Judgment No. HB 118 /11
Case No. HCA 138/10
CRB NO. CC22/10

FANI MULEYA **APPLICANT**

VERSUS

ROSINA MULEYA **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
NDOU AND MATHONSI JJ
BULAWAYO 5 SEPTEMBER 2011 AND 15 SEPTEMBER 2011

Mr Tshakalisa for appellant
No appearance for respondent

Civil Appeal

MATHONSI J: The respondent issued summons out of the Gwanda magistrates' court against the appellant to which was attached an affidavit sworn to by herself and annexures to the affidavit listing property valued at US$6730-00 acquired by the parties. In the affidavit she alleged that she was customarily married to the appellant and their union was blessed with 8 children.

The respondent further stated in the affidavit that the appellant and herself had separated 2 years earlier and she prayed that the court should divide the property the parties acquired during the subsistence of the union.

The appellant did not enter appearance to defend but somehow the parties appeared before the trial magistrate and a kind of trial was conducted. During that trial the respondent gave evidence under oath and even called a witness. The import of her evidence was to the effect that she had married the appellant in 1970 and they have 8 children together but the appellant chased her away. While she set out the property that they acquired together, no evidence was led at all as to how that property was acquired and how it should be shared.

The appellant, although allowed to cross examine the respondent and her witness, was not accorded an opportunity to lead evidence himself. The trial magistrate went on to deliver judgment in which she concluded:

> "In conclusion the court noticed that the two were married for the past thirty years and they jointly acquired some property, though defendant says he still loves plaintiff, the court noted that the two parties had been staying separately for two years, the plaintiff(s) witness told this court that he even tried to intervene but defendant showed no sign that he still loved his sister and he was assisted by his (defendant's) son. The court therefore found that it was just to have the two parties sharing their property."

She went on to arbitrarily share the property equally between the parties. The appellant appealed against the judgment of the magistrates' court on the following grounds:

> "1. The trial magistrate erred in ordering the division of 'matrimonial property' of the parties when the parties where (sic) not married to each other in terms of the Customary Marriages Act [Chapter 5:07] the only type of marriage which the magistrates court has jurisdiction over.
> 2. In any case the alleged division of property was not fair and equitable as it made awards in excess of the property appellant owns."

This matter is fraught with procedural irregularities. The process filed and the manner in which the trial was conducted means that it is a hybrid of trial action and application procedure. A litigant cannot issue a summons commencing action which is supported by affidavit as this is an unacceptable mixture of procedure. There is nothing in the record to suggest that any of the rules relating to the filing of pleadings and the holding of a pre-trial conference were complied with. The filing of an affidavit suggests that application procedure was being resorted to but then the trial court went on to take oral evidence.

Even the hearing of oral evidence was not completed because the appellant, who was defendant in the court a quo, was not allowed to lead evidence. This was in clear violation of the basic tenets of natural justice, in particular the *audi alteram partem* rule.

All magistrates' courts are formal courts of record whose proceedings are governed by set rules and established procedure. These rules should be followed and anything done outside the rules is susceptible of being set aside as being unprocedural. *Mandava v Chasweka* HH 42/08 (as yet unreported) at page 2.

In *Kazuva v Dube* HB 119/10 I had occasion to comment at page 4 as follows:

> "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."

As if that was not enough, the respondent sought a division of property on the basis of an unregistered customary law union. She did not plead any other recognisable cause of action like joint ownership, tacit universal partnership, unjust enrichment and/or equity.

Unregistered customary law unions are still not recognised marriages in our law and as such section 7 of the Matrimonial Causes Act [Chapter 5:13] does not apply to them. While the courts have always been willing to assist women who find themselves in the situation of the respondent and would readily divide property acquired during the subsistence of an informal union, that can only be done where well-founded claims for a share of the estate are made and a proper and recognisable cause of action is pleaded and certainly not on the basis of the union per se. *Feremba v Matika* 2007 (1) ZLR 337 (H); *Jengwa v Jengwa* 1999(2) ZLR 121(H); *Mtuda v Ndudzo* 2000(1) ZLR 710(H).

Section 11(b) (iv) of the Magistrates Court Act [Chapter 7:10] allows magistrates to preside over divorce cases of persons married under the Customary Marriages Act [Chapter 5:07] but it has no application on unregistered customary law unions.

As stated by MAKARAU J. P (as she then was) in *Feremba v Matika* (supra) at 340B:

"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."

As the existence of an unregistered customary law union does not on its own clothe the magistrates' court with jurisdiction to distribute the property, it not being a marriage, other recognisable cause of action should have been pleaded. It was not.

In my view the magistrate fell into error in dividing the property as if the parties were married in terms of the Customary Marriages Act and also in not addressing the issue of

monetary jurisdiction if she felt that she had to deal with the matter in terms of common law. This coupled with the fact that the procedure for trial action was not followed and the appellant was not even accorded an opportunity to lead evidence means that the proceedings cannot be allowed to stand. The matter has to be remitted to allow the court to comply with the rules and the law relating to such estates.

In the result, I make the order that:-

1. The appeal is allowed to the extent that the order of the court a quo is set aside.
2. The matter be and 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 to hold a pre-trial conference before the trial proper.
4. Each party shall bear its own costs.

Ndou J agrees..

Messrs Tshakalisa c/o Moyo & Nyoni applicant's legal practitioners
Zimbabwe Women Lawyers Association, respondent's legal practitioners