

HENRY NYOKA
and
JENNIFER MUREZA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 12 and 27 October; 10 November 2009 and 11 March 2010

Family Law Court

D.C. Kufaruwenga, for the plaintiff
R. Mzyece, for the defendant

MAVANGIRA J: The plaintiff issued summons for the ejectment of the defendant from House No. 14 Msasa Park Drive, Msasa Park, Harare. The basis of the plaintiff's claim is that he is the sole owner of the immovable property. He avers that upon the termination of an unregistered union between him and the defendant, the defendant who had resided at the said premises during the subsistence of and on the basis of the unregistered customary union, refused to vacate the plaintiff's house and remains in unlawful occupation thereof.

The defendant counterclaimed for a fair division and distribution of all the assets which the parties acquired during the subsistence of their unregistered customary union. The basis, as amended, of the defendant's counterclaim is that the nature of their customary union was such that it formed a tacit universal partnership and should thus be governed by general law as opposed to customary law. The defendant further avers that in the event that customary law governs the proprietary interests of the parties the plaintiff would be unjustly enriched should he retain as his sole property the assets acquired through the joint and complementary efforts of the parties during the subsistence of their union. It would also cause an injustice to the defendant who contributed both directly and indirectly to the acquisition of the movable and immovable property. The defendant's claim regarding the immovable property known as Stand No. 700 Chadcombe Township, Salisbury Township, commonly known as House No. 14 Msasa Drive, Msasa Park, Harare, is that it be shared equally between the two parties with each party getting a fifty percent (50%) share. She also has an itemized proposed distribution of the movable property.

An amended joint pre-trial conference minute dated 9 September 2009 and signed by both parties' legal practitioners records the following as the issues referred for trial:

1. "1. Whether or not the following movable property should be shared between the parties-
-5 door frames
-1 window frame
2. What percentage of the value of House No. 14 Msasa Park Drive, Msasa Park, Harare should be paid to the defendant before she vacates the property?"

It also records the following admissions:

- "(a) Both parties admit that a tacit universal partnership existed during the subsistence of their union.
- (b) Both parties accept and admit that an order for the distribution of their movable property be made in accordance with the settlement contained in the '**minutes of settlement**' dated 18 August 2009 and filed of record."

A document headed 'Minutes of Settlement Conference' dated 9 September 2009 and signed by both parties' legal practitioners records and itemizes the movable assets that the parties agreed ought to be awarded to each party and this will be reflected in the court's order. It also records that the parties failed to agree on how to share five door frames and one window frame. It records that both parties agreed that House No. 14 Msasa Park Drive, Msasa Park, Harare should be distributed and shared between the two of them. It records that the parties agreed that the immovable property was valued at USD45 000. It also records that the parties agreed that the defendant should vacate the property upon being paid her share therein. It records that the plaintiff's stance was that the defendant's share in the immovable property does not exceed eight percent (8%) of its aforesaid agreed value while the defendant's stance was that her share is 40% of the agreed value. It also records that this issue remained unresolved by the parties.

It is clear from a perusal of the amended joint pre-trial conference minute that the parties came to an agreement that a tacit universal partnership existed during the subsistence of their unregistered customary law union. It appears that it is on that basis that they proceeded to negotiate and agree on the distribution of the movable assets as listed in their 'Minutes of Settlement Conference'. It is noted that this is so despite the stance taken by the plaintiff in his pleadings, particularly in response to the defendant's counterclaim wherein he disputed that there was a tacit universal partnership between them and further contended that the defendant had no claim to the property which he claimed was all acquired through his single-handed

efforts and without any contribution from the defendant. It is also noted that it is on the same date when this agreement was reached that the defendant's amendment to her counterclaim was filed so as to plead tacit universal partnership or unjust enrichment in the alternative. In view of the agreement between the parties I shall proceed to determine the defendant's counterclaim on the basis of the principles applicable to tacit universal partnerships.

The Outstanding Movable Property

Agreement having been reached on all the other movable assets acquired by the parties, the only outstanding items on which this court is asked to make a determination would appear to be the five door frames and one window frame. The plaintiff's position was that these items cannot be distributed by this court as they do not belong to either of them. He said that the property was brought to their residence by his workmate and subordinate, one Simbarashe Matibenga, for safekeeping. He said that Simbarashe is constructing a house in Damofalls and comes to collect the items as and when they are needed. He said that Simbarashe had in fact initially brought five door frames and seven window frames but that as at the time of trial there were five door frames and one window frame left. He also said that Simbarashe's mother had recently died and Simbarashe had been granted seven days' compassionate leave to attend to his mother's burial in Zhombe. As a result, he could not call him to give evidence as he was consequently unavailable.

The defendant's position on the other hand was that she had purchased the five door frames and one window frame at Magaba in Mbare in 2002 for the development of a residential stand which the parties had acquired in Waterfalls. During cross-examination of the plaintiff by the defendant's legal practitioner it was also put to him that the defendant's contention was that there were four window frames which were in the carport since 2002 but that the plaintiff had since sold three of them. It was at this juncture that the plaintiff stated that there were in fact seven window frames and five door frames that were brought by Simbarashe.

It is common cause that the defendant had earlier instituted proceedings in the Magistrates Court for the distribution of the property acquired during the subsistence of the parties' union. The order made by the Magistrates Court for the distribution of the property between the parties was apparently appealed against by the plaintiff in the instant matter and subsequently nullified or set aside by this court. It is also common cause that in her claim in the Magistrates Court the defendant had not included these items. When she was asked to

explain why, her response was that she forgot to mention the said items. As the defendant was the initiator of the proceedings in the Magistrates Court, it must be assumed that she obviously placed before the court that which she contended to be property available for distribution between the parties. She did not then include these items. Similarly, in her pleadings *in casu* she did not include these same items. From the appeal case number, “CIV ‘A’ 534/06”, the appeal must have at least been noted in or around 2006. The defendant’s counterclaim in the instant matter was filed in June 2009, some three years later. Had it not been for the appeal noted in that matter by the plaintiff *in casu* the said items would have remained undistributed. No plausible reason has in this court’s view been proffered why these items have only surfaced at this very late after the filing and closing of pleadings by the parties. In the circumstances the plaintiff’s explanation as to the ownership of these items appears more probable. The defendant’s claim to them cannot be sustained and she therefore cannot succeed on this claim.

The defendant also said that a headboard and dressing table in the spare bedroom had been omitted when the parties agreed on the sharing of movable assets should be awarded to her. In her counterclaim the defendant gave a detailed list of household goods and effects as well as a proposal as to how these ought to be shared. The list includes a bedroom suite which she had proposed should be awarded to herself but which the parties eventually agreed during their “settlement conference” should be awarded to the plaintiff. It also includes a bed regarding which she had made no proposal as to who it should be given to but which eventually the parties also agreed should be awarded to the plaintiff. The list also includes the said “headboard and dressing table in the spare bedroom”. She had proposed that these be awarded to the plaintiff. It is noted however that these items were not dealt with when the parties reached agreement as recorded in the “minutes of settlement conference”. They were omitted. It appears therefore that the plaintiff’s complaint that the defendant’s claim should fail as she had not amended her pleadings to indicate that she was claiming these items for herself is misconceived and ought to be disregarded. It is also noted that it is not the plaintiff’s claim that these particular items do not form part of the assets acquired during the subsistence of their union as he claims with regards the door frames and window frame. The plaintiff’s complaint appears only to be that she is claiming them without having amended her pleadings. The defendant’s contention that she listed these items in her counterclaim but that they had not been distributed is not challenged or disputed. I find in the circumstances that the headboard and dressing table do form part of the movable assets available for distribution and that they

have always been part of the defendant's counterclaim. I also find that in their deliberations that resulted in the execution of the "minutes of settlement conference" the parties inadvertently omitted, as alleged by the defendant, to deal specifically with these items. I find therefore that the plaintiff has no real opposition to the defendant's claim to these items which will be thus be awarded to the defendant taking into account the other items of property that the parties have agreed should be taken by the plaintiff.

The Immovable Property

The defendant's evidence was to the effect that she contributed both directly and indirectly to the acquisition of both the movable and immovable property. She said that she contributed ten percent (10%) of the purchase price of the house as this was required by the plaintiff's employer in order to enable the plaintiff to access a loan from his employer. She was however unable to state the amount of money that she contributed which represented the said ten percent but said that she thought that it was \$31.00 and that she gave the money to the plaintiff. She said that the plaintiff did not bring a receipt home and that she did not ask for it. She did not think it necessary to insist on seeing the receipt because immediately thereafter they went to look for a house in Chitungwiza. The defendant said that the loan for the house was repaid in full in 2000 after the plaintiff had returned from a trip to Germany and that they then started on the development of the Waterfalls stand. When she was shown the plaintiff's payslip for August 2006 and it was put to her that as at that date deductions were still being made from the plaintiff's salary in repayment of the housing loan, the defendant insisted that the loan was fully repaid in 2000. She later said that she believed that the plaintiff had manufactured false payslips in order to create the impression that the loan had not yet been paid up. She further said that it was at that stage in 2000 that the plaintiff obtained from the Deeds Office the title deeds to the property. She denied that the copy that was given to the plaintiff was for information purposes only. She said that it was the original copy of the title deeds that the plaintiff obtained and that it only disappeared from the house mysteriously in 2004 when they started having problems. It was put to her that the title deeds were being kept by Coghlan, Welsh & Guest; her response was that she believed that the plaintiff took the title deeds to his employer so as to portray the false picture that the loan was not yet paid up. The defendant said that she had last had sight of a copy of the title deeds in 2006 during the trial at the Magistrates Court. It was further put to her that there was no evidence on it that the mortgage bond registered over the property and endorsed on the title deeds was cancelled. Her

response was that that was because no one had initiated the process for its cancellation after the loan was paid up. She also said that she believed that the copy that she was being shown was a fake copy and that the plaintiff's witness, Trymore Mutsadyanga gave false evidence.

The defendant said that the plaintiff was more interested in purchasing a motor vehicle and he raised the ten percent deposit that was required for him to obtain a loan for the purposes of buying one. She said that she was also a cross-boarder trader and was also involved in sewing clothes and knitting jerseys for sale. She said that she realised amounts of money that enabled her to make meaningful financial contribution in developing the immovable property particularly with regard to fixtures such as the fitted carpet inside the house and razor wire on the peripheral wall. She also fed the family and would sometimes pay school fees for the children. She said that she had been in formal employment for a short period of time during the subsistence of the union. She claimed that they had lived together for twenty years altogether. Of these the earlier 16 years constitute the period during which their unregistered customary law union lasted, this being the equivalent of the period during which the tacit universal partnership was in existence or in operation.

In her pleadings the defendant claimed fifty percent (50%) of the value of the immovable property. At the settlement conference she placed her claim at forty percent (40%) of the value of the property. At trial she said that she was entitled to seventy percent (70%) of the value of the property.

The plaintiff, being the defendant in the counterclaim, stated that he got a loan from his employer, Fidelity Printers and Refiners in 1997. The loan was repayable over a period of 25 years by way of monthly deductions from his salary. A mortgage bond for \$310 000 was registered over the property by his employer for his indebtedness to the employer. The loan was in three parts. The first part was for the purchase. The second part was for the development while the third was for security all three being part of one loan, the housing loan. There was a three bed roomed house and an incomplete perimeter wall on the property. He also got loans from his employer which enabled him to complete the perimeter wall, construct a drive-way and a car-port, put up razor wire, carpet the house and install an alarm system. All the loans that he got from his employer were secured by the mortgage bond that is registered over the property. He said that he has not yet finished repaying the loan and that he still owes his employer an outstanding amount of USD30 000.

The plaintiff further said that the defendant did not play any role or make any direct contribution in the acquisition and development of the property. He said that during some of the period from 1990 to 2006 when their union subsisted, the defendant was involved in cross-border trading but would not bring any income home. He said that it was his idea to buy the house and not the defendant's and that he had in fact terminated his employment with his previous employer because the company did not buy houses for its employees. He also said that the defendant did not make any indirect contribution to the welfare of the family because his employer was paying the children's school fees and also giving him furniture loans and other loans called "recoverable loans" which he utilised for the family's various other needs. He said that the defendant would take the children to school but he later enrolled them at a boarding school when they were in Grades 4 and 5 respectively. Although they did not have a house domestic maid, then plaintiff's young brother whom they stayed with would do the cooking, the defendant doing it occasionally whenever she was present.

Although the plaintiff said in is evidence in chief that he wanted the defendant to be evicted from the immovable property because the property is not his but belongs to his employer, note is taken that he did not renege on the agreement recorded in the 'Minutes of Settlement Conference' to the effect that the defendant should vacate the immovable property upon being paid her share therein. Note is also taken of the fact that it is common cause that there are title deeds in the plaintiff's name in respect of the said property. The parties are however not agreed as to whether the property is still encumbered or not. The plaintiff said that the mortgage bond registered over the property is still active as he has not yet repaid the loan from his employer in full. The defendant on the other hand insisted that the mortgage bond had long since been repaid and that it remained endorsed on the title deeds merely because no action had been taken to have it cancelled. On this aspect, Mutsadyanga's evidence corroborated the plaintiff's evidence. Mutsadyanga was however unable to assist the court beyond this statement as he failed to answer numerous questions put to him by the defendant's legal practitioner regarding pertinent details about the mortgage bond. He was unable to explain, *inter alia*, how the amount of US\$30 000 that he said was still outstanding and owing by the plaintiff was arrived at particularly in view of the recent dollarisation of the economy and in view of the fact that the loan to the plaintiff was in Zimbabwe dollars. The defendant on the other hand contended that the mortgage loan was paid up in 2000 after the plaintiff had been on an overseas trip from which he realised sufficient money to pay off the loan. There is

however no indication from the evidence of either party of any marital problems then bedevilling them. No possible or probable reason is proffered as to why the plaintiff would at that time opt to take no steps to ensure the cancellation of the bond. In the absence of any evidence to controvert the plaintiff's evidence in this regard as corroborated by Mutsadyanga, the court has to find in favour of the plaintiff on this aspect and accept that the plaintiff still has to pay an amount of US\$30 000 in liquidation of the loan.

The court will have to take the above into account in determining the issue referred to it by the parties for its determination, viz: What percentage of the value of House No. 14 Msasa Park Drive, Msasa Park, Harare should be paid to defendant before she vacates the property? This issue also ought to be viewed against the fact that the parties have agreed that a tacit universal partnership existed during the subsistence of their union. The parties also agreed that the immovable property was valued at US\$45000.

In *Marange v Chiroodza* 2002 (2) ZLR 171 at 181 G the following is stated:

“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.”

The plaintiff's stance is that the defendant's share does not exceed 8%. The defendant on the other hand has fluctuated from 50 % in her counterclaim to 40% at the settlement conference to 70% in her evidence before this court.

In terms of direct payments towards the purchasing of the immovable property the defendant's claim is that she raised the deposit which was 10% of the purchase price. She also claims that through her own enterprises she raised funds with which she had carpets fitted in the house and razor wire installed on the peripheral wall. She did not claim to have made any further contributions insofar as payments of the purchase price or development of the property were concerned. The plaintiff has disputed the defendant's claims in these regards. In fact the plaintiff tried to paint the most disgraceful picture of a defendant who made very marginal contribution that is not worthy of any meaningful recognition at all as all she brought back from her cross-boarder trading was the occasional parcel of sugar for his parents and nothing for the family. The plaintiff's attempt to minimize the defendant's contribution appears to be more vindictive than factual. Furthermore it contradicts the manner in which the parties managed, by agreement, to share their movable assets between themselves with each party getting assets that appear to be generally of similar value to the other party's. I find the evidence of the plaintiff in this regard and the image of the defendant that he has attempted to

portray to be highly improbable. I believe the defendant's testimony in this regard. I also take into account that the defendant's indirect contribution cannot be ignored and that whilst her contribution may not amount to 50% of the purchase price of the immovable property, it certainly cannot be and is not as low as 8%. I also note that in his evidence the plaintiff said that his "offer" of 8% to the defendant was only in recognition of the fact that she had borne him children. In my view, the partnership was not solely involved in the purchase of the immovable property in issue, neither were the contributions of the parties to the partnership restricted to payments for its purchase and or development. On her part the defendant did not only bear children. According to her testimony already referred to above she also performed many duties and chores and made significant contribution to the partnership "business" generally. In *Chapeyama v Matende & Anor* 1999 (1) ZLR 534 at 542D-E the following was stated:

"The first defendant was able to show that she was not the idle person the plaintiff attempted to hold her out to be... In all the circumstances, I am satisfied that she contributed significantly to the acquisition of the family assets and as I stated in *Chapendama v Chapendama* 1998 (2) ZLR 18 (H), where a court is satisfied that each of the parties made a significant contribution but the court is unable to quantify the contribution of each of the parties their contribution should be estimated to be equal."

In view of the finding made above that the plaintiff is still burdened with the repayment of US\$30 000 for a property valued at US\$45 000, it is my view that for that reason it would not be equitable to quantify the parties' contribution to be equal. The defendant's contribution must ultimately be quantified as being lower than the plaintiff's. No mathematical equation can be employed to quantify the defendant's contribution and hence her share of the value of the immovable property. In my view not much significance ought to be placed on the ratio of the outstanding amount of US\$30 000 to the agreed value of US\$45 000 in view of the lack of explanation of how the amount of US\$30 000 was calculated or arrived at particularly against the backdrop of the conversion from Zimbabwe dollars to US dollars. On a robust assessment of the evidence placed before the court I would quantify the defendant's contribution as being 35% and would thus find that that is the percentage that the plaintiff must pay to the defendant as her share of the value of the immovable property before she vacates the property. In my view this is a proper case where each party must bear its own case.

In the result it is ordered as follows:

1. That the plaintiff is awarded 65% and the defendant 35% of the value of the immovable property commonly known as House No 14 Msasa Drive, Msasa Park, Harare.
2. That the plaintiff pays the defendant 35% of the agreed value of US\$45 000 for the said immovable property.
3. That the following movable assets be and are hereby awarded to the plaintiff as his sole and exclusive property:
 - a. one refrigerator, microwave, one floral brown lounge suite, one radio, one carpet, one coffee table, one VCR, one decoder, one computer, one double bed, one bedroom suite, one wardrobe (in defendant's bedroom) and a Toyota Corona motor vehicle.
4. That the following movable assets be and are hereby awarded to the defendant as her sole and exclusive property:
 - a. one stove, one 3 piece kitchen unit, one deep freezer, kitchen chairs, one suitcase, all kitchen utensils, one DVD, one television, one wardrobe (in girl's bedroom), one display cabinet, one two-in-one blanket, one coffee table with stools and one room divider.
5. That the headboard and dressing table in the spare bedroom be and are hereby awarded to the defendant as his sole and exclusive property.
6. That the defendant vacates the immovable property within 10 days from the date of full payment as calculated in terms of paragraph 1 above.
7. That each party shall bear its own costs of suit.

Dzimba, Jaravaza & Associates, plaintiff's legal practitioners
Vasco Shamu & Associates, defendant's legal practitioners.