JAMESON MANDAVA
versus
TSITSI CHASWEKA

HIGH COURT OF ZIMBABWE
MAKARAU JP and HLATSHWAYO J
HARARE 6 and 8 May 2008.

CIVIL APPEAL

Appellant in person
Respondent in person.

MAKARAU JP: On 23 May 2005, the respondent issued summons out of Marondera Magistrates' court. Her claim against the defendant, as it appears on the face of the summons, is recorded as "sharing property". An affidavit was attached to the summons, curiously titled in my view as "Applicant's supporting affidavit (Property Sharing)". In the affidavit, the respondent alleged that she was in an unregistered customary union with the appellant and that during the subsistence of the union, the parties had acquired certain household goods and effects. She gave the estimate value of each item that she alleged the parties acquired. She further alleged that due to the violent conduct that the appellant exhibited towards her, the union between them had broken down irretrievably. She ended the affidavit by praying that the court confirms the distribution of the assets as suggested by her in the affidavit.

It is not clear on the record how the matter was set down for trial. I shall return to this point in detail later. The record however indicates that on the day of the trial, the appellant was in attendance and verbally indicated that he was opposed to the proposals made by the respondent. Prior to the set down date, he had not filed any pleadings or other papers in the matter.

The matter proceeded to trial with the parties giving evidence. For the purposes of this appeal, it is in my view not necessary that I go into the details of the evidence that each party led. After hearing the parties, the trial court made an award that dissatisfied the appellant, prompting him to note an appeal to this court. In his notice of appeal, the appellant challenged the distribution that was made in the lower court and prayed that it be set aside.

The parties were not legally represented at any stage of the legal battle between them. We thus could not engage them at all regarding the legal issues that arise in this appeal. The

legal points made in this judgment are therefore our opinions without the aid of argument by counsel.

The two issues that arise are in my view so important that a copy of this judgment will be dispatched to the Chief Magistrate for his attention and for the benefit of other trial magistrates who may be falling into the same pitfalls that the trial magistrate in this matter fell. I shall make the necessary order for this to be effected by the Registrar.

Firstly, 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 acceptable 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.

In the lower court, the respondent commenced her suit by issuing summons against the appellant. She then filed an affidavit to support her claim. This was a most unusual mixture of procedures and one that the rules of the lower court do not provide for. In accordance with the rules, having issued summons in the matter, the respondent had to file her particulars of claim to be answered by the respondent by the filing of a plea or other answer.

Affidavits on the other hand, such as the one filed by the respondent together with her summons, are a part of the application procedure.

The two procedures, viz, one commenced by the issuance of summons and the other by the filing of an application, while overlapping and sometimes exchangeable in terms of utility, are quite distinct one from the other. They cannot be employed at the same time to resolve the same dispute.

I have indicated above that the parties were not legally represented before the lower court. I thus do not hold it against her that she filed incompetent papers before the lower court. In my view, the fault lies squarely with the Clerk of the lower court who accepted summons to which an affidavit was attached.

Even assuming that the incompetent procedure detailed above escaped the attention of the Clerk, the trial magistrate should not have proceeded to trial on a matter that had not reached *litis contestation*. After the issuance of summons, no further pleading were filed in the matter. No pre-trial conference was held. The matter was thus not at issue and should therefore not have been referred to trial.

In my view, the informality allowed in this matter by the trial court, of hearing the parties in the absence of pleadings filed of record and before a pre-trial conference was held in the matter is unacceptable and cannot be allowed to stand. It destroys the integrity of magistrates' courts as courts of law. It reduces proceedings before the court to the same level as that before the traditional leaders and at village level.

Even if we assume that the procedure before the court was application procedure, the appellant as respondent in the lower court had to file his notice of opposition and opposing affidavit before the matter could be referred to a magistrate for hearing. Application procedure is ordinarily determined on the basis of the papers filed and in the absence of papers from the respondent, a hearing of oral evidence was improper.

The magistrate should have returned the matter to the Clerk as not being ready for a hearing in the absence of such observance to the rules as I have highlighted above. His lapse in this regard in my view cannot be condoned and is unacceptable. It is hereby brought to the attention of the Chief Magistrate for corrective action to be immediately taken lest the procedures in the magistrates' court and the integrity of such court fall into disrepute.

The second issue that arises in this appeal is one that escaped a number of trial magistrates from the nature of the appeals that are reaching this court. The issue is on of a socio- legal nature and requires intervention from parliament to correct the anomaly that exists between registered and unregistered customary unions.

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 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 avert to the choice of law provisions of our law and finally they tend to forget their monetary jurisdictional limit when distributing joist estates at general law.

The trial magistrate in *casu* fell into all three traps. In his award, he was attempting to effect a just and equitable distribution of the joint estate as if he was dealing with a marriage recognized as such at law. He applied the law of equity as provided for in section 7 of the Matrimonial Causes Act and attempted to sort the estate into three lots marked 'his", "hers"

and " theirs" following the guidelines given to divorce courts by the Supreme court in *Takafuma v Takafuma* 1994 (2) ZLR 103 (SC).

The above is not to say that parties in an unregistered customary union cannot approach the court for relief. They can. However when they do so, it is a requirement of our law that they chose which law they want to apply to the resolution of their dispute as between customary and general law and if they chose general law, they must plead a cause of action recognizable at law as their " marriage" is not recognized as such.

In *casu,* no choice of law inquiry was gone into and it is clear that he was not applying customary law. However, since no cause of action at general law had been pleaded, it is difficult to establish how he came up with the order that he made and which principles of law he applied.

Finally, the magistrate's court is a creature of statute with set jurisdictional limits in civil matters. Assuming that a choice of law had been properly made and that choice was general law, that a valid cause of action had been pleaded and the matter had properly proceeded to trial in terms of the rules, the value of the estate that the trial court set to distribute far exceeded its monetary jurisdiction and the trial magistrate did not even advert to this issue.

The issues that I have highlighted above are not new to this appeal court. I have had occasion to discuss the same issues in *B Feremba v P Matika* HH 33/2007. I will take the risk of repeating myself again in this judgment and exhort all trial magistrates approached to distribute the joint estates of persons in an unregistered customary union to ensure that the parties before have made the appropriate choice of law between customary and general law. Once a choice of law has been appropriately made, two further issues arise but only if general law is chosen. These are the cause of action and the monetary jurisdiction of the trial magistrate.

In view of the fact that the trial magistrate failed to observe any of the above, his decision cannot stand.

In the result, I make the following order:

1. The appeal is allowed.
2. The matter is hereby remitted to the magistrate's court for a trial de novo.
3. The parties are to file pleadings in accordance with the provisions of the rules and a pre-trial conference has to be held in the matter before the trial.

4. Each party shall bear its own costs.
5. The Registrar of this court is directed to bring this judgment to the attention of the Chief Magistrate.

HLATSHWAYO J agrees……..