NYARADZAI KAZUVA **APPELLANT**

AND

GILBERT DUBE **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
CHEDA AND MATHONSI JJ
BULAWAYO 4 OCTOBER 2010 AND 7 OCTOBER 2010

Appellant in person
Mr Mlala for respondent

Civil Appeal

MATHONSI J: The Respondent in this matter issued summons out of the Magistrates Court of Bulawayo on the 14th August 2008. In that summons he claimed a "sharing of property" and "custody of children". At the same time the Respondent filed an affidavit sworn to by himself in which he alleged that he had been customarily married to the Appellant in 1995 which union still subsisted and that there were three minor children born of the union namely Perfect Dube, born on 2nd April 1996, Prince Dube, born on 3 January 2000 and Priscilla Dube, born on 19 August 2004.

In that affidavit the Respondent persisted in his claim for custody of the children and a division of the property between himself and the Appellant. On the 6th May 2008, he filed an additional affidavit in which he sought to amend his papers by withdrawing house No. 15913 Nkulumane 12, Bulawayo from the list of the property to be shared alleging that it belonged to his employer, Delta Beverages (Pvt) Ltd.

The Appellant did not file any notice of appearance to defend, neither did she file a plea or notice of opposition. The matter was set down for hearing on the 12th May 2008 on which date some kind of a trial commenced with the Appellant in attendance. The Appellant verbally told the court that she was opposed to the claim made by the Respondent and both parties gave evidence before the Magistrate.

During the trial, the Respondent told the Court that he was claiming the "matrimonial house" because he acquired it with the assistance of his employer who provided a loan for the construction of a two roomed house. The house was completed in 1997 at which point he and the Respondent moved in and although he produced Deed of Transfer No. 629/02 with no mortgage bond registered on it, showing that the house is in his name, Respondent maintained that the house belonged to his employer.

The Appellant also testified in Court to the effect that herself and the Respondent acquired the house together after which they agreed that she should go and work in Botswana to raise money to improve the house as the Respondent's income was too meagre for them to develop the house. With the extra income she get from Botswana, they managed to add 6 more rooms to the house which now proudly stands as an 8 roomed house.

The Appellant maintained that she wanted to remain in that house with the children and should be awarded custody of the said children. The court allowed the two elder children to testify and both of them unequivocally told the court that they preferred staying with their mother. In fact Perfect Dube said he preferred staying with his mother because his father "does not buy vegetables". And although Prince Dube insisted he wanted to live with his mother he did not give reasons for that.

In its judgment, the Court a quo concluded that as the parties were living together as husband and wife both contributed to the extension of the house and for that reason the Appellant was entitled to a share of the house. As there appeared to be no dispute on the sharing of the movable assets, the court a quo awarded the stove, 2 blankets, Colour television, Double bed and sofas to the Respondent. The Appellant was awarded another stove, kitchen utensils, 3 blankets, mosquito net, display, radio, curtains and a room divider.

The house was shared at the ratio of 80% to the Respondent and 20% to the Appellant with the Respondent being allowed to buy out the Appellant in order to retain the house. The Respondent was awarded custody of 2 of the children namely Perfect and Prince, despite their avowed preference to be with their mother while the youngest child, a girl, was awarded to the Appellant.

Unhappy with that decision the Appellant appealed to this Court on the grounds, inter alia that the division of the assets was not equitable and that she is the better custodian parent.

At the hearing of the appeal, Appellant who appeared in person, exhorted us to overturn the decision of the Court a quo and award her a 50% share of the house and custody of all the children together with maintenance especially as Respondent has now remarried and is unable to look after the children properly in those circumstances.

This matter presents some difficulty. The first problem arises from the fact that the matter appears to be a hybrid of trial action and application procedure. Respondent issued a summons commencing action which was supported by affidavit. This was an unacceptable mixture of procedure which was not picked by both the Clerk of Court and the trail magistrate.

Without following the rules relating to the filing of pleadings and the holding of a pre - trial conference before a trial could be conducted, the Magistrate proceeded to trial and heard viva voce evidence from the parties while also accepting affidavits filed by the Respondent. As stated in *Mandava v Chasweka* HH 42/08 (as yet unreported) at page 2;

> "All Magistrates' Courts in this country are formal courts whose proceedings are governed by a set of rules and established procedures. It is trite that the pre-setting of rules of procedure is to date the widely accepted manner of avoiding arbitrariness and ensuring fairness in the airing of disputes by litigants. Rules of Court are framed for a purpose and any procedure done outside the rules is susceptible of being set aside as being unprocedural."

It is clearly incompetent for the magistrates' court to invent a new procedure of dealing with disputes which procedure is not provided for in the rules of the Court and is a mixture of summons action and application procedure. That procedure simply does not exist. The two procedures are mutually exclusive and cannot be employed at the same time to resolve the same dispute. See *Mandava v Chasweka* (supra).

The second problem arising from this matter relates to the choice of law that was applied by the Court a quo. The Respondent approached the court seeking a division of property and custody of the children. It is common cause that the parties did not have a registered marriage and that theirs was an unregistered customary law union of 15 years.

Unregistered customary law unions are still not recognised marriages in our law. For that reason the provisions of section 7 of the Matrimonial Causes Act, [Chapter 5:13] do not apply to them. Section 11(b) (iv) of the Magistrates Court Act [Chapter 7:10] which accords jurisdiction to the Magistrates' Court to adjudicate over divorce cases of persons married in terms of the Customary Marriages Act, [Chapter 5:07] equally has no application to

unregistered customary unions. See *Feremba v Matika* HH 33/07 at page 3 where MAKARAU JP (as she then was) stated:

> "The 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 Magistrates' Court will apply. Secondly, for a claim based on common law, a recognised cause of action must be pleaded."

The existence of an unregistered customary law union does not, standing on its own, clothe the Magistrates' Court with jurisdiction to distribute the property of the parties because that arrangement is not a marriage for purposes of section 7 of the Matrimonial Causes Act, [Chapter 5:13].

While the courts have for some time now been advocating for legislative intervention in protecting women who find themselves in unregistered customary unions and would have contributed towards the acquisition of the estate of such unions, see *Jengwa v Jengwa* 1999 (2) ZLR 121 (H) and *Mtuda v Ndudzo* 2000 (1) ZLR 710(H), the law has not changed as to allow Magistrates' Court to distribute the estates of parties to an unregistered customary union in terms of the Matrimonial Causes Act, [Chapter 5:13].

The import of those decisions is that the courts stand ready to come to the aid of women in such situations and will generally accept well-founded claims for a share of the estate where a proper and recognisable cause of action has been pleaded and established. The common law principles that can be relied upon to found a claim for a distribution of the property acquired during the subsistence of an unregistered customary law union include joint ownership or partnership, unjust enrichment and/or equity.

Mr Mlala, who appeared for the Respondent conceded that the trial magistrate in this matter appears to have fallen into error by applying the principles set out in section 7 of the Matrimonial Causes Act, to divide the house in the manner that she did. In doing so, she also failed to advert to the choice of law provisions set out in section 3 of the Customary Law and Local Courts Act, [Chapter 7:05] and was not alive to the monetary jurisdictional limit which clearly placed the "matrimonial house" outside her jurisdiction.

This Court has stated, time without number, that the Magistrates' Court should always be careful not to fall into these errors when dealing with the estates of unregistered unions. See *Mandava v Chasweka* (supra) at page 3, where MAKARAU JP (as she then was) said:-

> "It is still part of our law that unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act, [Chapter 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 advert to the choice of law provisions of our law and finally they tend to forget their monetary jurisdictional limits when distributing joint estates at general law."

This is exactly what the trial magistrate in casu did as a result of which the proceedings cannot be allowed to stand and the matter will have to be remitted to allow that court to comply with both the rules relating to trial procedure and the law on such estates.

It remains for us to deal with the issue of custody of the minor children of the parties. The trial magistrate allowed the two elder children to testify and they made it clear that they preferred to stay with their mother. She ignored their wishes and awarded their custody to the Respondent. She awarded custody of the last born to the Appellant. What she has achieved

therefore is not only to foist the two boys on their father against their will but also to divide the children and split them into two groups.

It is always undesirable to separate siblings who are growing up together only to please the selfish interests of their parents. This Court, as upper guardian of minor children, cannot allow this to happen. The children should be allowed to remain together as this is in their interest. Pending the trial de novo, to determine the best custodian parent, all the three children should be given to their mother.

As the legal issues arising out of this appeal are of paramount importance, as is the interests of the children, counsel must be appointed to represent the Appellant at the trial pro deo in terms of Order 5 Rule 3 of the Magistrates Court (Civil) Rules, 1980.

In the circumstances, I make the following order; that

1. The appeal is allowed.
2. The matter is hereby remitted to the Magistrates' Court for a trial de novo before a different magistrate.
3. The parties are required to file pleadings in terms of the rules and hold a pre-trial conference before the trial.
4. The Assistant Registrar of this Court shall appoint a pro deo counsel to represent the Appellant at the trial.
5. Pending the trial de novo custody of the minor children of the marriage namely Perfect Dube, born on 2 April 1996, Prince Dube, born on 3 January 2000 and Priscilla Dube, born on 19 August 2004 be and is hereby awarded to the

Appellant and the Respondent is directed to provide adequate maintenance for the said minor children.

6. Each party shall bear its own costs.

Mathonsi J.....

Cheda J agrees.....

Messrs Cheda and partners, respondent's legal practitioners