contention that what he acquired was for himself alone and not to be shared would simply be a perpetration of the discrimination against women in unregistered customary law unions. In any case evidence was led that he went out 'hunting' for the family whilst the wife remained looking after the family. Clearly the plaintiff had a clean comfortable home, food prepared for him and his children raised for him whilst the defendant financially benefited from the plaintiff's business enterprise. Each benefited from the skill and labour of the other in his/her own way. It could also be said that the plaintiff could not have succeeded in his commercial enterprises had the defendant not cooked and washed for him and the family, cleaned the home and minded the children.

I am thus of the view that the requirements of a tacit universal partnership have been met by the defendant in that each party brought either money, labour or skill into the partnership and that partnership was to be carried out for the joint benefit of both parties.

With respect to the object of a partnership being to make a profit, as stated in *Butters* case Page 492h

“Once it is accepted that a partnership enterprise may extend beyond commercial undertakings, logic dictates, in my view, that the contribution of both parties need not be confined to a profit making entity.”

The fourth requirement that the partnership should be legitimate is a requirement common to all contracts. The partnership was a legitimate one. *Bester v Van Niekerk* (1960) 2 SA 779.

The finding that a tacit universal partnership existed does not however translate to a half share of the assets as claimed by defendant. As aptly noted in *Marange v Chiroadza* (*supra*) at 181G, in Roman Dutch law there is no presumption of equality of shares in a partnership, but the share of each partner is in proportion to what they have contributed.

In casu, the defendant's contribution was mostly in the household chores and looking after the children for the 14 year duration of the union. Though she alluded to working at the farm as additional contribution to the domestic activities she performed, it was clear that her contribution at the farm, even from her own evidence, was not much. Her desire to learn how Roses were grown put her in the category of a learner who was unable to contribute as much as a trained or experienced worker or overseer. In the circumstances her contribution could not have been great. What is clear to me is that she deserves a lot more than what was offered to her by the plaintiff.

It is common cause that there were two immovable properties acquired during the subsistence of the partnership outside the Tama farm. These are the Mandara property and no.

2 Yardley Close, Chisipite. It is pertinent to note that the Mandara house is registered in the names of the children of the union and so it is not subject of sharing. Though the plaintiff purported to offer the defendant usufruct rights in the said property it is clear that in as far as the property now belongs to the children, two of whom are now adults; it is only the owners who can make such an offer to their mother. The children as the registered holders of real rights in the property have the right to deal with the property as they wish. Any rights the plaintiff may seek to exercise over that property, such as to grant defendant, or anyone else for that matter, usufruct rights would be at the pleasure of the owners. It was thus folly of the plaintiff to believe that he was being benevolent in offering usufruct rights to the defendant over a property he no longer had ownership rights over without seeking the consent of the owners.

In any case, the defendant as the custodian of one of the minor children, who is a joint owner, may seek to remain in the property on that basis.

The second property, 2 Yardley Close Chisipite, is in the plaintiff's name. This property was acquired in 2006 when the partnership was intact hence the defendant claimed a 50% share.

The plaintiff's stance was that the defendant did not contribute anything and so she should not get any share. He also stated that if the defendant insisted on the existence of a partnership then such partnership should include the second wife as the second wife is now staying at this property.

The plaintiff was however not clear as to when he married the second wife for her to have a meaningful stake in the immovable property acquired in the partnership. If anything I got the impression that he may have married the second wife after the acquisition of the properties and so her living in the house should not unduly interfere with the defendant's entitlement as a result of her contribution as a partner. The recognition of the defendant's contribution is also based on the duration of the partnership.

Upon an analysis of the evidence adduced I am of the view that a 50 % share for the defendant is not justifiable in the circumstances. Her contribution during the 14 years of the union as testified to would entitle her to about a 25% share in the property.

The issue of the household movable properties was resolved by the parties serve for a Sony radio that the plaintiff wanted to be awarded to him with the defendant retaining the rest of the house hold goods at the Mandara property. That will be granted in that manner.

The issue of motor vehicles and farming equipment and vehicles associated with farming operations remained contentious. It was unfortunate that in their evidence the parties did not give values of the vehicles or equipment in question. The description of some of the equipment left a lot to be desired. It is important to always give precise descriptions of items so that court is better placed to distribute taking into account the particular item and its value. In this case, for instance the defendant alleged there were 15 tractors, 7 Mazda trucks, four grinding mills, a Haulage truck of which she wished to be awarded half of. The plaintiff on the other hand denied that there were 15 tractors but did not state how many tractors there were. He also stated that there were three disc harrows and not one, 2 Mazda trucks and a Haulage truck.

Due to the lack of precise description, court is left uncertain as to which tractors and Mazda trucks were being acknowledged as being available. Even in deciding on how to distribute them, it is unclear which tractor or truck is available. In respect to tractors it would have been helpful had the parties stated even the make and capacity of the tractors.

Another aspect that parties in litigation must always bear in mind is the importance of stating the values of the properties. In the absence of values a sharing of properties becomes a game of simply number of items when some of the items could be of little value whilst others would be very valuable. A party may end up with a valueless property whilst the other one gets the more valuable property.

To illustrate my point, if out of the 15 tractors defendant was awarded 7 she would not know which seven to take. Instead parties would begin a fresh fight over the identification of the tractors. Equally out of the 15 tractors most maybe very old and limited Runners whilst a few, if any, maybe newish. It would be ideal in such instances to distribute the tractors in such a way that each party gets something of value and not just a tractor in name.

Despite the difficulties posed by the insufficient details on the equipment and vehicles it is my view that I should proceed and apportion the best I can in the circumstances.

On the farming equipment I am of the view that most should remain with the plaintiff as they are meant for farming operations. Thus out of the three disc harrows defendant will be awarded one. The number of tractors was not clear from the evidence and so defendant will be awarded two of medium size horsepower tractors. The grinding mills will be retained by the plaintiff.

Of the items awarded to the defendant, the plaintiff will be granted the option to pay defendant the value of the equipment after valuation by a valuator agreed to by the parties or appointed by the registrar if the defendant does not wish to retain them.

On the motor vehicles plaintiff asked the defendant to choose between a Mercedes Benz 300D and a Ford Mondeo. The defendant, on the other hand, asked for four motor vehicles namely Chrysler, Isuzu truck, Mercedes Benz E240 and a Ford Mondeo. According to the defendant's list this would leave the plaintiff with 7 Mazda trucks and a Haulage truck.

After listening to the evidence on this aspect I am of the view that the defendant be awarded the Ford Mondeo and the Mercedes Benz 300D. The plaintiff will, however, be directed to have the motor vehicles repaired and serviced so that the defendant gets them in a good functional state.

Unjust enrichment

The defendant, in the alternative, made a claim for a share in the property acquired on the basis of unjust enrichment. Her contention was to the effect that in the light of the extent of her contribution to the marriage, the plaintiff would be unjustly enriched by the fruits of her effort, if she were to be awarded only the property offered by the plaintiff. She would on the other hand be impoverished by such an award.

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.

In *Jengwa v Jengwa* 1999(2) ZLR 121(H) at p 130F-G, GILLESPIE J had this to say pertaining to a claim based on unjust enrichment:-

“BARTLET J in *Industrial Equity v Walker* has given the law precisely that general action for which jurists in southern Africa have been pressing. The elements of that action, as the learned judge defined them, seem to be apposite to the case of the wife at customary law, to whose property rights the general law applies. 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.”

The contribution which impoverishes a woman in an unregistered customary law union has been definitively 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 stated 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.”

The evidence as already analysed whilst discussing the issue of contribution by the defendant shows that the defendant did contribute to the wealth of the family. She devoted 14 years of the marriage to looking after the home whilst plaintiff accumulated wealth. She provided the right home environment for the plaintiff to concentrate on his business enterprises. At the time of marriage she was 20 years old and expecting to advance in her education. That expectation was not realised as she was now devoted to taking care of the home. She thus suppressed her educational advancement for the sake of the family. She, in a way, suppressed her income earning capacity. Having made such sacrifice she is now being asked to leave with virtually nothing for her 14 years of toil as a house maker and bearer of their children. She is in a way the poorer as she leaves the union whilst plaintiff retains the wealth created during the union. I believe that a case could still have been made for unjust enrichment.

In the circumstances of this case, however, I am of the view that the action of tacit universal partnership is the most appropriate principle for sharing the assets acquired during the union.

Maintenance

Two issues were raised on maintenance namely: -

1. The quantum of maintenance payable in respect of the three minor children of the union; and
2. Whether or not the defendant is at law entitled to maintenance and, if so, the quantum thereof.

Quantum of maintenance for the children

The evidence led was to the effect that there is an extant maintenance order *pendete lite* from the magistrates' court operating against the plaintiff. It terms of that order the plaintiff was ordered to pay school fees for the children as well as maintenance of USD350-00 per child per month. This is the sum the defendant said must be maintained in respect of the minor children as they needed to maintain the same standard of living they enjoyed before the parents terminated their union.

The plaintiff on the other hand contended that a sum of USD300-00 per month for all the minor children would suffice. The plaintiff substantiated his contention by stating that there were now only three minor children and that these children spent most of their time at school. According to the plaintiff the children are attending boarding school and so spent only three to four months of the year with the defendant during school holidays. The plaintiff further alluded to the fact that some of the children's needs are met at school as he pays all the schools fees. He also asked court to consider the fact that he has three other children who he looks after.

Under cross examination the plaintiff admitted that apart from coming home during school holidays the children do also come home when given long weekends referred to a 'exit' and may also come on other weekends.

The defendant testified that although the children spent more time during the year at boarding school, whilst at school they require maintenance for various personal products that are not catered for in the school fees paid by the plaintiff. There are such items as school outings and trips that they undertake at school. There is also the issue of transportation when they come home and go on trips, as well as additional food items that they require whilst at school. She also testified that the children had become used to a certain lifestyle and the termination of the partnership should not lead to the plummeting of the lifestyle the children were used to.

In issues pertaining to children the primary consideration is the best interest of the children. *In casu*, the children are expected to continue enjoying the same standard of living they enjoyed when their parents were still together more so if the responsible person can still

afford that standard of living. It is common cause that though the plaintiff has been paying school fees he has also been meeting the maintenance order granted by the magistrates court. For the past six years when plaintiff and defendant have been on separation the children have continued to enjoy the lifestyle they were used to before their parents separated. That lifestyle must continue unless the plaintiff can show that his circumstances have changed for the worse to an extent whereby he can no longer afford that same lifestyle for himself and for the children. This, the plaintiff did not establish. An analysis of the plaintiff's testimony does not reveal his incapacity. It is clear that he just wanted a reduction because the partnership has come to an end. The plaintiff did not disclose his income and expenditure in order to satisfy court that he can no longer afford the standard of living the children were used to and the sum that was determined by the maintenance court, which sum he has been meeting.

I am thus of the view that based on the evidence adduced, there is need to maintain the children's standard of living and this can only be done by maintaining the maintenance sum at the current level. It is accepted that the children spend most of their time at school, but as stated by the defendant, even whilst at school there are some needs that she has to cater for.

Maintenance for the defendant.

In her pleadings the defendant did not claim for maintenance for herself. It would appear that the issue of her maintenance arose at the pre-trial conference stage as it is only then that the pre-trial conference minutes reflect the issue of maintenance for the defendant. Whatever motivated her to seek maintenance for herself at such stage and not earlier is not clear to me.

In her oral testimony the defendant claimed a sum of USD 750-00 per month as maintenance for herself. The defendant apparently took the figure as was granted at the maintenance court when she applied for maintenance *pendete lite*.

At common law one of the consequences of divorce is that it puts an end to the reciprocal duty to support that existed between the spouses during the marriage. See *S v Simpson* 1964 (1) SA 61(N).

In the case of a registered marriage post divorce maintenance may only be claimed in terms of section 7(1)(b) the Matrimonial Causes Act which provides that:-

“Subject to this section, in granting a decree of divorce or at any time thereafter, an appropriate court may make an order with regard to the payment of

maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage.”.

In the case of unregistered customary law unions, as is the case here, there is no legislative provision for maintenance after the dissolution or termination of the union.

It was thus incumbent upon the defendant to clearly establish the basis for the claim for maintenance after the termination of the union or partnership that is recognised by law. The defendant did not disclose the legal basis for her claim for maintenance for herself. One only gets a glimpse of the reasons for seeking maintenance in her evidence when she was asked why she thought she should be maintained by the plaintiff. Her response thereto was to the effect that she is the mother of his children and that when she gave birth to the children she suffered a lot. She had to be operated on in some instances hence she now has some health problems. It was also her evidence that she needed to undergo a major operation. No medical evidence was, however, tendered in support of these averments on medical condition.

In any case post divorce maintenance even on dissolution of marriage in terms of the Matrimonial Causes Act must be justified. It is not just there for the asking. In *Priscilla Mhlanga v Samson Mhlanga* HH 70/11 I reaffirmed the fact that post divorce maintenance cannot be awarded on the mere say so but must be claimed, pleaded and proved. If that is the position in registered marriages, I do not think it would be more favourable in unregistered unions. One cannot simply say because our partnership has been terminated I deserve to be maintained by my ex-partner or that because I am the mother of his children he must therefore maintain me. I am thus of the view that no proper claim for maintenance for the defendant was made.

It may also be noted that even if the claim were to be entertained, there was virtually no evidence justifying the quantum being claimed serve to say that it was the sum granted as maintenance *pendete lite* in the maintenance court. In order for this court or any other court to properly assess the quantum of maintenance the parties need to give evidence on their respective incomes and necessary expenditure. Such evidence was lacking in this case. There was just an assertion of figures without showing how those figures were arrived at. Thus as far as defendant's maintenance is concerned she ought to have stated her necessary expenditure and show that plaintiff is able to meet such especially that this would be after the termination of the union. It would be from such evidence that court would be able to determine a just sum and the duration for the payment of such amount.

I am thus of the view that no justification has been made for an award of maintenance for the defendant.

Accordingly it is hereby ordered that:

1. The defendant be and is hereby awarded custody of the minor children namely- (i) Tatenda Mautsa, born 22 April 2000 and (ii) Tariro Nokutenda Mautsa, born 13 October 2004.
2. The plaintiff is granted rights of access for two weeks of every school holiday and on alternate public holidays.
3. The plaintiff shall pay maintenance in respect of the minor children in the sum of US\$350-00 per month per child until the child attains the age of majority or becomes self supporting whichever is earlier;
4. The plaintiff shall retain the minor children on his medical aid and make provision and payment for prescription or shortfalls as may be required from time to time;
5. The plaintiff shall continue to meet the minor children's school fees and other obligatory school requirements.
6. The defendant is hereby awarded the following movable properties:
 - (i) All the household and appurtenances goods at 25 Coucal Drive, Mandara, except for a Sony radio which shall be awarded to the plaintiff;
 - (ii) Ford Mondeo motor vehicle;
 - (iii) Mercedes Benz 300D motor vehicle;
 - (iv) Two tractors of medium size;
 - (v) One Disc harrow.

The plaintiff shall have the two motor vehicles namely Ford Mondeo and Mercedes Benz 300D repaired and serviced within 60 days from the date of this order, or such longer time as the parties may agree, so that defendant receives them in a good functional state.

On the farm equipment those shall be valued by a valuator agreed to by the parties or one appointed by the Registrar from his list of independent valutors. The plaintiff may exercise the option to pay defendant the value thereof within 60 days from the date of receipt of the valuation report, unless the defendant elects to retain the equipment.

7. The defendant is awarded a 25 percent share in the immovable property namely; no. 2 Yardley Close, Chisipite, Harare whilst the plaintiff retains a 75 percent share of the same.
8. The parties shall within 30 days of this order appoint a mutually agreed valuator to value the property. Should the parties fail to agree on a valuator, one shall be appointed for them by the Registrar of the High Court.
9. The plaintiff is hereby granted the option to buy out defendant's share in the said immovable property within a period of 12 months from the date of receipt of the valuation report. Should the plaintiff fail to buy out defendant within the stated period or such longer period as the parties may agree, the property shall be sold to best advantage by an estate agent mutually agreed to by the parties, failing such agreement, by one appointed by the registrar from his list of independent estate agents. The net proceeds shall be distributed in terms of the sharing ratio of 75:25.
10. In the event of the plaintiff failing to sign the requisite transfer documents, the Sheriff be and is hereby directed to sign the documents in plaintiff's stead to effect transfer or change of ownership in respect of both movable and immovable properties.
11. The cost of valuation shall be met by the plaintiff in respect of both the movable and immovable properties.
12. Each party shall pay their own costs of suit.

Messrs Gill Godlonton & Gerrans, plaintiff's legal practitioners
Messrs Kantor and Immerman, defendant's legal practitioners