KUDZANAYI MELO
versus
AUSTIN KANDIBERO

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE; 20 & 21 March & 24 May 2023

Civil trial

Mr *L C Ndoro*, for the plaintiff
Ms *S Takaindisa*, for the defendant

TSANGA J: The parties were in an unregistered customary law union entered into in 2010 which was dissolved in December 2021. During that time they had two children, one in 2010 and the other in 2016. The parties are before me in relation to the plaintiff's claim whereby she seeks 50% of the value of a stand described as Stand No.7989 Fidelity, Southview Park, Phase 2 Harare. In addition she seeks the full value of one of the vehicles described as a BMW Registration Number AEE 3546 also acquired during their union. The summons were issued on 11 February 2022. Since at the time the Matrimonial Causes Act [*Chapter 6: 13*] applied to marriages in terms of the Marriage Act [*Chapter 5:11*] or the Customary Marriages Act [*Chapter 5:07*], both now repealed and replaced with the Marriages Act [Chapter 5:17], the plaintiff's cause of action was and is located in a tacit universal partnership with the defendant under general law. General law is applicable since as stated in *Marange* v *Chirodza* 2002 (2) ZLR (H) 171, in cases where the distribution of the estate of parties in an unregistered customary law marriage is raised and the estate includes land or rights to land, the application of general law is justified. As stated therein, this is because real rights are alien to customary law and also to avoid discrimination against women in particular who will have chosen to marry according to custom.

Plaintiff's evidence was essentially that they bought the 263 square metre stand in 2015 although it was the defendant who signed the agreement on 8 October 2015. Its purchase price, inclusive of a top up, was US$15 780.00. In terms of her own contribution to the endeavour, she explained that she had a flea market at the tobacco auction floors where

she said she sold clothes over a two month period from April to May 2015. During this period, she would average about $80.00 to $100.00 a day in earnings. Their agreement, according to her, was that the money would be put in a savings tin at home. The defendant who was working for a wholesalers would also deposit money into the box. When the auction floors closed, she had continued selling clothes from home on credit averaging earnings of about US$50.00 a month. She had continued selling clothes throughout 2015 but had stopped in 2016 when she fell pregnant with their second child, resuming again in 2017. The money for buying the clothes from South Africa had come from the defendant.

Her evidence was further that at the time that they opened the savings tin, it had US$2200.00 and it was this money that they used as a deposit for the stand. Thereafter, monthly payments were made by the defendant, her own contributions then shifting more to an indirect nature by looking after the family and the home. As she explained, she had washed and cooked for him in addition to looking after the children. She would also buy groceries whilst the defendant concentrated on developing the stand.

It is in light of the above contributions that she insists that she is entitled to a 50% share of this property. As at the time of this trial, the building developments on the stand had reached roof level and are being financed by the defendant.

Also acquired during their time together were two vehicles, the BMW AEE 3546 and a Toyota Hino Dutro registration ACH 8620 both paid for by the defendant. Again, she emphasised that her contributions were non-financial but in the form of performing wifely duties. She would like him to keep the Toyota truck whilst she has lays claim to the value of the BMW, acknowledging that it was sold for US$2000.00 in December 2021. She alleged that the proceeds were used by the defendant to go and pay bride price for another wife in January 2022. It is for this reason that she lays claim to its value which she would like added to the value of the stand. She disputed that the money had been used for the family's upkeep.

The defendant denied that their union was a tacit universal partnership. This stems from his standpoint that his wife's contributions were minimal, if any, in the acquisition of the property. He did not regard her contribution in terms of household and mothering duties as justifying a 50 % share. He disputed that the plaintiff had contributed the deposit for the stand. He denied that there was ever a savings tin into which money was put. His stance was that he had in fact given her the money which she had used to buy the clothes for sale in South Africa. His view was therefore essentially that he had singularly worked for both the

stand and the BMW which she lays claim to. To the extent that he is willing albeit reluctantly to recognise her indirect contributions, the most he is prepared to give her is 15% of the value of the stand. As for the value of the BMW, his evidence, though not supported by any proof, was that the money had been used to pay rentals.

In steadfastly arguing that there was a tacit universal partnership, plaintiff's legal practitioner, Mr *Ndoro,* drew on *Marange Chiroodza* 2002 (2) ZLR 171(H) in which MAKARAU J at p181 D-F stated as follows:

> "The arguments in support of the view that an unregistered customary law union establishes a tacit universal partnership are similar to the arguments advanced by jurists who favour holding that there is a universal community of property between married persons. Marriage itself is a union for life in common of a man and a woman. The legal rights and obligations created by marriage include community of life and maintenance of one common household. This is an invariable consequence of marriage. As such, the parties contribute in their different roles to the successful running of their common household. The common estate may be built by the industry of the husband and the thrift of the wife, but it belongs to them jointly as one could not have succeeded without the other. As van der Heever put it in *Edelstein v Edelstein NO & Ors*, the husband could not have successfully conducted his trade if his wife had not cooked dinner and minded the children. It is on this basis that I hold that there existed a tacit universal partnership between the plaintiff and the defendant in the above matter."

In other words, the argument is that an unregistered customary law union is not different in its nature as a marriage between two people acting in partnership in pursuit of marital endeavours.

In arguing against the existence of such a partnership, Ms Takaindisa, on behalf of the defendant, pointed to the requirements of a tacit universal partnership as stated in *Mtuda* v *Ndudzo 2000 (1) ZLR 710 (H)* which she argued had not been met. In so far as one of those requirements is that each of the parties must bring something into the partnership or must bind himself or herself to bring something into it whether money, labour or skill, the plaintiff was said not to have brought in anything. Secondly, no business had been carried out for the joint benefit of the parties. Thirdly, there had been no joint business to make profit.

The issues for decision as referred to trial were as follows:

a) Whether or not the plaintiff and defendant were in a tacit universal partnership.
b) Whether or not Stand No. 7989 Fidelity Southview Park, Harare, should be shared equally.
c) Whether or not the plaintiff should be awarded the value of BMW Registration Number AEE 3546, if so, the quantum thereof.

(a) Whether or not plaintiff and defendant were in a tacit universal partnership.

In arguing for a 50% share on the basis of a tacit universal partnership, the plaintiff places reliance on an equality based model in how she viewed their customary union. What gives rise to the partnership in the context of the case before me is indeed aptly captured in the paragraph cited by counsel for the plaintiff in *Marange* v *Chiroodza*. An unregistered customary law union is in the nature of an everyday marriage in terms of reciprocal obligations and expectations by the couple even if its recognition is curtailed in terms of the law at least for divorce purposes. Granted a marriage certificate is important for a variety of reason such as providing legally documented and valid proof of existence of a marriage, to easier channelling of actions which require proof of marriage in the modern world. An example is a change of name and status. In other words, it serves an important record of proof of marriage in administrative pursuits where such proof is necessary. As stated in the *Marange* case at p 174G of the judgment there is, however, no difference between the sanctity and respect accorded to a registered and an unregistered union. It is for this reason that for the greater part, the legislative approach has generally been to broaden the ambit of its recognition beyond issues dealing with custody and guardianship to recognising it fully for purposes of inheritance as happened with the Administration of Estates Act Amendment Act of 1996.

I am inclined to agree with the plaintiff that as there was a union between the two of a marital nature, giving rise to complementary duties, there is a valid argument in locating the dispute in the context of a tacit universal partnership in terms of how the property under dispute should be looked at.

In *Chapeyama* v *Matende* 2000 (2) ZLR 356 (SC) the court highlighted that there is a clear distinction in applying s 7 of the Matrimonial Causes Act to sharing property in an unregistered union as matter of law, since that law does not apply, as compared to using its provisions as guidelines where the general law principle of a tacit universal partnership has been found to exist. Drawing on s 7 (1) as a guideline, it states as follows:

> **"7 Division of assets and maintenance orders**
> (1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage, or at any time thereafter, an appropriate court may make an order with regard to—
> (*a*) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to the other;

Section 7 (4) provides as follows:

> (4) In making an order in terms of subsection (1) an appropriate court shall have regard to all the circumstances of the case, including the following—
> (*a*) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
> (*b*) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
> (*c*) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;
> (d) the age and physical and mental condition of each spouse and child;
> (*e*) the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties;
> (*f*) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
> (g) the duration of the marriage;

What makes the guidelines in s 7 useful is that they address pertinent factors raised by the plaintiff here such as her income earning capacity, her direct and indirect contributions and the duration of their marriage among others within the context of a marital set up. The parties clearly do not share the same attitudes or values towards the plaintiff‘s work as a mother and a house wife as being of any real value in terms of her contributions. Indirect contributions for example, when used here as a guideline, help address the perception that women do not deserve economic entitlements on divorce where their contribution has been in the home through unpaid work.

(b) Whether plaintiff is entitled to the value of a 50% share in the stand

It remains a fact that the burden of primary parenting and housework remains largely with women with responsibility for duties such as child bearing and taking care of the children, preparing family meals, ensuring domestic cleanliness and that of family members, as well as remaining central players throughout a child’s school going years, and ensuring that their husband’s physical and emotional needs are just as equally processed and met. This work requires intensive labour. It is time consuming and vital to family life.

It is evident from the facts that the plaintiff’s income earning capacities were fundamentally affected by child birth and child rearing. She described that she had had to take a break from her business of selling clothes in 2016 when she gave birth to their second child leaving her husband as the primary breadwinner. He had time to invest in his earning capacity whilst she did not.

The reality is that one of the costs that comes from a primary care taker role is that the opportunity to participate in paid work is curtailed. Having children does usher in new transitions in any couple's life and even more so for women who bear the brunt of child care labour. Yet such distinct roles consistent with traditional gender roles, continue to define unequal power relations that are still persistently latched on by some men on divorce to deny women a greater share in the distribution of property. Despite the significance of child bearing and rearing and household duties in any couple's life, as long as perceptions persist that mothering is for free and domestic chore sharing is not the norm, women will continue to be regarded as unequally positioned on divorce even where the law provides that their indirect contributions should be considered.

It is not that this type of work has no financial value since outside the home such work as caring for others such as nursing, or cooking for a food outlet or working as a chef does have an economic value. Indeed Zimbabwe has witnessed a wave of migration to the United Kingdom, for example, just to do care work because it is better paid work compared to certain jobs here. The problem is that inside the home care work is more often than not generally regarded by a husband as just free work, making it difficult to place a financial value on it. The role of the courts is not to further the impoverishment of women on divorce by according such work a minimum value. Indeed the Supreme Court has recognised the important role of a wife's indirect contributions in cases such as *Usayi* v *Usayi 2003(1) ZLR 684 (S)* and *Mhora* v *Mhora* SC 89 / 2020 by giving the woman in each case a significant if not equal share of the property under dispute.

The plaintiff did bring in her labour into the partnership for the benefit of the family. She also brought in some money even if her share was far from being the same as his. Hers was mainly a different form of contribution in line with a marital partnership where parties maintain distinct gender roles. Thus by carrying on domestic duties a woman is just as equally invested in the marriage as much as a man whose role may be that of the main breadwinner.

Their union was for a little over a decade during which time she played her part. When the property was acquired in 2015 it was put in his name. Whilst deemed as his property nothing prevents a court as a guideline in distributing property from taking from his share and granting it to the other spouse where the justice of the case demands that this be done. Notably, the parties also do not own any other immovable property other than that

under dispute. Therefor the position that she be awarded a mere 15% share would not be just even if the defendant will continue paying child support. That support is for her children and not for her. The fact is that she is in a weaker position in terms of her income earning capacity because her investment in the partnership was indirect as a primary care take for the family. It would be grossly unfair to expect her to start a life with such a minimum income in proportion to his as if to say she is in that position because she chose not to "work". As highlighted, having a baby affected the stream of income which she had. Even if she had wanted to work formally, the reality here is currently that finding formal employment remains a great challenge. Even if she were to start her own business, income to start one's own projects is just as difficult for ordinary citizens to access. All this the court cannot turn a blind eye to.

Having contributed indirectly for over 10 years, the plaintiff, in my view, has made a compelling argument for a 50% share of the value of the stand and its improvements as it currently stands. The property should be valued and the plaintiff award her 50 % as at the time of divorce.

As for the value of the BMW, whilst the defendant said he had used the proceeds to pay rentals, the difficulty is that there was no evidence placed before this court to support his assertion. He did not deny that he paid *lobola* for a new wife in January 2022, making it most probable that he used money from the sale of the car. The car was indeed acquired by him in his name at a time when he was a full beneficiary of plaintiff's indirect contributions to the home and when each played their distinct though complementary roles. It has not been disputed that the car was sold. It is not disputed that he also acquired a lorry which the plaintiff has not laid claim to. It is therefore fair and just in my view that she be awarded the value of the BMW being US$2000.00.

It is therefore ordered that:

1. The Plaintiff is awarded 50% of the value of Stand No. 7989 Fidelity Southview Park, Harare, and its improvements whilst the Defendant retains the other 50%.
2. In order to determine the 50% value of each party's entitlement, the parties shall appoint a mutually agreed to valuator within 30 days of this divorce order, failing which the Registrar of the High Court is directed to appoint an independent valuator from his list of valuators.
3. The parties shall share the costs of valuation.

4. The Defendant is given the option to buy out the Plaintiff of her half share within 6 months of the date of valuation unless the parties mutually agree in writing to a longer period.
5. In the event that the Defendant is unable to buy out the Plaintiff, then the property shall be sold through an agreed to estate agent or if there is no agreement on one, then the Registrar of the High Court shall appoint one from the list of Estate Agents and the proceeds, minus any attendant costs stemming from the sale, shall be shared in half.
6. The Defendant shall also pay the Plaintiff the sum of US$ 2000.00 being the value of the BMW AEE 3546 which he sold.
7. Each party shall pay their own costs.

Thondhlanga & Associates, Plaintiff's Legal Practitioners
Bhatasara Legal Practitioners, Defendant's Legal Practitioners