PATRICK CHIVISE
versus
SHEBA DIMBWI

HIGH COURT OF ZIMBABWE
OMERJEE and MAKARAU JJ
HARARE 3 June 2003 and 7 January 2004

Civil Appeal

Appellant in person.
Mr *Muchengeti*, for the respondent.

MAKARAU J: The parties were in an unregistered customary marriage that failed after 8 months of cohabitation. Upon separation, the respondent issued summons out of the Magistrates' Court, Marondera, claiming the distribution of the property acquired during the marriage and payment of the sum of $16 000-00, allegedly owed the respondent by the appellant. The property that fell for distribution was a residential stand and a set of sofas.

After hearing evidence from the parties and their witnesses, the trial court awarded the immovable property to the respondent. He also ordered the respondent to pay the sums of $8 000-00 and $5 205-00 to the appellant as a refund of his contribution towards the deposit for the purchase of the stand and for service charges. Regarding the sofas, the appellant was ordered to pay to the respondent the sum of $5 000-00 being her contribution

towards the purchase of the sofas. The claim for payment of the sum of $16 000-00 was dismissed.

The appellant was dissatisfied with the judgement and noted an appeal to this court against the entire judgement. In his notice of appeal, the appellant prayed that the respondent's claim in the lower court for the distribution of the matri-estate be dismissed.

In his grounds of appeal, he attacked the trial court's judgement on the basis that the court erred in accepting the evidence of the respondent as credible and in disregarding his own version of how the property in dispute was acquired.

It is trite that a court of appeal will be very slow to set aside the findings of a trial court on the credibility of witnesses. This is not a rule of law but a practical recognition in court procedures that the trial court is better placed than an appeal court to assess the credibility of the witnesses that appear before it. The trial court is physically involved in the verbal exchanges between the parties and can more reliably assess the credibility of the witnesses from the manner in which the testimony unfolds, unlike the appeal court has to rely on the record of proceedings. It is only in exceptional instances, where the record of proceedings clearly indicates that the findings of credibility by the trial court were in error that an appeal

court will interfere. There in no such indication in this appeal.

In my view, the findings of the trial court on the credibility of the witnesses cannot be faulted. On this basis alone, the appeal cannot succeed.

There is however one issue that concerned me in the judgement of the trial court and on which I must comment even if the appeal cannot succeed on the grounds raised in the notice of appeal.

The issue of how to distribute the property of parties to an unregistered customary marriage and which law is applicable to such disputes has dogged the courts for quite some time. No settled position has emerged from the various decisions that have been passed down by this and the Supreme Court. The confusion that characterises the law in this field, and that in my view, can only be cleared by the legislature by reforming the law of marriages in this country, is manifest in the judgement by the trial court.

In its judgement, the trial court had this to say on pages 2-3 of the judgement, which raised my concern:

> "The law pertaining to sharing of property states that for property to be shared there must have been (a) recognised form of marriage and if it was an unregistered customary law union the court will consider the duration of the marriage before dealing with the issue of distribution of property. The general principle is that in customary marriages the wife has no claim to property, it is said to belong to the wife (husband?)

> unless she directly made contributions. This rule has become relaxed of age because nowadays most women are employed and are contributing in marriage.
>
> In this particular case, we cant talk of sharing property at all. This is an unregistered customary union which lasted for only 8 months and both parties did not acquire much as husband and wife and each must take what he /she contributed."

It does appear to me with respect that the trial court tied itself up in knots in trying to resolve the dispute before it. Firstly, there is no rule of customary law that provides the estate of such parties can only be distributed after the duration of the marriage has been established. The validity or otherwise of a customary marriage is not tested by how long it has endured but by whether certain formalities and rituals at customary law have been performed. The duration of the union is irrelevant for most practical purposes under customary law. It is however relevant when considering the equitable distribution of the matri- estate under the provisions of s7 of the Matrimonial Causes Act [*Chapter 5.13*].

Secondly, having determined that there was no marriage to talk about, the trial court resolved to order that each party be entitled to what they brought into the marriage. In doing so, it is not clear which provision of customary law the trial court was applying.

The choice of law applicable to the distribution of such estates is a real issue that has exercised these courts before. GILLESPIE J (as he then was), dealt with the issue in some detail in *Jengwa v Jengwa* 1999 (2) ZLR in dicta

that I find most useful in highlighting the unsatisfactory status of the law in this regard.

There is no known principle of tacit universal partnership under customary law. There is also no known principle of joint ownership between persons in a union akin to a marriage. In my view, the trial court purported to apply either of the principles between the parties by ordering that each party must be awarded what they contributed to the marriage. It simply tried to find an equitable solution to the dispute after declaring that there was no marriage to talk of and after noting that the parties did not acquire much by way of a joint estate.

Thirdly, in establishing what each party had contributed to the marriage, the trial court used the same considerations of equity that it would have used had the parties been in a registered union, thus compounding the confusion as to how to treat the property of persons in an unregistered union.

The confusion on the part of the trial court is understandable and to some extent excusable. A perusal of some of the cases that have come before this court and the Supreme Court will reveal that the position of how to treat the estates of persons in positions similar to that of the parties in this appeal will reveal the same unsettled position.

Some of the cases that have tried to grapple with the issue without settling the position are *Jengwa v Jengwa* (supra), *Mtuda v Ndudzo* 2000 (1) ZLR 718 (H), *Matibiri v Kumire* 2000 (1) ZLR 495 (H), *Chapeyama v Matende and Another* 2000 (2) ZLR 356, and *Mashingaidze v Mugomba* HH 3/99.

The general position that emerges from the above cases appears to me to be that customary law *per se* is inapplicable, as it will lead to an injustice between the parties. (See *Jengwa v Jengwa (supra) and Matibiri v Kumire*). General principles of law including unjust enrichment, universal partnership and joint ownership have been resorted to through judicial innovation aimed at providing a just and equitable distribution of such estates. The result in most of the cited cases has been an attempt to find a just remedy for women in such unions. In the cases that have been reviewed, no woman in such a union has gone from the court empty handed. In *Jengwa v Jengwa* (*supra*), after sounding a warning against judicial innovation that may distort existing legal principles, GILLESPIE J observed that the development of the law towards recognising the property rights of women in such unions should be encouraged and regarded as conforming to the national will. He had this to say on page 131:

> "Zimbabwe has acceded to the United Nations Convention on the Elimination of All Forms of Discrimination against Women. This includes the obligation on member states to

> ‘take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular [to] ensure on the basis of equality between men and women:
>
> ….
>
> (h) the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property…..’

In the face of this national desideratum, it would scarcely be appropriate for the court not to subvert the wife suffering gender discrimination.”

It remains my view that the law in this field of family law remains unsatisfactory and an opportunity to call upon the Legislature to intervene that is presented by this case ought to be heard.

The issue that however remains for determination is whether the trial court was correct in applying a general law principle to the distribution of a customary law union. In my view, it was as there is no known principle of customary applicable to such disputes.

In the result, the appeal is dismissed with costs.

Omerjee J agrees.

Sakala & Company, respondent's legal practitioners.