Judgment No. HB 16/2004
Case No. HCA 43/2002

PATIENCE NCUBE

Versus

RICHARD NDLOVU

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE & NDOU JJ
BULAWAYO 3 NOVEMBER 2003 AND 25 MARCH 2004

P Hara for appellant
R Moyo-Majwabu for the respondent

Civil Appeal

NDOU J: When this appeal commenced, Mr *Moyo-Majwabu* for the respondent submitted that the court *a quo* did not canvass the existence of a customary marriage between the parties. He therefore contended that there is no evidence of the existence of a marriage between the parties. I do not agree with this submission on two grounds. First, the question of the existence of a customary marriage was never raised during the trial in the court *a quo*, and in the respondent's heads of argument. It was raised for the first time during oral submissions before us. Second, and more importantly the trial court made a finding that "the two parties have been in a customary union for the past 3 years." Mr *Moyo-Majwabu* submitted in the respondent's heads that "the decision of the court *a quo* is unimpeachable." The finding of the court *a quo* on the existence of a customary union is supported by undisputed evidence adduced during the trial.

On page 9 the appellant testified that – "we have been in a customary union with the respondent since 1998". The respondent did not challenge this evidence. Indeed on page 11 the respondent stated – "I acquired the stand in 1994 with the mother of my children before I married the applicant" (emphasis added)

On page 12 Joram Ndlovu, the respondent's brother said – "when the applicant got married to the defendant the house was already there". Admittedly, Violet Tshabalala on page 10 talked about the respondent's stated intention to get married in court and Collet Malaba talked about – "they were preparing for their wedding". Contextually, it is clear that the parties were married customarily and evidence shows the involvement of the respondent's parents and the appellant's aunt in this regard. There is, therefore, no basis for the belated attempts to make the existence of the customary union an issue.

The facts of this case are that the parties were customarily married in 1998. The said marriage was not registered. One minor child was born out of the union. After three years the respondent moved out of the disputed property and went to stay with another woman or wife (the latter's status is not clear). It was beyond dispute that when the parties married, the disputed property had already been acquired by the respondent and registered in his name. The respondent acquired the property as a stand and improvements thereon were effected after the marriage. According to respondent when the parties got married the house was almost complete. He however, did not dispute that the appellant contributed to the construction of the house and purchases of movable assets. He did not dispute that she bought two doors, $2 000 worth of bricks, 5 bags of cement and paid $1 000 for the roofing. All these materials were used in the construction of the disputed house. He did not dispute that she curtained the house, put up a washing line and bought cutlery and pots.

Whilst accepting the contribution made by the appellant the trial magistrate stated:

> "In a customary law union the property belongs to the man unless the woman can prove that there was tacit universal partnership. The woman is only entitled to *mavoko* or *umai*."

This antiquated customary law principle has undergone drastic change. It had to because of its obvious unfairness towards the wife. The trial magistrate is, unfortunately, living in the past. The winds of change in this regard seem to have missed his chambers. In *Chapeyama* v *Matinde & Anor* 1999 (1) ZLR 534 (H) CHINHENGO J held that where a customary law marriage is dissolved, even where a tacit universal partnership has not been pleaded, a decision and distribution of property acquired during the subsistence of the customary union is possible. In *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 (H) GARWE J (as he then was) awarded part of the matrimonial house to a wife in an unregistered customary union on the basis of equity or unjust enrichment – see also *Ntini* v *Masuku* HB-69-03 and *Muringaniza* v *Munyikwa* HB-102-03.

In casu, the trial magistrate was wrong in finding against the appellant on the basis that there was neither tacit universal partnership nor joint partnership. The concept of tacit universal partnership is unknown in customary law even under the general law the unregistered customary union does not fulfil all the requirements of tacit universal partnership which are:

(a) each of the parties must bring something into the partnership or must bind himself/herself to bring something into it, whether money, labour or skill;

(b) the business to be carried out should be for the joint benefit of the parties;

(c) the objective of the business should be to make profit and;

(d) the agreement should be a legitimate one.

My reading of the judgment of the court a quo gives me the impression that the trial magistrate had the concept of unjust enrichment in mind. The court said – "In the circumstances the court will give each party what they worked for."

The court went on to order as follows:

> "The respondent is to pay back the applicant what she contributed towards the building of the house:
>
> 1. 2 doors
> 2. toilet seat
> 3. washing line
> 4. …
> 5. …
> 6. $2 000 for the bricks
> 7. $1 000 for the roofing
> 8. 5 bags of cement"

This approach disregards the value added to the disputed house by the resources that the appellant ploughed into the construction of the house. Roofing material and bricks purchased for $1 000 and $2 000 respectively in the late 1990s to early 2000 will cost far more today. Having regard to inflation the appellant's contribution to the construction of the house is far more than what was acknowledged in the judgment. The trial magistrate misdirected himself in this regard. Her contribution entitled her to the share of the property. In determining her share the evidence shows that she found the house under construction, she contributed as alluded above, she has been resident in the house since then. I believe her contribution is in the region of one third of the house.

In light of the foregoing the appeal succeeds with costs and the order of the Magistrates' Court in Bulawayo CC 2/2002 is set aside and substituted as follows:

1. The immovable property being house number 7333 Nketa 9 Bulawayo be evaluated within 30 days from the date of this order by a reputable estate agent agreed upon by the parties or their legal practitioners and failing such agreement by an estate agency nominated by the Clerk of the Civil Court, Bulawayo Magistrates' Court.
2. The cost of the evaluation of the said property is to be borne by both parties in equal shares.
3. The appellant (plaintiff) is hereby granted leave to within 90 days of the date of the evaluation, to make payment to the defendant of, or satisfactorily secure payment of such two thirds share of the net value of the property against transfer of the entire property to her.
4. Failing the provisions of 3 *supra* the property is to be sold to best advantage and the net proceeds therefrom to be shared: one-third to the appellant (plaintiff) and two thirds to the respondent (defendant).
5. Pots and plates awarded to the appellant (plaintiff) with the rest of the property awarded to the respondent (defendant)
6. The respondent (defendant) shall bear the costs of the appeal.

Chiweshe J …… I agree

Moyo, Hara & Partners, appellant's legal practitioners
James, Moyo-Majwabu & Nyoni respondent's legal practitioners