GANIZANI NUNU

versus

SARAH MADZIYA

HIGH COURT OF ZIMBABWE

MAKONESE & MAVANGIRA JJ

HARARE, 10 and 17 November 2011 and 7 March 2012

**Civil Appeal**

*F Chagadama* for the appellant

Respondent in person

*T Mpofu amicus curiae*

MAVANGIRA J: The appellant herein issued summons out of the magistrates’ court claiming an order for division of “matrimonial property”. In a document headed “Plaintiff’s Declaration” the plaintiff averred that the parties were customarily married in 1996 and were blessed with three children. He averred that the parties’ union had irretrievably broken down with the parties living separately albeit in the same house. He averred that there were no prospects of a reunion as they were no longer affording each other conjugal rights. He further averred that it would be just and equitable if the listed property acquired during the subsistence of their union would be shared between them.

The respondent who was the defendant in the matter before the magistrate’s court filed a plea and a counterclaim in which she sought that the property be shared between them with variations as to which items were to be awarded to either party.

After a trial the magistrate handed down a judgment in which he distributed the property between the parties. Various movable assets were apportioned to the parties respectively. He then awarded a 60% share of the immovable property to the appellant and a 40% share of the same to the respondent. He ordered that the appellant was to pay to the respondent 40% of the value of the immovable property within six months of the judgment failing which it was to be sold by public auction with the proceeds to be shared between the parties in the said proportions**.** Dissatisfied with the magistrate’s judgment the appellant then appealed to this court.

In his notice of appeal the appellant raised the following grounds of appeal. Firstly, that the court *a quo* misdirected itself in failing to appreciate that the immovable property in question was acquired prior to the union of the parties and was inherited by the appellant from his father’s estate and was therefore not matrimonial property. The second ground of appeal is that the court *a quo* erred in failing to appreciate that the respondent was not employed and had no source of income during the period when the immovable property was developed; the respondent had acquired a loan in 2002 yet the house was extended in 2007. The third ground of appeal is that the respondent ought to have quantified her alleged contribution so that she could be compensated and that the court *a quo* failed to arrive at a just and fair decision and erred in ordering that the immovable property be sold.

The appellant’s prayer is for the judgment of the court *a quo* to be reversed and the matter to be referred back to the trial court for quantification and proof of contribution by the parties.

On 10 November 2011 we postponed this appeal to 17 November 2011 as we were of the view that we would need to request an *amicus curiae* to assist the court. We formulated this view as it appeared to us that a fundamental aspect of this matter emerging from the principles enunciated in *Feremba* v *Matika* 2007 (1) ZLR 337 had been overlooked by the appellant’s counsel and also considering that the respondent is a self actor who would not be able to present legal argument. The appellant’s counsel was on 10 November invited to submit supplementary heads of argument before the hearing of the appeal on 17 November 2011 and she duly complied. Mr *Mpofu* filed heads of argument after the court’s request for him to do so as *amicus curiae*, which request he graciously accepted.

Both Mr *Mpofu* in his written and oral submissions and Miss *Chagadama* in her supplementary heads of argument agree that the proceedings before the magistrate must be set aside. The opportunity is taken to express the court’s gratitude to Mr *Mpofu* for the assistance rendered within a very limited space of time in which he was able to prepare and submit very detailed and incisive heads of argument in which he has dealt extensively not only with the issues raised in the case authority brought to his attention but also with other important issues and aspects that require to be adverted to. His heads of argument have been of great assistance in the articulation of the various issues dealt with in this judgment.

The claim before the magistrate and in respect of which judgment was delivered, was for “division of matrimonial property”. It is common cause that the parties were in an unregistered customary union. In *Mandava* v *Chasweka* 2008 (1) ZLR 300 at 303D-E, MAKARAU JP, as she then was stated:

“It is still part of our law that unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act [*Cap 5*:*13*]. Consequently, parties to such unions cannot be divorced by the courts and their joint estate cannot be distributed in terms of the divorce laws of this country. Trial magistrates who deal with the estates of parties to an unregistered customary union tend to fall into three errors. Firstly, they tend to proceed to deal with unregistered unions as if they are registered. Secondly, they fail to avert to the choice of law provisions of our law and finally they tend to forget their monetary jurisdictional limit when distributing joint estates at general law.”

Turning to the matter at hand I shall proceed to address the various issues that arise seriatim.

**CAUSE OF ACTION**

As already stated above, the parties were in an unregistered customary union. The appellant’s claim before the court *a quo* was for “an order for division of matrimonial property”. In a document headed “Plaintiff’s Declaration” and attached to the summons the appellant stated that the parties were customarily married to each other in 1996 and that three children were born out of the marriage. He stated further that their union had irretrievably broken down giving the reasons therefore. He then also listed the property that the parties had acquired and prayed for the distribution of the same in the manner that he suggested therein.

An unregistered customary union is not a marriage in terms of the Matrimonial Causes Act, see *Feremba* v *Matika supra* at 339 H*; Mandava* v *Chasweka supra.* It thus cannot be dissolved by an order of court. Furthermore, its existence cannot ground a basis upon which the parties to it can claim a division of property. Any such claim, i.e. for the division of property, would have to be founded under common law. On this aspect, the learned judge in the *Feremba* case stated at 340F-341A:

“It is trite that customary law applies to the distribution of the movable assets of parties to an unregistered union. Some judges have however said that the remedy available at customary will lead to injustice as this does not take into account the indirect contributions of the wife and restricts her to claim only that property that directly vests in her terms of customary law. (See *Matibiri* v *Kumire* HH 80-2000). Others have accepted that the principle of a tacit universal partnership is applicable. (See *Mtuda* v *Ndudzo supra*; *Mashingaidze* v *Mugomba* HH 3-99 and *Marange* v *Chiroodza* HH 130-2002). Some have suggested that the common law principle of unjust enrichment could be used to achieve equity as between former parties in such a union. It is trite that the principles of joint ownership remain applicable between such parties. (See *Jengwa* v *Jengwa* 1999 (2) ZLR 121 (H)). Each of the common law principles that have been suggested and used to achieve equity as between parties to an unregistered union have peculiar essential elements that have to be proved if alleged and result in different distributions of the assets in issue being effected by the court. However, it is the agreed position at law that whatever legal vehicle is used to try and achieve equity between the parties, some legal principle must be pleaded. The union itself is not a cause of action at common law.”

The underlining is mine. She proceeded at 31E:

“This court has on a number of occasions exhorted legal practitioners to always plead a recognised cause of action for the distribution of assets of parties in an unregistered customary union. See *Mashingaidze* v *Mugomba supra* and *Jengwa* v *Jengwa supra*.”

The learned judge also made similar remarks in the *Mandava* case, to the effect that if a party to an unregistered customary union opts to institute legal proceedings for the distribution of assets acquired during the subsistence of the union in terms of general law and not customary law, then a cause of action must be pleaded.

In *casu*, from a perusal of the appellant’s pleadings filed in the court *a quo* it is clear that although the appellant herein sought to rely on general law principles, no cause of action was pleaded. The lower court itself also appears to have been satisfied that the existence of the customary union constituted a cause of action. It proceeded to deal with the matter on that basis. The lower court erred in this respect. The exhortation in the *Feremba* case to always plead a recognised cause of action may have been addressed specifically to legal practitioners as it obviously should. That does not however exempt litigants who are not legally represented from the same requirement; nor are magistrates at liberty to overlook the lack of a pleaded cause of action whether the parties before it be legally represented or not. As appositely submitted by Mr *Mpofu*, a court can obviously not relate to a matter unless there is a cause of action arising from the pleadings. It is to the pleadings that the court is directed and it is on their basis that it makes a decision. He cited *Robinson* v *Randfontien Estate GM Co Ltd* 1925 AD 173 at 198 where INNES CJ stated:

“The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry.”

As Mr *Mpofu* further rightly submitted, the fact that the evidence might then show what the parties want does not cure the defect in the pleadings if there was never a cause of action. In *casu*, the lower court should therefore not have proceeded to deal with the matter in the absence of a cause of action being pleaded before it.

**CHOICE OF LAW**

From the above discussion, it appears, and I have no hesitation in agreeing with Mr *Mpofu*’s submission, that the discourse under the heading “Cause of Action” leads to the inevitable proposition that for a cause of action to be established, there must first of all be a choice of law enquiry. As in the *Mandava c*ase, in *casu*, the magistrate in the court *a quo* was attempting to effect a just and equitable distribution of the joint estate as if he was dealing with a marriage recognised as such at law. One such indicator is found in the very last sentence of his reasons for judgment:

“The plaintiff got two immovable properties that is the share (60%) of the house and the rural homestead and that is the reason why I awarded the defendant more movable properties.”

The court also erred in this respect. As rightly submitted by Mr *Mpofu* on this aspect, the obligation upon a party is to show that the application of customary law will cause an injustice seeing as is normally the case that the parties would be least acquainted with customary law in their way of life. That is the basis upon which the courts have been called upon and accepted the invitation to apply general law under such circumstances. In the *Mandava* case the following was stated at 303G:

”The above is not to say that the parties in an unregistered customary union cannot approach the court for relief. They can. However when they do so, it is a requirement of our law that they choose which law they want to apply to the resolution of their dispute as between customary and general law and if they choose general law they must plead a cause of action recognizable at law as their “marriage” is not recognized as such.”

The choice of law rules are set out in s 3 of the Customary Law and Local Courts Act [*Cap 7*:*05*] which provides:

**“3 Application of customary law**

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 para (*a*) of subs (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 the general law of Zimbabwe, as the case may be.”

Thus where a party to an unregistered customary union seeks to have the joint estate distributed before a magistrates’ court, a justification for not applying customary law must be made and accepted by the court using the choice of law considerations listed in 5:3 above. The issue of whether or not a recognised cause of action has been pleaded will then follow after the determination of the court that general law is the correct choice of law. In *casu* no such inquiry was made with the result that the lower court misdirected itself and applied general law which on the facts is *prima facie* inapplicable and thereby afforded a remedy alien to customary law. The lower court thus erred on this score as well.

JURISDICTION

The monetary jurisdictional limit of the lower court is also brought into focus. The magistrate’s court being an inferior court and also a creature of statute is subject to monetary limits of jurisdiction set out by law. See *Feremba* at 340B:

“The magistrate’s court has jurisdiction to apply customary law and can apply such law to the distribution of the assets of the parties who were in such a union. If however the court for some legitimate reason is not applying customary law, then two further issues arise. Firstly, for it to have jurisdiction, then the value of the assets to be distributed has to be ascertained, for the ordinary monetary jurisdiction of the magistrate’s courts will apply”.

The Magistrate’s Court (Civil Jurisdiction) (Monetary Limits) Rules, S.I. 21/2009 sets

out the monetary limits of the court’s jurisdiction. The court cannot deal with a matter which involves property worth over US$2000-00 unless the defendant consents in writing to the court’s jurisdiction. I am in agreement with Mr *Mpofu’s* submission that whenever an immovable property is involved, as in *casu*, the court must cautiously consider its jurisdiction given that it would be only in very rare situations, if at all, that a built up immovable property would be valued at less than US$2000-00.

In the *Mandava* case the following was stated at 304B-D:

“Finally, the magistrate’s court is a creature of statute with set jurisdictional limits in civil matters. Assuming that a choice of law had been properly made and that choice was general law, that a valid cause of action had been pleaded and the matter had properly proceeded to trial in terms of the rules, the value of the estate that the trial court set to distribute far exceeded its monetary jurisdiction and the trial magistrate did not even advert to this issue.

The issues that I have highlighted above are not new to this appeal court. I have had occasion to discuss the same issues in *Feremba* v *Matika* HH 33-2007. I will take the risk of repeating myself again in this judgment and exhort all trial magistrates approached to distribute the joint estates of persons in an unregistered customary union to ensure that the parties before them have made the appropriate choice of law between customary and general law. Once a choice of law has been appropriately made, two further issues arise but only if general law is chosen. These are the cause of action and the monetary jurisdiction of the trial magistrate.

In view of the fact that the trial magistrate failed to observe any of the above, his decision cannot stand.”

A similar statement was made in *Feremba* case at 342A-B in the following terms:

“Finally, if the court is to entertain the matter on the basis of any of the above principles, then its general monetary jurisdiction limits apply. It therefore becomes imperative for the court to be aware of the value of the estate involved and to then ascertain whether it has the requisite jurisdiction in the matter.”

And at 342D-E

“Thirdly, as the trial magistrate was clearly not applying customary law or proceeding in terms of s 11 (b) (iv) of the Magistrates Court Act, he had to be satisfied that the value of the estate that he was distributing fell within his monetary jurisdiction. This he did not do.

In *casu* the magistrate also fell into the same error as observed in the *Feremba* and *Mandava* cases with regard to the monetary jurisdictional limits applicable to him. He ought to have engaged into an enquiry relating to the value of the estate. He did not. The immovable property involved in this matter is a developed property. It is a residential home in Chitungwiza. I am in agreement with Mr *Mpofu* that this is a proper case for this court to take judicial notice of the fact that such property plus the other movable assets involved in the matter are clearly above the monetary jurisdictional limits of the Magistrate’s Court of US$2000-00.

In the order in which he distributes the immovable property, the trial magistrate also includes a paragraph wherein the immovable property was to be valued within fourteen days of the date of the order. As rightfully submitted by Mr *Mpofu* on this aspect, this is what the authorities that have been cited and relied on herein required the trial court to do before considering whether it could deal with the substance of the matter.

It follows from the above that the trial court also erred and misdirected itself in entertaining and purporting to make a determination in a matter or dispute in which it had no jurisdiction. Mr *Mpofu*’s submission on this aspect is also apt. He submitted that the law is to the effect that an order granted by a court of no jurisdiction is void and not merely wrong. He cited *Muchakata* v *Netherburn Mine* 1996 (1)ZLR 153 (SC) in which the following was stated by KORSAH JA at 147B:

“If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it.”

As also submitted by Mr *Mpofu,* the participation by the respondent in the proceedings in the court below coupled with the fact that she has not taken the point on appeal, cannot invest the void order with any validity. He cited in this regard *Choga* v *Johnston’s Motor Transport* (*Pvt*) *Ltd* 1998 (2) ZLR 560 (HC) at 565 A-G where CHATIKOBO J stated:

“In other words, while one can waive irregularities in a voidable act, one cannot waive something which never was. The point is made rather well by the legendary LORD DEVLIN in *Essex County Council* v *Essex Incorporated Congregational Church Union* 1963AC 808 at 834, where he says that when a superior court is questioning the jurisdiction of an inferior tribunal:

‘It has to be satisfied that the tribunal has general jurisdiction, that is, jurisdiction to enter upon the inquiry. A statute, besides laying down conditions precedent to the entry upon the inquiry, often lays down conditions which have to be satisfied before the tribunal takes some step in the course of the inquiry or makes interim or final orders. If these conditions are not satisfied, it is then sometimes said that the tribunal had no power to take the step or make the order. That is not what is meant by general jurisdiction. If the tribunal makes an order it ought not to have made, it may thereby fall into an error of law which can be corrected but the error does not deprive it of jurisdiction. This distinction is made clear in the opinion of the Judicial Committee in the well known case of *Colonial Bank of Australasia* v *William* (1874) LR 5 PC 417 (PC) where it is said:

‘... the question is whether the inferior court had jurisdiction to enter upon the inquiry, and not whether there has been miscarriage in the course of the inquiry.’’

I perceive the words I have emphasised to mean, in modern or local parlance, that the issue of waiver or acquiescence or consent does not arise where the act complained of is a nullity. It is only in respect of acts which are voidable on account of irregularities committed by an authority who had the power to act, that the person affected by the decision can elect to waive the irregularity or to consent to or acquiesce in the unfair treatment. That seems to be what LORD REID had in mind when, in his speech in the *Essex County Council* case at p820 said:

‘... it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.’

It is my firm view therefore, that “action which is *ultra vires* is unauthorised by law, outside jurisdiction, null and void, and of no legal effect” (Wade *Administrative Law* 6 ed p 349) and consequently not condonable.”

APPROPRIATE DISPOSTION

Miss *Chagadama* for the appellant in her supplementary heads of argument submitted that the appeal should be upheld and the magistrate’s decision quashed. Mr *Mpofu*’s submissions were that although the appeal court in the *Feremba* and *Matika* cases remitted the matters to the magistrate’s court for trials *de novo*, such a course would not be available in *casu* as the lower court clearly has no jurisdiction. He submitted that this is a matter which would have to be argued before the High Court if the parties are so inclined as remittal to the magistrate’s court is almost certain to result in the lower court refusing jurisdiction. He submitted that the proper course would be for this court to set aside proceedings of the lower court and leave the parties with an option to approach the High Court on proper pleadings if they are so inclined. As he aptly put it, remittal implies the ability to rectify and there can be no rectification if the court has no jurisdiction.

The following issues may be said to be “peripheral” in the context of the major aspects discussed above. They are of importance however insofar as they expose areas where the trial court fell into error and have been highlighted by Mr *Mpofu* in his very extensive heads of argument. The first is that the respondent in her counterclaim as the defendant in the lower court, claimed 30% of the disputed property. She led evidence and she cross examined the appellant, the plaintiff then, in a bid to establish her entitlement to 30% in the property. The lower court proceeded to award her 40% and there is no basis from the pleadings or record why that award was made. The appellant on the other hand wanted the whole property to be awarded to him. This meant that the court had to either give the appellant the whole property or give the respondent a maximum of 30%. Yet the court proceeded to make awards that were not based on what was presented before it. Mr *Mpofu* cited *Castle and Castle NO* v *Pritchard* 1975 (2) SA 392 (R) where the court held:

“It is wholly undesirable to enter judgment upon pleadings not before the court.”

In addition to this case Mr *Mpofu* also cited *Moresby-White* v *Moresby-White* 1972 (3) SA 222 (RA) where it was said:

“It was therefore not open to the court *a quo* to make a finding of fact on an issue which was not before it.”

The other issue highlighted by Mr *Mpofu* is that it appears from the record that the trial magistrate was also the same magistrate who conducted the pre-trial conference in this matter. I can do no better than quote his written submission in this regard:

“Such a course cannot be valid. A judicial officer handling a pre-trial conference has an almost open cheque. The law entitles her to entertain as well as express strong views on the matter. Such an official cannot after expressing or entertaining such views thereafter sit in judgment in respect of the same parties in the same cause. Justice must be rooted in confidence and confidence is what is shaken when a judicial officer assumes such a dual role. Such proceedings are tainted and cannot be valid.”

The final issue highlighted by Mr *Mpofu* relates to the evidentiary documents attached to the respondent’s heads of argument. As rightly submitted the court can only deal with such documents if a proper application for the adduction of evidence has been made and granted – See *Rangeland Ltd* v *Henderson* 1955 (3) SA 134 (SR). The court would then consider whether to remit the matter for the adduction of evidence or to hear the same. See *Warren-Godrington ForsythTrust* (*Pvt*) *Ltd* 200 (2) ZLR 377 SC. In *casu* there was no such application and it is in any event, in view of the main issues discussed earlier in this judgment not necessary to pursue this aspect.

It is only proper and befitting that we again express herein our deep gratitude to Mr *Mpofu*, *amicus curiae* for his well set out and extremely useful heads of argument which he so ably prepared in a very limited space of time at the request of the court.

The end result of all the issues discussed herein is inevitably that the judgment of the lower court must be set aside. I also agree with Mr *Mpofu* that as the resolution of this matter has been dependent upon points that none of the parties raised, there is in the final analysis no winner between them and none of the parties is therefore entitled to costs.

For the above reasons, it is ordered as follows:

IT IS ORDERED

1. That the proceedings in and the judgment of the court *a quo* in CC 46/09 be and are hereby set aside.
2. Each party shall bear its own costs.

MAKONESE J: agrees.

*Legal Resources Foundation*, appellant’s legal practitioners,

*T Mpofu*, *amicus curiae*