

JOHN MICHAEL MAUCHAZA
versus
SARAH NOTA

HIGH COURT OF ZIMBABWE
GOWORA and PATEL JJ
HARARE, 14 July 2011 and 28 March 2012

Civil Appeal

J Tsivama, for the appellant
The respondent in person

GOWORA J: On 10 July 2006, the respondent herein, whom I shall refer to as the plaintiff issued summons in the Magistrates Court Harare against the appellant, the defendant claiming “sharing of property.” Particulars of claim attached to the summons made reference to a customary union which resulted in the establishment of a universal partnership. It was accordingly prayed that it would be just and equitable for the court to order that a house shared by the parties during the partnership be sold and the proceeds jointly shared between the parties.

The defendant pleaded to the claim in a manner which both denied and accepted the existence of the customary union, the existence of the universal partnership and the acquisition of the immovable property over which the plaintiff was claiming a right to a share. I find that the defendant’s legal practitioners filed a plea which was not only vague and embarrassing but which did not clearly set out the facts upon which the defence was based. The errors I have referred to above notwithstanding, the matter went before a magistrate for trial and on 19 April 2007 the magistrate rendered a judgment in terms of which the plaintiff was awarded a fifty percent share in the immovable property. The defendant then noted an appeal against the judgment.

The evidence adduced at the trial in the court below established that the parties had an unregistered customary union which resulted in the birth of one child. The parties stayed together from 1982 to 1986 when the plaintiff left the matrimonial home. During the period in question, despite the absence of a formal relationship, the parties conducted

themselves and treated each other as husband and wife. Evidence was led to the effect that a customary marriage ceremony took place where the defendant paid part of the bride price (lobola). According to the plaintiff the defendant had not finished paying all of it when they separated. The defendant accepts that the parties had such a union.

There are a number of issues on which the parties differ in so far as the evidence adduced at the trial is concerned. The case for the plaintiff is that she had failed to return home after an excursion with the defendant. As a result she and the defendant decided to get married. The defendant's case is that he and the plaintiff had not returned home. The next day the plaintiff was told by her relatives she was not acceptable at home. She moved in with him. He was then forced to live with her, and decided to pay damages for having made her pregnant. What is not in dispute is that the parties lived together from 1982 to some time in 1986. During that period an immovable property, known as 82 Caledon Avenue, Hatfield, was purchased through a mortgage bond secured in the name of the defendant. The defendant was responsible for settlement of the mortgage payments, whilst the plaintiff took care of the other household expenses. The deposit for the house was paid by the defendant even though the plaintiff indicated in her evidence that she had contributed towards half of the deposit paid by the defendant. From the evidence adduced before him, it is my view that the magistrate correctly concluded that the defendant had paid lobola for the plaintiff and the parties were married in terms of custom. The union was however never solemnised.

Although the defendant did not plead lack of jurisdiction in his plea, when closing submissions were filed on his behalf at the close of the trial, it was argued on his behalf, that if the plaintiff's claim was premised on a tacit universal partnership then the trial court lacked the jurisdiction to entertain the matter as the value of the property in dispute was in excess of Z\$5 million. It was conceded by the defendant's legal practitioner that no evidence had been adduced on the value of the property but the court was urged to take judicial notice of the fact that a half share in an immovable property in Hatfield could not possibly at the time be valued at less than Z\$5 million. It was accordingly argued that the claim should be dismissed on that basis.

The trial court was addressed on the question of the lack of jurisdiction of the court given the monetary value of the items in dispute, but it does not appear as if the magistrate addressed his mind to this. It had not been pleaded but a defendant can consent to a claim where the value of the claim exceeds that set by statute. Although there is no evidence on the value of the property the defendant has urged this court to assume that it is in excess of Z\$ 5 million.

In the exercise of its appellate jurisdiction the High Court being a superior court with inherent jurisdiction is empowered to exercise review powers. There are certain aspects to this matter that point to procedural irregularities. First and foremost the summons in terms of which proceedings were instituted is the form used for instituting divorce proceedings in the Magistrates' Court for the dissolution of a marriage solemnised in terms of custom. The summons to which the particulars of claim were attached appeared to be divorced from the cause that the plaintiff had brought to court. The summons spoke an action for sharing of property which is not a cause of action recognisable under general law. The summons calls upon a defendant to appear at court to answer the plaintiff's claim and to file his defence before the date of hearing. This is in fact in terms of r 8 (8) of the Customary Law Court rules.

To this the plaintiff had attached particulars of claim in which she sought a half share of the proceeds of the Hatfield property after a judicial sale of the same. There is no claim therein to a decree for divorce, despite the summons having been issued under rules utilised for divorce in a customary union. On the other hand summons under general law in terms of the rules of the Magistrates' court allows a defendant seven days in which to enter appearance after service of summons. A defendant who enters an appearance to defend the claim is obliged to file a plea in which the basis of the defence to the claim is set out. In terms of Order 19 r (1) the party wishing to have the action brought forward to trial must request the other party to attend a pre-trial conference at a mutually convenient time and place. This is normally done before a magistrate in chambers. At the pre-trial conference all issues ancillary to the trial are dealt with including the issues for trial and the duration of such trial.

In *casu*, all these stages were skipped which leads one to conclude that despite the cause of action having been premised on general law the parties conducted their dispute as if it were premised on customary law principles. There was therefore a mixture of procedures starting from the institution of the summons themselves. I have no hesitation in concluding that the summons was defective.

I turn then to the issue of jurisdiction or lack thereof. In terms of the Magistrates Court Act [*Cap 7:10*] the jurisdiction of the court is provided for as follows:

“11. Jurisdiction in civil cases

(1) Every court shall have in all civil cases, whether determinable by the general law of Zimbabwe or by customary law, the following jurisdiction-

(a) excepting any other jurisdiction assigned to any court by this Act or any other enactment, the persons in respect of whom the court shall have jurisdiction shall be-

- (i) any person who resides or carries on business or is employed within the province;
- (ii) any partnership whose business premises are situated o, any member whereof resides, within the province;
- (iii) any person whatever, in respect of any proceedings incidental to any action or proceedings instituted in the court by such person himself;
- (iv) any person, whether or not he resides, carries on business or is employed within the province, if the cause of action arose wholly within the province;

(b) with regard to the causes of action-

- (i) ...
- (ii) ...
- (iii) ...
- (iv) in actions in which it is claimed a decree of divorce, judicial separation or nullity of amarrriage solemnized in terms of the Customary Marriages Act [*Cap 5:07*], including actions relating to the division, apportionment or distribution of the assets, whether movable or immovable, of spouses or former spouses of such marriages and the payment of maintenance in terms of the Matrimonial Causes Act [*Cap 5:13*].”

A Magistrate's court would therefore not have the jurisdiction to deal with this matter as a divorce in the absence of solemnisation of the union under the Act. The only circumstance under which the Magistrate's court would have jurisdiction is if the matter were an ordinary civil dispute which was within the monetary jurisdictional limit of the court. From the description of the house which is the subject matter of the dispute, it is pretty obvious that its monetary value exceeded by far the jurisdiction of the Magistrates court. The Magistrates court is a creature of statute and can only function within the confines and parameters set by the statute that creates it. It cannot grant to itself any powers not afforded it by the statute and one of those powers is the limitation on its monetary jurisdiction. In *Mandava v Chasekwa* HH 42-08 MAKARAU JP (as she then was) and HLATSHWAYO J stated as follows in relation to the jurisdiction of the Magistrates court:

“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 done and that choice was general law that a valid cause of action had been pleaded... the value of the estate that the trial court set to distribute far exceeded its monetary jurisdiction...”

In my view those remarks are pertinent and apposite in *casu*. There was a choice of law exercised in that the plaintiff based her claim on universal partnership and or unjust enrichment. This choice was however only exercised in terms of the particulars of claim filed by the plaintiff. The court had the capacity to determine the dispute as formulated by the plaintiff even if in the particulars of claim the cause of action appeared to be drifting between a universal partnership and unjust enrichment.

Although the plaintiff appears to have chosen to have the dispute settled as a claim for distribution of assets under a tacit universal partnership the record reveals that the matter was actually disposed of as if the court was considering a divorce under customary law. Clearly in the absence of a marriage under customary rites the court had no jurisdiction to determine the plaintiff's claims unless premised under general law. To add to the confusion, the summons under which the dispute was presented to court removed it from claims under general law. In *Feremba v Matika* HH 33-07 MAKARAU

JP (as she then was) raised awareness to the problem of jurisdiction arising from these unions with the following remarks:

“...The distribution of the assets of parties in an unregistered customary union by the Magistrate’s 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 s 7 of the Act have no direct application in distributing the assets of such parties. Further, the provisions of s 11 of the Magistrate’s Court Act [*Cap 7:10*] which grants magistrates courts jurisdiction in divorce actions of persons married in terms of the Customary Marriages Act [*Cap 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 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 magistrates court jurisdiction will apply. Secondly, for a claim based on common law, a recognised cause of action must be pleaded.”

In this instance, the face of the summons bore the legend ‘sharing of property’. Even if it were to be assumed in the plaintiff’s favour that the claim had been brought under general law, the monetary jurisdiction of the court in this case has been challenged by the defendant as no evidence was placed before the court as to the value of the immovable property that the plaintiff sought a share in. The fact that such property was located in the low density suburbs cannot in my view lead to an inevitable conclusion that the value thereof exceeded the monetary jurisdiction of the Magistrate’s court. Generally properties in the low density suburbs do tend to be of higher value than those in the high density suburbs but it is however not given that in every instance the value of such property has to be high or exceed the jurisdiction of the Magistrate’s court. In this case, and in fact in every case where a Magistrate’s court has to adjudicate over a matter involving an immovable property, it is important that the value of such property be established at the outset to inform the court whether or not the property is within its jurisdictional limits. In this case it was not done and other than to remark that the property may well have been outside the jurisdiction of the court I cannot make a definitive statement because its value was never established.

In *Mandava v Chasekwa supra* the appeal court had to contend with all these problems emanating from the trial court. At p 3 the court stated:

“It is still part of our law that unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act [*Cap 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 the 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 joint estates at general law.”

In this case the court fell into the error of treating the claim as if it had been brought under customary law when the particulars clearly identified the claim as one falling under general law. The court then applied the factors set out in the Matrimonial Causes Act in its disposal in that it took into account the contributions that the plaintiff had made as a house wife. Given the totality of the irregularities attaching to these proceedings it is my view that the proceedings are a complete nullity. The extent of the irregularities is such that this court cannot make an order in favour of either of the parties. The justice of the case demands that the proceedings be set aside in their entirety. I therefore make an order as follows.

The proceedings in the court *a quo* under case number 9146/06 be and are hereby set aside with no order as to costs.

PATEL J: agrees

Sawyer & Mkushi, legal practitioners for the appellant
Legal Aid Advice Scheme, legal practitioners for the respondent