MUCHANETA CHIWA
versus
SUSAN CHARI

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 3 November 2022 & 17 January 2023

Civil Appeal

Mr *F Masarirevhu*, for the appellant
Mr *K Mawodzwa*, for the respondent

MUCHAWA J: This is an appeal against a judgment of the Magistrates Court which was seized with determining the appropriate award between the parties, of the immovable property stand number 4078 Manyame Park, Chitungwiza after the dissolution of the tacit universal partnership between them.

It is common cause that the appellant and respondent were in an unregistered customary law union from 2009 until 2020. They had three children together and acquired various movable properties and one immovable property being Stand Number 4078 Manyame Park, Chitungwiza which was acquired in 2014. The appellant instituted an action seeking to have the property distributed. The parties agreed on the distribution of the movable properties and referred the issue of the immovable property to trial.

The court *a quo* gave the following order:

1. Plaintiff is awarded 70 percent of the stand number 4078 Manyame Park, St Marys Chitungwiza.
2. Defendant is awarded 30 percent of the stand number 4078 Manyame Park, St Marys Chitungwiza.
3. The property shall be evaluated by a registered Estate Agent who is to be paid by both parties proportionately to each's share and the evaluation should be done when the youngest child attains the legal age of majority or becomes self- supporting whichever

comes first. Plaintiff will be accorded the chance to buy out defendant first within 6 months of receipt of the valuation report to which after the expiry of the 6 months, the Defendant will be accorded same opportunity to which failure to do so by either party, the property will be sold by private treaty and each party paid out appropriately.

4. Each party to bear its own costs.

Disgruntled, the appellant has lodged the instant appeal on the following grounds:

1. The court *a quo* erred in suspending the valuation and sharing of the property to the time the parties' last born child turns 18, which is in essence 11 years from the date of judgment. The court in this regard erred by failing to appreciate that by so doing, it violated the appellant's entitlement that accrue to him as a partner upon termination of the tacit universal partnership.
2. The court *a quo* erred by imposing such a condition , effectively amounting to a usufruct, to the respondent and children when in fact there is law of maintenance which would ordinarily apply in the event that the property is distributed between the parties and the appellant was in fact paying maintenance.

The appellant seeks the following relief:

"That the order suspending valuation and distribution of property to the date until the parties' last child reach legal age of majority or becomes self- supportive be set aside and substituted by the following:

3. The property shall be evaluated by a registered estate agent who is to be paid by both parties proportionally to each share's and the evaluation shall be done 6 months after issuance of the court order. Plaintiff will be accorded the chance to buy out the defendant first within 6 months of receipt of the valuation report to which after expiry of the 6 months, the defendant will be accorded the same opportunity to which failure to do so by either party, the property will be sold by private treaty and each party paid out proportionately."

We heard the parties and reserved our judgment. This is it.

Mr *Masarirevhu* submitted that the court *a quo* missed the point that the reason why the parties sought a dissolution of their partnership is so that they can be freed from each other and the suspended condition of 11 years defeated this and effectively tied the parties together for the next 11 years. This situation was said to present a potentially explosive situation as the appellant who had been awarded a bigger share of the property would lay claim to it whilst the respondent had been given some form of a usufruct over the property yet the question of who takes the fruits of the property had not been clarified. It was averred that the court *a quo* seemed to have been blind

to the nature of the relationship between the parties, which was that they had been husband and wife in a customary law union and such relationship had irretrievably broken down.

The court was referred to several case authorities wherein this court had distributed assets acquired in a tacit universal partnership and had ordered that evaluations be done within 30 days even in the face of there being some minor children between the parties, with options to buy each other out within 3 months of the date of judgment. See *Makahamadze* v *Mutuvira* HH 176/15, *Chauraya Makokoro* HH 362/13.

Furthermore, Mr *Masarirevhu* submitted that the court *a quo* misdirected itself by considering the best interest of the children, an issue which was not relevant in the distribution of assets acquired in a tacit universal partnership, particularly, as this was not a valid marriage. It was averred that all that was relevant was to establish the contribution of the partners, purpose of the partnership and the object which is profit and dissolve and distribute. Mr *Masarirevhu* further argued that once a partnership is terminated, then partners should part ways with each holding what is deemed their appropriate share for further investment for profit. As this was the only immovable property between the partners, the order of the court *a quo* is alleged to take away the appellant's right to benefit from the same investment.

The issue of the usufruct is contended not to have been before the court *a quo* and that it was an error to make a determination based on this issue which issue would best be dealt with as a subject of maintenance proceedings. Such a court, it was argued, was best placed to deal with the best interests of the children. It was pointed out that the appellant was in fact already paying maintenance and such would cater for rentals and school fees amongst other things.

Mr *Mawodzwa* submitted that the court *a quo* did not err as it took into account the fact that the respondent and the 3 minor children were living in the property whilst the appellant had created a home for himself elsewhere with another wife. It was argued that the court *a quo* had made a value judgment which could not be impugned as the exercise of discretion was not wrongly exercised.

Furthermore, Mr *Mawodzwa* submitted that taking into account the best interests of the minor children was the court *a quo* using its common law power to look after the interests of minors as these are always the decisive factor. Reference was made to cases such as *Jeche* v *Mahovo* 1989

(1) ZLR 364 (S), *Maluwana* v *Maluwana* HH 155/01 and *De Montille* v *De Montille* HB 6/03, amongst others.

The court was also referred to p 16 of record where, under cross examination he was asked to confirm whether he wanted to evict the respondent from the house and he answered that he did not. Mr *Masarirevhu* clarified that the appellant simply meant that he was not before the court to evict the respondent but to get a distribution of the immovable property. In fact, in his particulars of claim on record p 29, para 10, the appellant states that he does not have the intention of engaging in unlawful confrontation with the respondent nor does he want to arbitrarily evict her without her small share of what they acquired in terms of the contributions made.

When Mr *Mawodzwa* was pressed to provide case law authorities in support of his averments he conceded that he had none and also that there were indeed several variations available to the respondent to cater for the best interests of the children, including getting a variation of the maintenance she was receiving.

The authorities cited by Mr *Mawodzwa* are all correct in relation to a matter where the issue before the court is one of custody, guardianship or access of the children, *inter alia*. Then the primary consideration is that of the best interests of the children. In fact in all the case authorities cited by the respondent's counsel, the court was seized with determining on the custody of children between the two parents. It then held that the best interests of the children takes precedent over those of the parents. These findings are clearly irrelevant in this current matter, where the issue was one of distribution of the assets at the termination of a tacit universal partnership.

The court *a quo* indeed seems to have determined this issue on an irrelevant issue. Its clear role was to consider the equitable distribution of the assets of the partners upon termination of the partnership. This was an error on its part. See *Proton Bakery (Pvt) Ltd* v *Takaendesa* SC 126/05. The issue of maintenance of the minor children could be dealt with in the maintenance court.

The order granted does tie the two partners together and creates a potentially volatile arrangement for a whole 11 years on the control of the asset and that is undesirable. Each partner should walk away with what is due to them. Though it is unfortunate that the children will be affected by this turn of events, the law does cater for their needs in other ways such as the provision of maintenance which amount can be varied based on changed circumstances.

This court, in the past has always granted orders which ensure a clean break between partners. See cases cited above. We were referred by appellant's counsel, to only one case wherein an exact same order was made. It is that of *Nyamunokora* v *Makoni* HMT 18/21. That too was distribution of assets based on a tacit universal partnership. In that case there were however two immovable properties for distribution and some minor children and the suspension was for 11 years too. The parties seem not to have appealed that decision. It may be understandable given that there were two properties unlike *in casu.*

Had this matter been one where the parties were in a registered marriage and the distribution was in terms of the Matrimonial Causes Act, [*Chapter 5:13*], then the provisions of s 7(4) would have been applicable. See the provisions below which show that the children are at the very centre of the considerations of the court:

> "4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following—
> (*a*) the income-earning capacity, assets and other financial resources which **each spouse and child** has or is likely to have in the foreseeable future;
> (*b*) **the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;**
> (*c*) the standard of living of the family, **including the manner in which any child was being educated or trained or expected to be educated or trained;**
> (*d*) **the age and physical and mental condition of each spouse and child**;
> (*e*) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
> (*f*) **the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage**;
> (*g*) the duration of the marriage;
> and in so doing the court shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses." (My emphasis)

In the case of *Feremba* v *Matika* HH 33/07, the position was clearly set out as follows:

> "Thus, the current legal position is such that trial magistrates should not approach the distribution of assets of parties in an unregistered customary union as if they are apportioning the assets of a couple that is divorcing in terms of the Matrimonial Causes Act [*Chapter 5:13*]."

The same position was stated in the case of *Mashingaidze* v *Mugomba* HH 3/99. On p 21 of the judgment GWAUNZA J (as she then was) had this to say:

> "However, while I would support the view that a proven unregistered customary law union should be treated like any other marriage when it comes to dissolution and division of assets jointly acquired by the parties during its subsistence, <u>such a view is currently not supported by the law</u>." (The underlying is mine).

It is clear therefore that the court *a quo* erred in seeking to import some provisions of the Matrimonial Causes Act into this matter which was purely one concerned with the distribution of the assets of partners whose tacit universal partnership had terminated.

Accordingly, this appeal succeeds and I order as follows:

1. The appeal succeeds.
2. The order suspending valuation and distribution of property to the date until the parties' last child reaches legal age of majority or becomes self- supportive be set aside and substituted by the following:

   "a. The property shall be evaluated by a registered estate agent who is to be paid by both parties proportionally to each party's share and the evaluation shall be done 6 months after issuance of the court order. Plaintiff will be accorded the chance to buy out the defendant first within 6 months of receipt of the evaluation report to which after expiry of the 6 months, the defendant will be accorded the same opportunity. Upon failure to do so by either party, the property will be sold by private treaty and each party paid out proportionately."

For purposes of clarity and the avoidance of doubt, I now restate the entire order of the court *a quo* as now corrected by our order above. It should now read as follows:

1. Plaintiff is awarded 70 percent of the stand number 4078 Manyame Park, St Marys Chitungwiza.
2. Defendant is awarded 30 percent of the stand number 4078 Manyame Park, St Marys Chitungwiza.
3. The property shall be evaluated by a registered estate agent who is to be paid by both parties proportionally to each party's share and the evaluation shall be done 6 months after issuance of the court order. Plaintiff will be accorded the chance to buy out the defendant first within 6 months of receipt of the evaluation report to which after expiry of the 6 months, the defendant will be accorded the same opportunity. Upon failure to do so by either party, the property will be sold by private treaty and each party paid out proportionately
4. Each party to bear its own costs.

MUCHAWA J:……

WAMAMBO J: Agrees…….....

Tendai Biti Law, appellant's legal practitioners
Mugiya & Muvhami Law Chambers, respondent's legal practitioners