

BERNARD FEREMBA  
versus  
PRECIOUS MATIKA

HIGH COURT OF ZIMBABWE  
MAKARAU JP and BHUNU J  
HARARE, 29 May 2007

CIVIL APPEAL

Appellant in person  
Respondent in person

MAKARAU JP: On 12 December 2005, the respondent issued summons out of the magistrates' court at Harare claiming division of certain property and costs of suit. In the claim the respondent alleged that she was in an unregistered customary union with the appellant which has since dissolved. She further alleged that during the subsistence of the union, she and the appellant jointly acquired certain movable property which she listed in an annexure to the summons. She averred that it would be just and equitable for the property so listed to be distributed as between the parties.

The claim was resisted.

On 5 January 2006, the parties appeared before the trial magistrate and led evidence in support of their respective claims and defences. The respondent testified that during the subsistence of the union, she was a hairdresser and occasionally would raise some money with which she helped the appellant to purchase the movables in question. The respondent then called as a witness one *Nomalanga Matika*, her sister whose testimony as to the acquisition of the property was largely hearsay, being what her sister had told her. Such evidence should not have been admitted at the trial of the matter.

In turn, the appellant testified that the respondent did not contribute towards the acquisition of the movables as she was not gainfully employed while he was. He denied specifically that she was a hairdresser during the subsistence of the union. He further testified that some of the items of property in dispute had been given to him by a friend. He admitted that the respondent had purchased some stools and a push-tray which he stated could be granted to the respondent as her sole and absolute property.

After hearing the parties, the trial magistrate awarded the bed, kitchen unit, radio, 2 plate stove, wardrobe, 4 stools and a push-tray to the respondent. To the appellant he awarded the lounge

suite, a mountain bicycle, a color television set, a mobile phone, a bag, a fan, a television stand and a coffee table.

In his reasons for judgment, the trial magistrate noted that the parties had been in an unregistered customary union for 8 years and that the items in dispute were all acquired during the subsistence of the union. He also held that the respondent as “a wife” had indirectly contributed to the acquisition of the items. He also referred to the decision of this court in *Mtuda v Ndudzo* 2000 (1) ZLR 710 before making the award that he did. This is what he had to say in his rather terse reasons for judgment:

“In *Mtuda v Ndudzo* 2000 (10 ZLR 710 the court remarked that generally speaking the various judgments which have emanated from the higher courts are to the effect that a wife in an unregistered customary law union is entitled to protection in the event that the two part way and that consideration such as her level of contribution, duration of union etc would be pertinent”.

Dissatisfied with the decision, the appellant noted an appeal to this court. In the notice of appeal, the appellant raised seven grounds of appeal. In the main, he argued that the distribution had failed to take into account some other property already in the possession of the respondent, that some of the property included in the distribution was actually state property and that in making the award, the trial court had awarded him certain items that were not his. On the whole, he argued that equity was not achieved in the distribution order made by the trial court.

At the hearing of the appeal before us both parties were not represented and so the legal issues that arise in this appeal were not argued. This judgment therefore represents our views without the aid of argument from counsel.

It can however be presumed from his stance in the notice of appeal that the appellant is not denying that there is at law some basis for distributing the items acquired during the subsistence of his union to the respondent. He further appears to be arguing that the legal basis for such a distribution must be ownership as he argues that he was erroneously awarded some items that are not his.

On the other hand, the respondent appears to have approached the court for a distribution of the assets on the basis of equity and the fact that these were jointly acquired during the subsistence of the union. She further contends that she contributed towards the purchase of some of the items. It is however not clear from the pleadings whether she is averring joint ownership of the property or she is simply bringing her claim on the grounds of equity as is provided for under section 7 of the Matrimonial Causes Act [*Chapter 5:13*].

The issues arising in this appeal will continue to dog this and other courts for some time to come. The distribution of the assets of parties in an unregistered customary union by the magistrates' court presents three main legal issues that all trial magistrates must be wary of. Firstly, an unregistered customary union is not a marriage in terms of the Matrimonial Causes Act and thus, the provisions of section 7 of the Act have no direct application in distributing the assets of such parties. Further, the provisions of section 11(b)(iv) of the Magistrates Court Act [*Chapter 7:10*] which grants magistrates' courts jurisdiction in divorce actions of persons married in terms of the Customary Marriages Act [*Chapter 5:07*] do not apply to unions that are not registered under the Act. 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' courts will apply. Secondly, for a claim based on common law, a recognized cause of action must be pleaded.

Due to the ambivalence with which the law treats unregistered customary unions, the jurisdiction of magistrates' courts to distribute the assets of such persons must be carefully founded within the provisions of customary law or common law as neither the Customary Marriages Act nor the Matrimonial Causes Act apply to such "marriages".

As correctly pointed out by the trial magistrate, decisions of this court and of the Supreme Court on the issue have shown judicial activism on the part of the courts in an effort to find a remedy where none exists at law. It is now the accepted position at law that general law has made no direct provisions for the distribution of estates of person in unregistered customary unions even if for some purposes, the law recognizes the unions as marriages. Neither has statute law made such provision. While the decisions of this and the Supreme Court are clear that some remedy has to be fashioned for the benefit of women in the position of the respondent, the courts have not been unanimous on the basis of such a remedy.

It is trite that customary law applies to the distribution of the movable assets of parties to an unregistered union. Some judges have however said that the remedy available at customary law will lead to injustice as this does not take into account the indirect contributions of the wife and restricts her to claim only that property that directly vests in her in terms of customary law. (See *Matibiri v Kumire* HH 80-2000). Others have accepted that the principle of a tacit universal partnership is applicable. (See *Mtuda v Ndudzo* (supra); *Mashingaidze v*

*Mugomba* HH 3-99 and *Marange v Chiroadza* HH 130-2002). Some have suggested that the common law principle of unjust enrichment could be used to achieve equity as between former parties in such a union. It is trite that the principles of joint ownership remain applicable between such parties. (See *Jengwa v Jengwa* 1999 (2) ZLR 121 (H)). It is trite that the principles of joint ownership remain applicable between such parties. Each of the common law principles that have been suggested and used to achieve equity as between parties to an unregistered union have peculiar essential elements that have to be proved if alleged and result in different distributions of the assets in issue being effected by the court. However, it is the agreed position at law that whatever legal vehicle is used to try and achieve equity between the parties, some legal principle must be pleaded. The union itself is not a cause of action at common law.

I am not clear as to where the confusion on the part of the trial magistrate and indeed on the part of many others whose judgments have been the subject of appeals before this court arises from.

In my view, trial magistrates faced with a claim for the distribution of assets of parties to an unregistered union may seek guidance from the remarks of GWAUNZA J (as she then was) in *Mashingaidze v Mugomba* (supra). On page 21 of the judgment she had this to say:

“However, while I would support the view that a proven unregistered customary law union should be treated like any other marriage when it comes to dissolution and division of assets jointly acquired by the parties during its subsistence, such a view is currently not supported by the law.” (The underlying is mine).

Thus, the current legal position is such that trial magistrates should not approach the distribution of assets of parties in an unregistered customary union as if they are apportioning the assets of a couple that is divorcing in terms of the Matrimonial Causes Act [*Chapter 5:13*].

This court has on a number of occasions exhorted legal practitioners to always plead a recognized cause of action for the distribution of assets of parties in an unregistered customary union. (See *Mashingaidze v Mugomba* (supra) and *Jengwa v Jengwa* (supra).

I repeat that exhortation herein to all trial magistrates before whom a claim as the one in this appeal comes. It is this: where one party to an unregistered union seeks to have the joint estate distributed before a magistrates’ court, a justification for not applying customary law must be made and accepted by the court using the choice of law considerations listed in section 3 of the Customary Law and Local Courts Act [*Chapter 7:05*]. When general law is the correct choice, then, a recognized cause of action must be pleaded. Such a cause of action may be

unjust enrichment, a tacit universal partnership or joint ownership. An averment merely to the effect that the parties were in an unregistered customary union is not sufficient to found a cause of action at general law. Trial magistrates must be wary of this procedural aspect of the matter.

Finally, if the court is to entertain the matter on the basis of any of the above principles, then its general monetary jurisdiction limits apply. It therefore becomes imperative for the court to be aware of the value of the estate involved and to then ascertain whether it has the requisite jurisdiction in the matter.

The trial magistrate in the matter before us fell into all three errors. Firstly, he did not advert to the choice of law considerations before he decided to apply general law to the dispute before him. The parties were essentially in a customary law relationship and had terminated their relationship using customary law rites and practices. They are thus to be presumed to have elected customary law as the law governing their relationships. A justification for departing from customary law had to be established and stated in the judgment.

Secondly, having chosen to apply general law to the dispute, the trial magistrate accepted the fact of the union as a cause of action. It is not. He then proceeded to apply the considerations mentioned in section 7 of the Matrimonial causes Act as if this Act is of direct application to such unions.

Thirdly, as the trial magistrate was clearly not applying customary law or proceeding in terms of section 11(b)(iv) of the Magistrates' court Act, he had to be satisfied that the value of the estate that he was distributing fell within his monetary jurisdiction. This he did not do.

In the absence of clarification as to the cause of action that the respondent was relying on in the lower court and the value of her claim, we cannot determine whether the trial court had jurisdiction in this matter and whether it erred in its findings error or not as this will largely depend on the cause of action that the respondent would have pleaded before the trial court.

On the basis of the foregoing, we would allow the appeal, set the decision of the trial magistrate aside and remit the matter to the magistrates' court for a trial *de novo*, preferably before a different magistrate.

BHUNU J agrees.....