

LILIAN MOYO

Versus

DOUGLAS CHIDUMO

IN THE HIGH COURT OF ZIMBABWE
NDOU & KAMOCHA JJ
BULAWAYO 29 OCTOBER 2012 & 21 FEBRUARY 2013

S. Gahadzikwa for appellant
C. Dube-Banda for respondent

Civil Appeal

NDOU J: The parties were living together between 1988 and 2006. During this period, the appellant acquired and registered in her name property known as 23383 Pumula South, Bulawayo (“the Pumula house”). The parties were neither married in terms of the Marriage Act [Chapter 5:11] nor Customary Marriages Act [Chapter 5:07]. In the Magistrates’ Court the issue was whether the parties had conducted an unregistered customary law union. The trial magistrate held that there was such unregistered customary law union. As a consequence of that finding the court divided the Pumula property between the parties as follows: 60% for the appellant and 40% for respondent. The appellant’s case is that the parties were not married and were not in an unregistered customary law union. Her case is that the parties were in lengthy cohabitation relationship. Such cohabitation did not result in any legal rights attributed to a marriage in terms of the laws of Zimbabwe. The issue for determination was primarily whether the respondent married the appellant in terms of the Shona custom. This is so because the cause of action is premised on the existence of an unregistered customary union between the parties. In order to be successful in either general law or customary law suit, the plaintiff must plead a recognizable cause of action. In my view, the fact that the parties had a lengthy concubinage does not clothe anyone of the parties with a cause of action in terms of customary law which was used as the basis for the claim in the court *a quo*. The trial magistrate, in her judgment, made scant findings on the demeanor of the witnesses who testified. This is not surprising because the magistrate misdirected herself in her judgment when she stated “... it is common cause that the parties lived together as husband and wife for a long period of 18 years and that no children born out of this union.”

This is a material misdirection as the parties contested the issue. The appellant testified that there was no marriage, registered or unregistered between her and the respondent. She was cross-examined at some length on the issue by the respondent. The respondent vehemently asserted on the existence of an unregistered customary union. He averred that he paid lobola to the appellant’s brother, the late Kenneth Godzi. The respondent, on the one hand called Lovemore Dzambu to support his case that the parties were married. The appellant

on the other hand, called witnesses Tebsa Moyo and Casper Godzi who both supported her testimony that there was no customary union between the parties. Tebsa Moyo is appellant's elder sister and Casper Godzi is the appellant's elder brother. Both stated that the respondent was merely a "boyfriend" to the appellant. They said, according to their custom, the respondent could not have met and negotiated the customary marriage with Kenneth Godzi alone and secretly. The process would have involved several other relatives like a paternal uncle, paternal aunt, brother and family members. In short the issue of the existence of a marriage between the parties was not common cause but, on the contrary, hotly contested. It is trite that where the trial court has reached no findings at all on the credibility of witnesses to vitally important incidents, the appellate court has to do its best on such material as it has before it – *Van Aswegen De Clercg* 1960 (4) SA 875 (A) at 881 in fine 0 882E. This approach is applicable in this case. According to the respondent he negotiated and paid lobola to the appellant's late brother. What can be gleaned from his evidence is that these negotiations and payment were made secretly without the knowledge of her elder sister and brother. In customary practices it is a notorious fact that the payment of lobola is not secretive and the relatives of the bride would not be ignored about the event. In fact close relatives are the first to know about such a development. This cannot certainly be a private engagement between the prospective son-in-law and the prospective brother-in-law. The negotiation and payment of lobola involves a whole host of go-between, aunts and relatives. The respondent did not garner corroboration to his allegation that he paid lobola. The respondent is the only witness whose credibility was questioned and disbelieved by the trial court, albeit on a different issue the house being in the sole names of the appellant. The respondent was the plaintiff in the trial, so his failure to establish the agreement on the payment of lobola and other marriage considerations, meant that he failed to establish the existence of an unregistered customary law union. The trial 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 union – *Feremba v Matika* HH-33-07. The court *a quo* was dealing with a claim instituted under customary law so that question of unjust enrichment (to achieve equity) is not applicable. The decisions dealing with the general law concept of unjust enrichment are, not applicable to the facts of this case. It was illogical for the trial court to have found the existence of an unregistered customary law union in the face of the above testimony. Once the respondent, as plaintiff in court *a quo* failed to establish the existence of an unregistered customary law union, his claim should have been dismissed.

Accordingly, the appeal succeeds and the judgment of the trial magistrate is set aside and substituted by the following:

"The plaintiff's claim is dismissed with costs."

Kamocha J I agree

Gahadzikwa & Mupunga c/o Zimbabwe Women Lawyers Association, appellant's legal practitioners
Dube-Banda, Nzarayapenga & Partners, respondent's legal practitioners