

RUMBIDZAI SHAAMANO
versus
JABULANI NKOSI

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 8 March, October 2012
and 10 January 2013

Family Law

V Nyemba for plaintiff
V Maramba for defendant

CHITAKUNYE J: This case epitomises the need for legal practitioners to have clarity of mind in deciding on a cause of action they wish to rely on. Such clarity of mind would serve to curtail pursuing untenable positions.

In *casu* the plaintiff seemed unsure of the cause of action to rely on.

The plaintiff and defendant began living together as man and wife in 1998 after the defendant had paid lobola for the plaintiff. Their union was never solemnised. Their union was blessed with three children who are still minors.

In July 2009 the plaintiff issued summons out of this court against the defendant. She alleged that their union had irretrievably broken down. She virtually approached court as if there was in existence a valid marriage and so she wished it to be dissolved in terms of s 5 of the Matrimonial Causes Act, [*Cap 5:11*]. Based on the above grounds for the breakdown the plaintiff sought an order for:-

- (a) a decree of divorce;
- (b) a division and distribution of matrimonial assets;
- (c) an award of custody of the minor children; and
- (d) that the defendant be ordered to pay maintenance and costs of suit.

In the alternative the plaintiff alleged that the plaintiff and defendant entered into a *tacit universal* partnership and that such partnership had now come to an end. She thus sought an order:

- (a) declaring that a partnership existed between the plaintiff and defendant;
- (b) that the plaintiff be declared the owner of assets in part 1 and the defendant owner of assets in part 11 of her schedule;
- (c) that the partnership be declared dissolved from the date of this order;
- (d) that the defendant pays costs of suit.

In his plea, the defendant did not challenge the basis upon which a decree of divorce and other ancillary relief was being sought. He equally did not see anything amiss in the alternative claim. He only disputed assertions that the plaintiff had contributed towards the purchase of the assets to be distributed in terms of the Matrimonial Causes Act.

On the issue of custody, the defendant contended that he was a better custodian parent than the plaintiff and so he should be awarded custody of the minor children of the marriage.

In his counter-claim defendant claimed that:

- (a) he be awarded custody of the minor children,
- (b) the defendant be ordered to pay maintenance for the children,
- (c) that stand number 18A Newbold Road, Greystone Park, Harare be declared to have been lawfully purchased single-handedly by the plaintiff in reconvention (i.e. himself) in the names of a nominee namely Panashe Nkosi; and
- (d) that the defendant in reconvention shall have rights of access to the minor children on each and every alternate weekend and school holiday.

The approach by the parties was as if their living together was recognised as a valid marriage in terms of the law hence they were now seeking a decree of divorce, to be awarded custody and to have their assets distributed in terms of the Matrimonial Causes Act.

At a pre-trial conference the following was agreed-

1. Maintenance

- 1.1 that the defendant shall pay school fees, levies and transport and shall further buy uniforms for the minor children of the marriage;
- 1.2 the plaintiff shall pay the medical bills, buy groceries, pay the house maid and shall do any other duties of a mother to her children.

2. All the other issues shall be dealt with by the trial court.

The issues referred to trial included:-

1. Whether or not the plaintiff contributed directly or indirectly towards the purchase of any properties listed in Annexure A attached to the plaintiff's declaration, if so, what was the extent of the direct or indirect contribution.
2. Whether or not it is in the best interest of the minor children for custody to be awarded to the plaintiff.

None of the issues dealt with the nature of the relationship between the parties. As a consequence both parties never addressed their minds to that aspect.

On the date of trial counsel for both parties indicated that the parties had settled all issues except the issue of custody. Counsel did not however indicate the basis upon which the settlement had been reached. For instance, was it on the basis of a valid marriage or a recognition that they were in a *tacit universal* partnership, or was it a purely out of court settlement without the need to prove a particular cause of action or legal basis for the distribution of the assets.

In the absence of evidence of the basis upon which parties settled this court will only take the settlement as a purely out of court negotiated settlement based on the parties understanding of their relationship.

I say so because from the pleadings filed of record and the evidence led in court there was no evidence of a valid marriage as recognised by law nor was a *tacit universal* partnership proved.

The evidence from both parties showed clearly that their union had not been solemnised either in terms of the Marriages Act, [Cap 5:11] or the Customary Marriages Act, [Cap 5:08]. The evidence however showed that the two had gone through the requisite customary law rites in establishing their union. They lived as husband and wife in terms of an unregistered customary law union.

Section 3 of the Customary Marriages Act, [Cap 5:07] states that:

“3(1) subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless—

- (a) Such marriage is solemnised in terms of this Act; or
- (b) ...
- (c) ...
- (d) ...”.

Accordingly the parties' union was not a valid marriage in terms of the law but an unregistered customary law union. This court does not grant a decree of divorce were parties are in an unregistered customary law union. It was thus improper for plaintiff to have sought a decree of divorce from this court.

The provisions of the Matrimonial Causes Act on the distribution of assets of the spouses have no direct application in such cases. This court has stated on a number of occasions that a party's recourse is to plead a legally recognised cause of action based on the circumstances of each case.

In *Feremba v Matika* 2007(1) ZLR 337 at 341E-F, MAKARAU J reiterated that:

"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 law union."

As the issue of distribution of assets is no longer before me the above should only act as advice to counsel for future reference.

The issue before me pertains to custody. There are three children of the union aged 13 years, 7 years and 4 years. The children are all male. The plaintiff claimed custody of all the children. In his counter-claim, the defendant asked to be granted custody of the minor children.

The general law position on custody of children born out of wedlock is clear. In *LothiamValentine* 2007(2) ZLR 168 at 172D-E GOWORA J stated thus:

"The cardinal common law principle, according to our law, is that the mother of a child born out of wedlock is its legal guardian from birth until some special order is made by court. The father of such child cannot claim custody as of right but may, in the same manner, that any other third party can, claim custody of such child."

This would have been the position had the general law been applicable in this case. The plaintiff alleged that the general law is not applicable but the provisions of s 3(5) of the Customary Marriages Act. That subsection provides that:

"A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage."

In as far as it is agreed that for all intents and purposes the parties were 'married' according to customary law, having fulfilled all the customary law marriage rites, serve that

they had not registered their union, it is my view that the above subsection is applicable in this case.

Thus on issues pertaining to the status, guardianship, custody and succession of the children, the parties' union is treated as a valid marriage.

The basic principle in adjudicating on issues pertaining to children is the best interests of the children.

In determining what is in the best interests of the child there are many factors which must be taken into account.

In *Galante v Galante* (3) 2002 (2) ZLR 408 (H) SMITH J quoted in extensor some of the factors stated in *McCall v McCall* 1994(3) SA 201 (C) at 204-205. In that case KING J stated that:

“In determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors or criteria which are set out hereunder, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the listed criteria may differ only as to nuance. The criteria are the following:

- (a) The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- (d) The capacity and disposition of the parent to give the child the guidance which he requires;
- (e) The ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts' such as food, clothing, housing and other material needs – generally speaking, the provision of economic security;
- (f) The ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- (g) The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- (h) The mental and physical health and moral fitness of the parent;
- (i) The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
- (j) The desirability or otherwise of keeping siblings together;
- (k) The child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- (l) The desirability or otherwise of applying the doctrine of same sex matching...and
- (m) Any other factor which is relevant to the particular case which the Court is concerned.”

In this case the circumstances of the parties do not show any marked element warranting the denial of custody to either parent. For instance, in their pleadings neither alluded to any harmful practices or conduct by the other that would be detrimental to the children. The plaintiff's claim for custody is based on being the mother and so being a better custodian parent. The defendant on the other hand contended that the plaintiff is a lazy bone and so cannot look after the children.

It is worth to note that both claimed maintenance from the other in the event they are granted custody. That aspect confirms that both accept their incapability to look after the children on their own without economic support from the other. It also confirms that both appreciate that the non-custodian parent is financially able to contribute towards the needs of the children.

An analysis of the testimony by the two parties shows that each was intent on portraying the other as unsuitable but without much substance. For instance the defendant alleged the plaintiff was lazy and neglected the children to an extent that one of their sons died due to illness. There was nothing to show that the child died as a result of neglect. If anything both parties agreed that when they realised the child was unwell they took the child to some prayer meeting for faith healing. It was only after realising that the child's illness was worsening that they took the child to hospital. The decision to take the child for faith healing was not the plaintiff's alone, if anything it appeared to be in keeping with the defendant's belief.

There was also the complaint by the defendant that the plaintiff weaned their children too early and sent the children to sleep with the maid at too young an age. The plaintiff argued that it was in fact the defendant who caused her to wean early and to let the children sleep with the maid, because he demanded to have quality time with her. That demand for quality time necessitated early weaning and separation from the children at an early age. I did not hear the defendant to deny that he indeed demanded such quality time. Now that their union is on the rocks he cannot use compliance with his demand as a sign that the plaintiff did not love the children.

The defendant contended that he loved his children and as proof he would take the children for football matches. The plaintiff on the other hand left children with the maid as she frequented music shows by Oliver Mtukudzi. As far as the defendant is concerned, the plaintiff's pursuit of her recreational/leisure interests is a sign of lack of love for the children but his own pursuit of his leisure interests is a sign of love for the children. It is my view that

such attitude is not appropriate. Each was pursuing their interests but did not ignore the children.

It is an accepted fact that the parties employed a capable domestic maid who took care of the children to their satisfaction. The engagement of the maid was done by the plaintiff.

It was also accepted that during the subsistence of their union the plaintiff was for some periods employed and so would not be home all the time. The engagement of a domestic maid should thus not be taken as a sign of laziness or lack of love for the children. In the same vein it may be argued that the defendant's employment or engagements kept him away from the family on numerous occasions. That is not a sign of lack of love for the children.

Venencia Nyatsungo gave evidence for the defendant. She was the parties' maid for about five years. Her evidence could not take the defendant's case any further. It was clear from her testimony and the manner in which she testified that she was there to support the defendant's cause. Though she attempted to paint the plaintiff as a bad mother she could not explain how else the plaintiff should have done. For instance on the child who died and the issue of the defendant's demand for quality time Venencia could not provide what a prudent mother could have done in those circumstances. As a maid, Venencia was not well placed to know what the plaintiff would be doing whenever she went to town or came late from work. She was not privy to marital arrangements between the parties. I am of the view that not much reliance should be placed on her testimony.

The defendant's reasons for objecting to the plaintiff being granted custody and for him to be granted custody is best summarised in his answer when asked by his legal practitioner why he should be granted custody and not the plaintiff. His reply was to the effect that:

"I prefer that custody be to me because they must not be affected by the differences between me and my wife. They did not do anything wrong and they must not suffer. We have been together for ten years and the reason we parted is that I have been insisting she should do duties of a mother. Four times before the plaintiff has told me she is not able to do what I wanted her to do. Therefore she is going to her parents' home".

When further asked why he should be granted custody he proceeded to say that:-

"Everything that was done for the children was done by maids and not by my wife. The wife did not attend to the children when they soiled themselves or needed to change clothes".

On the other hand when the maid was asked if she was made to do work that was not within her job description she clearly indicated that all that she did was what she expected to do as a maid of immense experience. She was not asked to do work that was outside her job description as a maid.

It would appear the defendant had his own personal standards and those are the standards the plaintiff did not satisfy him in.

It is accepted that one of the children is about four years old. It is preferable that children of tender age remain with their biological mother as they still require the motherly love and attention. The defendant did not with conviction state what he has put in place to cater for such a child in the absence of the plaintiff. The defendant's assertion that he has taken on a new wife is not good enough as that new wife or better another partner is of unknown character to the children. The defendant has simply taken a gamble and brought in another woman in his life. There was no assessment of that woman's ability to take care of the children as her own. The defendant's assertion that when this new partner came she was liked by the children was countered by the plaintiff. No independent evidence was led on how the children viewed the coming into their home of a new 'mother'.

I am of the view that it is in the best interests of the children that they be kept together and in the custody of their mother. It is also imperative that the defendant be granted generous rights of access such that the children are not unduly denied of parental love and guidance from both parents.

Counsel addressed court on the plaintiff's request to be granted usufruct rights over Stand No. 18A Newbold Road, Greystone Park, Harare. It is common cause that the property is registered in the parties' child who is still a minor. The registered owner of the property was not party to these proceedings. Neither of the parties purported to represent the child's interests in this property and so a request for usufruct right over a property owned by party not party to these proceedings cannot succeed.

Accordingly it is hereby ordered that:

1. Custody of the minor children of the union, namely- Panashe Nkosi (born 26february 1999), Jabulani Nkosi (Jnr) (born 14 may 2005) and Tumelang Nkosi (born 23 December 2007) be and is hereby awarded to the plaintiff.
2. The defendant shall have rights of access to the minor children as follows-
 - (i) on each and every alternate weekend;
 - (ii) on each and every alternate school holiday for the duration of that holiday;

- (iii) on special family or religious occasions with the plaintiff's consent. The defendant may not remove the children from Zimbabwe without the prior written consent of the plaintiff, which consent shall not be unreasonably refused.
3. Maintenance - in terms of deed of settlement dated 28 October 2011 shall be as follows:
- (i) the defendant shall pay school fees, levies and transport and shall further buy uniforms for the minor children;
- (ii) the plaintiff shall pay the medical bills, buy groceries, pay the house maid and shall do any other duties of a mother to her children.
4. The movable property shall be distributed according to the parties' agreement as follows:
- (a) For plaintiff –
- i) 24 inch Colour Television
 - ii) Kitchen Utensils
 - iii) Microwave
 - iv) 2 Rice Cookers
 - v) 1 VCR
 - vi) Baby tender
 - vii) Door wardrobe
 - viii) Coat beds
 - ix) Metal kitchen unit
 - x) 1 maroon carpet
 - xi) 2 DVD players
 - xii) Black leather lounge suite
 - xiii) Coffee tables
 - xiv) Black room divider
 - xv) Dining room Suite with dresser
 - xvi) 1 Rug
 - xvii) 1 Double bed
 - xviii) 1 3CD Changer Radio
 - xix) Telephone desk

(b) For defendant:

- i) 1 Cream Lounge suite
- ii) Chateau bedroom suite
- iii) Computer
- iv) Computer desk
- v) Washing machine
- vi) Piece bedroom couch
- vii) 1 Rug
- viii) 1x 3CD Changer Radio
- ix) Toyota Corolla motor vehicle
- x) 24 inch colour television set
- xi) 29 inch colour Television set
- xii) 1 VCR
- xiii) King size bed

Each party shall bear its own costs of suit

V Nyemba & Associates, plaintiff's legal practitioners
Thondhlanga & Associates, defendant's legal practitioners