Judgment No. HB 102/2003
Case No. HC 2163/2000

JOSEPH SVUNURAI MURINGANIZA

Versus

PHILLIPA MUNYIKWA

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 9 OCTOBER 2003

T Ndlovu for plaintiff
Ms Moyo for defendant

Civil Trial

NDOU J: The plaintiff initially instituted these proceedings by way of an urgent chamber application against the defendant for the return of items which he had been dispossessed of by the defendant *viz*, a Standard Chartered visa electronic card and Link Save ATM card, Stanbic ATM card, driver's licence, Standard Chartered Bank cheque book and Meikles VIP cards. The plaintiff also sought an order for eviction of the defendant from stand number 14447 Selbourne Park, Bulawayo.

The defendant did not oppose the former relief sought but opposed the latter. She opposed the order for eviction. The gravamen of her opposition is that, first, she is customarily married to the plaintiff and thus entitled to a half share of the matrimonial property, and second, that she played a significant role in the acquisition and development of stand number 14447 Selbourne park. In particular she stated that she personally ploughed no less than $110 000 into the construction of the cottage on the stand. The provisional order on the return of the items listed above, having been confirmed, the claim for eviction was referred to trial.

At the pre-trial conference the parties agreed that the issues for determination at the trial were-

"(a) Did plaintiff solely acquire and develop stand number 14447 Selbourne Park, Bulawayo?

(b) Is the defendant entitled to a share in the property on the basis of her relationship with plaintiff or on any other basis?

(c) Does the plaintiff have the right at law to seek the eviction of defendant?"

The main thrust of the dispute is whether there is in existence a customary marriage between the parties. Once this is determined the other issues will fall into place. The other issues will only become relevant once this court has decided that there is a valid customary marriage between the parties. Evidence led mainly covered the requirements for a valid customary law marriage.

Common cause facts

The parties met in Harare in 1988-9 when the plaintiff was a student at the University of Zimbabwe. A love relationship developed. As a result of their liaison they had a child, Josephine in 1990. The child died on 26 April 1992. They have one surviving child, Franscisca born on 28 March 1992. After the birth of the late Josephine the parties started living together under the same roof. It is common cause that the plaintiff, in 1989, informed the defendant that he was married to one Ketina Manyethu. According to the defendant, the plaintiff indicated then that he was in the process of divorcing Ketinah, He, obviously disputed this issue. The said marriage was conducted under the then Marriages Act [Chapter 37] on 13 September 1975 and is still in subsistence. The plaintiff refers to Ketinah as his "enstranged wife". On 27 April 1992 the parties' families met in Gweru, i.e. after the burial of the late Josephine. There is, however, a dispute on the purpose of the meeting. According to the plaintiff on the one hand , the agenda of this meeting had nothing to do with

marriage negotiations but to discuss damages as the defendant's parents had threatened to boycott the burial and also take unspecified action against him. The defendant, on the other hand, says that the meeting commenced the process of their customary marriage.

The parties stayed together in Gweru and moved together to Bulawayo. In Bulawayo the plaintiff applied to be placed in the City of Bulawayo housing list on 24 September 1996. In the housing application form he completed details relating to wife/spouse in the following terms –

"13 Details Relating to Wife/Spouse –

Name: Philippa

ID Number: 27-061090 C 27

District: Gutu

Maiden Name: Munyikwa"

The stand was "acquired" during the absence of the plaintiff. He was overseas at the time studying. It is common cause that before his departure he made arrangements with his bankers to enable the defendant to make withdrawals. Indeed withdrawals were made and some of the money went to the acquisition fees for the stand. The defendant was plaintiff's *de facto* spouse. She did most of the running around to have the stand acquired and developed and infrastructure constructed thereon. She also ploughed in some of her own funds. In short, she played a material role in the acquisition and development of the property. It is not clear why the plaintiff's counsel submits that Ketinah has a stake in the stand in view of the fact that we use an accrual system in matrimonial causes. The property in issue was acquired during the time plaintiff and Ketinah had since ceased staying together.

Plaintiff's case

The plaintiff gave evidence to the following effect. He met the defendant in Harare in 1988. He informed her that he was married and that the marriage still subsists. He used to visit his wife at Norton. He wore a marriage band at the time and he would, with the defendant's knowledge visit his wife and children. He never customarily married the defendant nor promise her and/or divorce his wife. He solely acquired and developed the stand in question. He also assisted the defendant to acquire a house in Nkulumane number 16457 by paying the deposit and sundries which totalled $7 000,00. He also paid eleven instalments before the defendant sold the Nkulumane property. He said that he contributed considerable to the purchase of the said property. Plaintiff revealed that he paid some money to defendant's parents, not as *roora* bride consideration but as an appeasement fee after the death of the parties' child. He did this to enable her parents to come and pay their condolences to the parties. Plaintiff conceded that he made a further payment to defendant's father, a sum of $2 500,00, which the latter intended to use to buy maize bags. He testified that he deposited this amount into defendant's brother Renias Munyikwa's bank account. He stressed that this was not consistent with the Shona customary way of paying *roora/lobola*. He has not given understandable evidence on whether this was a mere donation or a loan. I am satisfied that the plaintiff was a poor witness. He lived with the defendant as man and wife and two children were born of the union. He lived with the defendant as a family. There be no doubt he and the defendant shared assets. His testimony that the defendant did nothing for the duration of the union cannot be believed. He is trying to cling to his marriage to Ketinah in order to get the disputed property from himself. He has no intention of sharing it with Ketinah. He is

using the marriage to his enstranged wife, who has no interest in this matter, for selfish reasons. In his application for the disputed property he registered the defendant as his wife/spouse. He did not register Ketinah. This was a clear falsehood on his part. Why did he himself describe their liaison as amounting to a marriage? The plaintiff is no fool. He is not lacking in education and sophistication. His evidence in court is contradictory to what the said document states and the life that he and the defendant were leading as a couple.

Defendant's case

She testified as follows. At the time they met in Harare she was working and he was a student at the University of Zimbabwe. She stated that the plaintiff did in fact indicate to her at the time that he was married to Ketinah Manyetu, but said that they had since separated. The plaintiff furnished her with proof of marriage certificate in terms of section 12(3) of the then African Marriages Act Chapter 105. She produced the copy as an exhibit. She was not aware, and the plaintiff did not bring it to her attention, that he and Ketinah had subsequent to the abovementioned customary marriage went on to solemnize a civil marriage in terms of the then Marriages Act Chapter 57. The plaintiff informed her that he was in the process of dissolving his customary marriage to Ketinah and eventually gave the impression that he had done so. She believed him. She stayed with him without formalising their relationship. However, after the death of their child they decided to regularise the relationship. In 1992 they did so customarily. The resultant customary marriage was however not registered. In 1995 they moved to Bulawayo. She says that although it was the plaintiff who applied for the disputed stand, she was instrumental in the

acquisition thereof whilst he was overseas furthering his studies. She acquired the vacant stand in 1998 and used both his and her money in the acquisition and the development of the stand. She injected not less than $110 000,00 into the construction of the cottage. She was adamant that the payments that the plaintiff made to her family was *roora/lobola*. She disputed the plaintiff's version that it was appeasement fee. I hold the view that defendant is an impressive witness. She was not shaken by the determined cross examination that she was subjected to. I find that she was labouring under the impression that he was married to Ketinah under the African Marriages Act and that such marriage was on the rocks at the time they met. Further I find that she was under the impression that the plaintiff had ended the said marriage by the time they got married in 1992.

Jethro Muchineripi

He stated that he acted as a go-between (*munyai*) between the plaintiff's family and that of the defendant. He travelled to Gutu with the plaintiff's people and negotiated the marriage between the parties. The plaintiff's delegation did not have sufficient funds on them. This resulted in an arrangement being made that payment be made through a bank deposit to minimise travel costs as the representatives were resident far apart. This arrangement was made for convenience's sake. As a headman he did not find such arrangement strange. I am satisfied that this witness is credible. This matter cannot be resolved by findings of credibility alone. The matter is further characterised by legal questions which have to be determined. These legal questions are by no means easy to resolve.

The first question is one of the unregistered customary marriage. In my view once there is evidence that the innocent party, as the defendant in this case, is under

the impression that the parties were conducting a customary marriage, failure to comply with one of the requirements is not necessarily fatal. I agree with HLOPE JP in *Mabuza* v *Mbatha* [2003] I ALL SA 706 (C) who quoted, with appraisal, the following passage from *A Source book of African Customary Law for Southern Africa* by T W Bennet at pages 194 –

> "In contrast, customary law was always flexible and pragmatic. Strict adherence to ritual *formulae* was never absolutely essential in close knit, rural communities, where certainty was neither a necessity nor a value. So, for instance, the ceremony to celebrate a man's second marriage would normally be simplified, similarly, the wedding might be abbreviated by reason of poverty or the need to expediate matters."

This is a case where Shona custom of handing over *roora/lobola* was modified to cut down costs. The modern banking facility was used. There certainly is nothing "most bizzare" arising out of this. This is an act of desperation on the part of the plaintiff by trying to resort to strict observance of requirements or formalities of Shona custom. The above South African authorities should, however, be read in conjunction with the provisions of section 3 of the Customary Law and Local Courts Act [Chapter 7:05] which provides, *inter alia*, that customary law shall apply in civil cases where, regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. It also provides that customary law shall apply unless the justice of the case otherwise requires.

As the parties were, in *casu*, married under an unregistered customary law union I agree with CHATIKOBO J's remark in *Matibiri* v *Kumire* 2000(1) ZLR 492 (H) at 496A-B:

> "The claim is, in essence, based on the fact of the plaintiff having been married to the defendant customarily. What she claims is, in effect, a share in the matrimonial assets acquired by the parties, whether jointly or separately, during the subsistence of the customary law union. It is a claim which is not

> cognisable at customary law because, upon dissolution of an unregistered customary law union, the property acquired by the parties during the union becomes the property of the husband unless it can be classified as *umai* or *mawoko* property."

See *Jena* v *Nechipota* 1986(1) ZLR 29 (S)" – See also *Mtuda* v *Ndudzo* 2000(1) ZLR 710(H) at 714 and *Jengwa* v *Jengwa* 1999(2) ZLR 121(H) at 128D. In *Mtuda* v *Ndudzo* case *supra* at 714E to 715D GARWE J (as he then was) rightly observed –

> "There can be no doubt that the concept of joint ownership of immovable property is a concept unknown to customary law. Tacit universal partnership is a general law concept which is unknown to customary law. So too is the equitable distribution of property acquired during an unregistered customary union. There has been legislative – even judicial hesitance to clarify the legal status of claims arising out of such unions. Decisions emanating from this court and the Supreme Court have not made the situation any clearer. As CHATIKOBO J noted in *Matibiri* v *Kumire supra* different judges have, sadly, approached the matter in different ways. My approach in this case will no doubt add to the confusion. What is clear, however, is that most judges in this jurisdiction are agreed that justice needs to be achieved in these cases and that, in the absence of clear legislative provisions, this might be achieved by judicial innovation."

> Dealing with the interpretation of section 3 ……., CHATIKOBO J remarked in *Matibiri* v *Kumire supra* …

> "… the section provides that customary law shall apply to the specific areas 'unless the justice of the case otherwise requires'. In my view, the truly logical construction to place on the phrase 'unless the justice of the case otherwise requires' is that if the application of customary law does not conduce to the attainment of justice then the common law should apply … faced with such an unsatisfactory situation and bearing in mind the injustices which would flow from the failure to provide a remedy, the court must do its best to adapt the unsatisfactory and undeveloped concepts of customary law to the changed social and economic circumstances of an African woman who finds herself in a customary law union which disentitles her to a share in the 'matrimonial property' even though for all intent and purposes she was a wife in every respect except the non-solemnization of the union. The remedy could only be found by adopting a reforming exercise in which the court embarks on a rule creating function so as to provide a remedy where none pretiously existed …"

The need for the law to be dynamic and to accommodate change has been stressed in *Zimnat Insurance C0 Ltd* v *Chawanda* 1990(3) ZLR 143 (S) at 153E-154F. The position is now settled that courts have the latitude in appropriate cases to make law."

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 is would not be possible to extend any relief to a woman in the defendant's position beyond her traditional entitlements of *umai* or *mowoko* 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. This court has a discretion to apply the general law, under which the defendant is entitled to make a claim based on her contributions to the marriage on the basis of unjust enrichment or equity. Tacit universal partnership is not applicable here – *Mtuda* v *Ndudzo supra* at 716D to 717A; *Muhlmann* v *Muhlmann* 1981(4) 632 at 634; *Mashingaidze* v *Mashingaidze* 1995(1) ZLR 219.

In this case, as I understand it, I do not have to distribute the matrimonial assets but to determine whether the defendant has sufficient interest in the disputed property to fend off the plaintiff's claim for eviction. From the above it is clear that on this issue I would have to rule in her favour. This, however, is not the end of the matter. It is now clear that the plaintiff was married to Ketinah Manyetu at the time he went through a marriage with the defendant. The said marriage to Ketinah is monogamous and in terms of the Marriages Act [Chapter 5:11] and the said marriage still subsist. There is, therefore, no valid marriage between the plaintiff and the

defendant. In *Makwiramiti* v *Fidelity Life Assurance & Anor*, 1998(2) ZLR 471 (S) at 473C-F GUBBAY CJ said –

> "The learned judge was undoubtedly correct in his view that the marriage of the deceased and Rosemary was bigamous and, consequently, illegal and of no validity. This was because at the time it was contracted the deceased was married to Rosaria under a monogamous or civil type marriage entered into under the Marriage Act. By embracing a monogamous regime, the deceased was deemed by law to have waived his customary privileges in respect of polygamy and, for as long as he remained married , to have submitted to the general law of the land. He is precluded from marrying another person, not only under the general law, but under customary law as well. He suffered from absolute incapacity to marry."

See also *Sibanda* v *Sibanda and Anor* HH-9-02 at page 13 of SMITH J's cyclostyled judgment.

I have found that the defendant was not aware of the existence of a monogamous civil marriage. She was, however, aware that there was a registered bigamous customary law union which had been subsequently dissolved prior to her union, this means that the parties' "marriage" is in fact putative marriage. In *Makovah* v *Makovah* 1998 (2) ZLR 82 (S) at page 89B-C GUBBAY CJ expressed himself as follows –

> "In my view the appellant's defence was generally dishonest. He got involved with an unmarried person when he was married without revealing his marital status. This was in spite of the fact that he was a Chairman of the Youth People's Christian Movement and a member of the Catholic Church. He went as far as registering his marriage fully aware that he was married in church and that his subsequent registered marriage would be bigamous. He even allowed another lie to be entered on the subsequent registered certificate … that the respondent was his first wife. After all that he has the temerity to defend the respondent's suit on the basis that their marriage was bigamous. That, in my view is the height of dishonest."

Then after setting out the provisions of section 7(1) of [Chapter 5:13] the learned Chief Justice continued at page 90B-D –

> "In my view, the above provisions cover marriage, such as the present one, which is declared null and void. If it were not the case it would work an injustice and hardship on a party, such as the respondent in this case, who laboured and contributed towards the marriage and the accumulation of the matrimonial property under the impression that the marriage was valid. It would also unjustly enrich a dishonest party such as the appellant in this case simple because the property in question is either registered in his name or is under his control. Such a position is unconscionable and the legislature by using 'nullity of marriage' must have envisaged that a situation such as the present one would be covered. I would state that such situations are very common in African society because of the failure by many to realise that once they contract a 'church' marriage their marriage becomes monogamous. In the circumstances, the trial judge acted properly in applying the provisions of section 7 of the said Act on the issue of the division of matrimonial property."

Plaintiff acted dishonestly by disclosing only the bigamous marriage to Ketinah. He now produces a subsequent monogamous marriage certificate to defeat the defendant's claims.

From the foregoing I am of the opinion that the defendant is entitled by virtue of section 7(1) of the Matrimonial Causes Act [Chapter 5:13] to a fair share of the matrimonial estate, but the question is what is a fair share? I do not have to answer this question because I am here dealing with a claim for her eviction from the disputed property. The gravamen of the plaintiff's basis for such eviction is that she is not entitled to a share in the disputed property or the matrimonial estate. In light of my above finding that she is entitled to a fair share, his claim for eviction must fail. The defendant is staying on the disputed property. In fact he has been staying there since the development thereon provided minimum infrastructure for residency. The plaintiff is living elsewhere. He has stopped paying for the rates due to the local authority. She paid off arrears to fend off legal action by the latter. She stays in the disputed property with the parties' only child. I have already found that she contributed to the acquisition and development of the disputed property number

14447 Selbourne Park, Bulawayo. The balance of convenience favour her continued stay until the matrimonial estate is distributed.

The plaintiff does not have a right to evict the defendant in light of her proof that she is entitled to a fair share on account of the putative marriage and her contribution. The plaintiff did not establish that he solely acquired and developed stand number 14447 Selbourne park.

I accordingly, order that the plaintiff's claim for eviction of the defendant from stand number 14447 Selbourne Park, Bulawayo be and is hereby dismissed with costs.

Cheda & Partners plaintiff's legal practitioners
Sibusiso Ndlovu defendant's legal practitioners