SHELTER MAVATA
versus
JAMES CHIBANDE

HIGH COURT OF ZIMBABWE
OMERJEE & HLATSHWAYO JJ
HARARE, 8 February 2012

Civil Appeal

Mr F. Nyangani, for the appellant
Mrs N. Mugiya, for the respondent

HLATSHWAYO J: This is an appeal against the decision of the Chitungwiza magistrate handed down on 25 March 2009, awarding the appellant 15% of the value of the immovable property acquired by the parties during the subsistence of their four year unregistered customary law marriage.

The plaintiff listed her grounds of appeal as follows:

"The learned Magistrate erred in awarding the Appellant only 15% of the value of the property with regard to the following factors:

1. The appellant's contribution to the acquisition of the immovable property and subsequent construction of the house whether financially, directly or indirectly, have been undermined, including
   1.1 Appellant's supervision of builders during the construction period throughout, whilst the Respondent was away from home.
   1.2 Appellant's total commitment where she would go on foot to buy most of the building material from Makoni Home Industry and the Builders Market using a push cart.
   1.3 Appellant foregoing her social life during the period of construction of the property.
   1.4 Appellant's contribution in selling goods brought home by Respondent for resale to raise capital for the construction of the house.
   1.5 The parties lived together during which period the Appellant gave the Respondent social well being, companionship, peace of mind and confidence much that while in his absence the Appellant would be trusted to commit herself to the construction of the property.
2. The learned Magistrate erred in finding that after consideration of the factors outlined in paragraphs 1.1 – 1.5 above, the Appellant deserved a paltry 15% of the value of the property"

The appellant then prays for a "substantially higher percentage which is both fair and reasonable and commensurate with her contributions" and costs.

In a notice of amendment of grounds of appeal, the appellant submitted the following additional grounds of appeal:

"3. The court a quo erred in failing to make an analysis of the choice of law in order to provide for the application of general law.
3.1 As a result the court a quo erred in failing to apply the principle of tacit universal partnership which was the only legal regime available in order to do justice to the parties.
4. The court a quo erred in failing to be guided by the provisions of the Matrimonial Causes Act (Chapter 5:13) in coming to its conclusion.
5. The court a quo erred in dismissing the Appellant's evidence that her brother assisted the parties financially on the basis that the brother can claim his money from the Respondent."

The appellant also amended her prayer by deleting the original one and substituting it with one calling for the setting aside of the order of the court *a quo* and awarding her 50% of the value of the immovable property and costs of suit.

Regarding the choice of law submission, the court *a quo* appears to have exercised its mind over it and made the decision to proceed in terms of general law, as shown by the following exchange in the record of proceedings (pp.16-17):

"CROSS EXAMINATION (Appellant being cross examined by respondent's legal practitioner)

Q: would you have any problems if the sharing of property is done under customary law and not general law?

A: No.

Q: You confirm you don't have an antenuptial contract in your marriage?

A: Yes.

Q: Are you aware that you should have advanced reasons why you have opted this court to proceed in terms of general law at the expense of customary law?

LEGAL PRACTITIONER FOR PLAINTIFF (Objects): These points were raised as points *in limine* which he later waived. It is also filed of record that after that the matter was referred to Pre Trial Conference for matter to proceed to trial.

LEGAL PRACTITIONER FOR DEFENDANT: I am not referring to points *in limine*. This court is a civil and customary law court and even if plaintiff has chosen customary law, this court was still going to have this procedure. In *Mashingaidze's* case 1995 (1) ZLR 219, that was stated and I will hand over to court.

COURT: Objection sustained."

Therefore, the ground of appeal raised by the appellant in paragraph 3 above falls away. Regarding the direct applicability of *section 7* of the *Matrimonial Cause Act*, the respondent is correct in pointing out that the marriage regime *in casu* is not recognized in that provision, but the provision can be used as a useful guidance when all the other prerequisites are met. However, in seeking to raise the choice of law issue again in heads of argument, the respondent is in error. Had he intended to challenge the basis upon which the court *a quo* had proceeded, the respondent should have raised the point by way of a cross-appeal, which in this case, he has not. It is clear, therefore, that the court *a quo* proceeded on the basis of general law principles, with the consent of both parties, and sought to answer the question pertaining to the percentage of the value of the immovable property the appellant was equitably entitled to. The plaintiff's closing submissions also confirm this, wherein it is state thus:

> "Defendant raised some points in limine citing that the claim was not properly placed before the Honourable Court , for the sake of progress the Defendant later waived the objections *in limine* based on the choice of law Mashingaidze v Mashingaidze 1995 (2) ZLR 219 and by <u>consent</u> the parties agreed to have the matter tried before this Honourable Court." (emphasis in the original)
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> In *Chapeyama v Matende & Anor* 2000 (2) ZLR 356 at p.368 it was held as follows:
> "I therefore come to the conclusion that the judgment of the learned trial judge would have been clearer if it had set out the following two consecutive findings that:
>
> a) this is a matter where the justice of the case required, in terms of s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*], that the general law be applied;
>
> b) the elements of a tacit universal partnership have been established and that in considering the division of property under that concept useful guidance can be found in the provisions of s 7 of the Matrimonial Causes Act [Chapter 15:13]
>
> *It is, however, clear that the learned judge dealt with the distribution of the property between the parties as if he had made those specific findings. In the circumstances I see no reason to interfere with the decision in that respect*."(emphasis added)

I respectfully, associate myself with the above opinion, which, at any rate is binding on this Court. In dealing with the distribution of the immovable property, which is the dispute *in casu*, the trial court proceeded as if it had made those findings and came to the conclusion that it did. Many judgements of this Court, and indeed the Supreme Court as well, have rued the fact that where an unregistered customary law union is concerned there is

no direct application of the provisions of s 7 of the Matrimonial Causes Act. See, for example, *Mashingaidze v Mugomba* HH-3-99, *Chapendama v Cha*pendama 1998 (2) ZLR and *Chapeyama v Matende, supra*. Where it was stated:

> "It is clear that the learned trial judge felt compelled to apply those provisions (s 7 Matrimonial Causes Act) as a guide in the situation stated above, because of what he properly considered would have been an injustice done to the first respondent if customary law was applied. He, however, ought to have justified this intervention on the basis of s 3 of the Customary Law and Local Courts Act [Chapter 7:05] and not on what he stated as the court's reformative duty to interpret customary law progressively so as to adapt it to the changing social and economic conditions."

Thus, just to add one's voice to the chorus of calls for legislative intervention in this area, women litigants in unregistered customary law unions seeking equitable relief in the distribution of property on the dissolution of their marriages have been knock, knock knocking on heaven's door of s 7 of the *Matrimonial Causes Act* for far too long with varying degrees of success. More often than not they have had the door slammed shut in their faces. Occasionally, they have had the indignity of being grudgingly served from the side-door or even the window. Isn't just time, right now, that this forbidding door was thrown wide open for them as well? As was pointed out in *Chapeyama v Matende, supra:*

> "A "divorce" under the regime of an unregistered customary law marriage is no less a divorce for the parties. It puts an end to co-habitation. It puts an end to other reciprocal obligations of the parties. It is a divorce in everything but name."

Now, in considering the award of the court *a quo*, an appellate court, such as this one, cannot interfere with the decision of the lower court, unless the trial court exercised its discretion erroneously or if it allowed extraneous or irrelevant matters to guide or affect it, or if it mistook the facts or did not take into account some relevant considerations.

In connection with the division of the immovable property, the lower court reasoned as follows:

> "From the evidence adduced, the Plaintiff testified that she was a housewife but everything was acquired during the subsistence of their marriage with defendant and therefore she deserved an equal share of both movable and immovable properties. Plaintiff also submitted that her brother...used to assist the couple with money specifically for the construction of immovable property...Defendant also conceded

that during the union the parties acquire an immovable property being stand number 16791 Zengeza 4, Chitungwiza. However, defendant testified that he acquired the stand by his own sole means and also built the same. He even denied getting monetary assistance from plaintiff's brother." pp.5-6 of Judgment.

And further:

"Defendant however wants to share the immovable property with 3 of his ex-wives saying they haven't claimed anything. However, according to the court's view that will be unfair because the stand was acquired during the matrimonial union with the Plaintiff in case and that means she is the only one with a claim over the property."

An objective analysis of the contribution of the parties to the acquisition and development of the property shows that:

a) While the respondent played the greater role in the acquisition of the stand by providing the bulk of the financial resources, the appellant also played a significant role directly and through her brother in the acquisition, and even a more decisive role in the development of the stand, and did not seek to exaggerate her contribution in her evidence. See, for example p.25 of the record:

Q: You said that your brother gave you $40 million
A: No he gave me $28 million and defendant $140 million
Q: Do you have any evidence to that effect?
A: What I am saying is true.
Q: Do you know the negotiations leading to the purchase of the stand
A: Yes
…
Q: What other amount did you borrow from your brother
A: We borrowed $20 million and whole lots of money
Q: You said you borrowed $20 million for stones and cement. Is that correct?
A: No because there was the other R1 000 I used to buy cement
Q: What was $20 million for
A: To pay the builders
Q: You also confirm that the defendant used to send money for building materials?
A: Yes
Q: Who was cooking for builders
A: Me."

b) The respondent was a cross-border truck driver and was more often than not outside the country and used to send some money to the appellant to purchase some of the building materials. The appellant, as is clear from the evidence above, would use her own initiative, including borrowing from her own

brother, in order to purchase some of the required material. She would also sell items sent by respondent for re-sale in order to raise additional resources.

c) The court a quo, therefore, erred in failing to take into account money sources from the appellant's brother as appellant's direct contribution to the acquisition and development of the stand. The court further erred in assessing her own direct contributions in purchasing building material, supervising and cooking for builders and raising additional resources as amounting to only 15%. The court correctly rejected the argument that the other three former wives were entitles to shares in the immovable property.

Taking all the above factors, I am of the considered view that the assessment of the appellant's share of the immovable property by the trial court was on the low side. In *Murehwa v Murehwa* HC 2867/08 a wife whose contribution was merely supervising and cooking for builders was awarded 60% of the matrimonial home against the husband's 40%. In the present case, the direct contribution of the appellant would entitle her to at least 50% of the immovable property. If one were to seek further guidance from the provisions of section 7 of the Matrimonial Causes Act, her share would increase even further. It is not necessary to do so in this case. She has claimed a fifty percent share, and on the basis of the above analysis, she is perfectly entitled to it.

Accordingly, the appeal succeeds with costs, and it be and is hereby ordered as follows:

a) The order of the court a quo is set aside and substituted with the following: "The plaintiff be and is hereby awarded 50% of the value of Stand 16971 Zengeza 4 and costs of suit."

b) The respondent shall pay the cost of this appeal.

Hute & Partners, Appellant's legal practitioners.
Mutsahuni, Chikore & Partners, Respondent' legal practitioners.

HLATSHWAYO J …….....

OMERJEE AJA agrees……..