

MONICA CHIGARIRO
versus
ASHFORD POTERA

HIGH COURT OF ZIMBABWE
TSANGA J
25 March, 8, 15 & 22 April & 6 September 2024

Civil Trial

E Mudede, for Plaintiff
Defendant, in Person

TSANGA J:

The plaintiff and defendant, who are wife and husband respectively, entered into an unregistered customary union in July 1999. They never formalised their customary union but were nonetheless customarily married from that time up until 7 September 2022 when the defendant gave his wife a divorce token (*gupuro*).

The plaintiff issued summons for property sharing of both movable and immovable as well as maintenance for the then minor children in October 2022. She pleaded a tacit universal partnership in seeking a half share of the immovable property on the basis that they had set up family together, had children and acquired both movable and immovable assets for the benefit of the family. Three children had been born out of the union, though only one born in 2007 remains a minor.

At the pre-trial conference they had reached settlement on sharing of movable assets and maintenance. The only issue remaining is the sharing of property described as Stand 956 Rumani, Borrowdale, registered in both their names.

The issues referred to trial for determination were as follows:

- a. Whether or not the plaintiff is entitled to 50% share of Stand No. 986 Rumani, Borrowdale Estate, Harare.
- b. Whether the Plaintiff is entitled to 50% of the value of the property as it was jointly owned by the parties.

Whilst the plaintiff lays claim to a 50% share the defendant is adamant that her contribution is minimal on the basis that she was never in formal employment whereas he was. His initial offer was 10% value though at the trial he said he was willing to pay 15% of the value of the property in question.

Plaintiff's evidence

The plaintiff basically narrated how she used to go to South Africa to purchase goods for the hardware shop which they ran. She would also go to Mozambique to order bales and would additionally go to Zambia to sell goods. She disputed that her husband had used his pension fund to build the house in question. This was on the basis that the pension had been acquired after they had completed building the house. She explained that they had initially started with building a cottage in 2006 and had moved into the property in 2007 and continued building. She also tendered the title deeds as evidence of her joint ownership of the property. She explained to the court that she is the one staying with the children in rented accommodation ever since her husband chased her away. She lives with two of their children who are still going to school.

In cross-examination, she admitted that has never been formally employed but highlighted her work as a cross border trader, which work she said she started in 2003. It was also put to her that she was in fact his employee which she denied, emphasising that she had gone on these trips as his wife on family business. She had provided the necessary labour for their joint business. She denied that she had deserted the family to go to South Africa between 2017 and 2019 explaining that she had in fact gone there for a year to work. This followed her husband's involvement in an accident in 2012 which had left him unable to be gainfully employed. The defendant also raised the issue of the plaintiff's alleged adulterous relationships in cross-examination, emphasising that the breakdown of their marriage was because of infidelity. The infidelity was not denied.

Plaintiff's second witness was her mother whose evidence corroborated the plaintiff that she had been a cross border trader during her union with the defendant. The defendant would even send the plaintiff on trips when she was pregnant. She also spoke of the plaintiff's current penury and how in fact her family is the one helping her look after the defendant's children.

Defendant's own evidence was that he had acquired two stands one in Norton and another in Ruwa, which he had paid for in full. He had later acquired the Borrowdale stand in 2007. He had constructed the main house on this stand in 2008 using proceeds from the sale of

the Norton Stand in particular. He estimated that he had built on the stand at a cost of US\$80 000.00 to which the plaintiff had not contributed. He had also resigned from his employment in 2009 and said he had used his pension fund to erect the double story structure. He described the house as still incomplete as it has two storeys instead of three as planned. He had had an accident in 2012 and had spent the years up to 2015 getting medical attention for his injuries. His evidence was that during that period his wife had indicated that she wanted to go to South Africa on business but he had realised that she was spending money on a boyfriend, He said she had cheated many times. He narrated an incident where he had bought her a phone, only for her to give it to one of her boyfriend two days later. They had parted because of continued infidelity.

He also stated that he had employed her in his company called *Clifford Industrial Suppliers* between March and November 2007 and that he had paid her on a trip basis. The business s had operated up to 2010 and had folded when his 3 tonne truck was stolen in South Africa and never recovered. He explained why the property in dispute was registered in both names, highlighting that he did not want his relatives to take anything away from her as his wife in the event that something happened to him. When she deserted the family, the defendant said their youngest child was only in the third grade at the time.

In cross examination, he confirmed that his wife did look after the family and the home and that she had indeed also looked after him following his accident. He also admitted that he has not paid maintenance since August 2023 which he attributed to his financial incapacity. He confirmed chasing her away from the home but emphasised that it was because she had boyfriends. He confirmed his offer to her as 15% of the value of the property.

His sister Mavis Potera also gave evidence, which did not take the case further other than confirming that she used to go on cross border trips with the plaintiff.

Analysis

The defendant centred his arguments on two main issues in motivating that the jointly registered property should be shared 85% in his favour and 15% in favour of his wife. The first argument related to him having put forward the financial contribution in the acquisition of the property whilst he described her as having never worked in formal employment and as such not having brought any money home. The second argument related to her conduct during that marriage, in particular the fact that she had been unfaithful.

The plaintiff's claim for a half share is brought the basis of a tacit universal partnership. The principle enunciated in *Marange v Chirodza* 2002(2) ZLR 171 puts the yardstick to be

used in universal partnerships in perspective. What partnership means in a context of marriage demands that the lived realities within marriage be appreciated. In other words, law is gendered in its practical effects and is almost always experienced differently by women and men because of their roles. Of particular importance is indeed that non-wage earning women in particular still generally contribute much more through their labour and therefore a conceptual framework of partnership in marriage which does not consider the difference in roles and contributions will not result in justice for women in particular..

The asset in question being an immovable property clearly falls to be dealt with under general law. The lifestyle of the parties is also not also not a traditional one. The justice of this case also dictates that general law be applied. Whilst this an unregistered customary law union, the provisions and guidelines outlined in the Matrimonial Causes Act [Chapter 5:13] can nonetheless be used as guidelines as stated in *Marange v Chirodza* above.

Equitable distribution underlies the considerations to be taken into account under s7 (4) of the Matrimonial Causes Act which increasingly has leaned in favour of equal distribution especially in lengthy marriages.

As to whether there was a tacit universal partnership, there clearly was a partnership in the context of a marriage as the evidence shows that they worked together to pool resources. The issue of a wife's indirect contribution has been addressed significantly in case law. In *Usayi v Usayi* 2003 (1) ZLR 684 (S) and in *Mhora v Mhora* SC 39/20, the Supreme Court upheld a grant of 50% value of the immovable property in light of the indirect contributions made by the wife in taking care of the family and the household. See also remarks on the nature of unpaid work made more recently in *Kudzanayi Melo v Austin Kandibero* HH 323/23 and in particular the fact that it is not for the courts to further the impoverishment of women by according such work minimum value.

A key issue here is under what circumstances can a court distribute assets in an unequal manner in view of the fact that s7 (4) does allow a court to have regard to "conduct as is just" in arriving at a decision on the distribution of assets. The conduct that the court is permitted to consider is left to the court to determine. Parties divorcing in terms of the Matrimonial Causes Act now do so on the grounds of irretrievable breakdown or separation for an identified period. Fault in divorce was abandoned when the Matrimonial Causes Act came into force in 1983. Irretrievable break down avoids hostile proceedings in that parties do not have to air the finer details of the marital breakdown in public. Moreover, where there has been adultery our law allows for a civil claim under the law of delict in which damages can be claimed for loss of

consortium and for the injury done. The defendant if so inclined should therefore have lodged a separate claim in an appropriate court for adultery damages. As held in *Carmichael v Moyo* 1994 (2) ZLR 176 SC a husband, in unregistered or unsolemnised customary law union which is recognised by customary law, is not precluded from suing for adultery damages in a court administering customary law. It is safe to say that since in our jurisdiction the delict of adultery is still very much alive as a remedy for inappropriate spousal behaviour under both general law and customary law it is therefore in such claims where the issue of adultery stands to be fully ventilated.

This being an unregistered union, the parties have already separated on their own at the family level on grounds of infidelity. The issue is whether this court should consider that infidelity as conduct impacting on the distribution of assets. This court makes a pertinent observation in this regard. There was no real evidence that the conduct complained of was economic conduct which diminished the matrimonial estate in any significant way. Defendant mentioned a cell phone that was purportedly given to a boyfriend long after the property was built. Actual evidence of spending family money on a boyfriend was not produced. It is true that the affairs may have sounded the death knell to their customary union but there is no evidence that it had an impact on the property acquired together. Moreover, the property is registered in both names. Where property is registered in both names, its distribution is generally equal between the owners unless there are compelling reasons for deviation from equal sharing. To centre adulterous conduct in property sharing should only be “just” where the evidence is clear that it impacted on their marital assets and diminished their marital estate in some way. The adultery may very well have no relevance to the proprietary issues and can often be the result of an already broken marriage.

Of significance here against the backdrop of the factors to be considered in distributing property in matrimonial causes is that there are clear indications from the evidence led, that there were joint efforts, both direct and indirect in the acquisition of property during the marriage. Indeed the defendant was a primary breadwinner. His career was not curtailed or hampered by child care responsibilities. Even if the plaintiff was a non-wage earning spouse, she contributed to the acquisition of the property in dispute indirectly, by going on cross border trips to get goods. This was in addition to running the home and looking after the family. More over the property is registered in both their names, indicating that that they both owned it. Indeed the defendant, from his own explanation, included his wife’s name on the title deeds

because he wanted her to have the property and stave off his relatives in the event that anything happened to him.

Apart from being a registered half owner, her needs are also pressing as she is the one looking after the minor child as well as the one who is a major but is still going to school. She has also been renting, having been chased away from the home they acquired during their union. There is absolutely no doubt that as a result of their union ending, there has been a major economic and impoverishing shift in the plaintiff's life that she and her children were used to. To worsen matters the defendant by his own admission, has not even been consistent with child support payments. They have been irregular. This further points to the need to ensure that the plaintiff benefits a fair share from her endeavours during a union which lasted 23 years so that she is on a firm footing following the collapse of the customary union. Indeed the duration of marriage is often a central factor in awarding a 50% share in lengthy marriages. He already stays at the farm which he says is State given. He is not paying rentals and neither has he been overly concerned with the welfare of his family.

Accordingly it is ordered as follows:

1. Plaintiff is awarded 50% of the value of the house and the same to be paid by defendant within six months of this order.
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 valutors.
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 three 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 pay an amount of US\$50.00 per month for the minor child (Ashly Potera born 11 September 2007), until she attains the age of 18 or when she becomes self-supporting, whichever occurs first. The money shall be deposited into the Plaintiff's bank account as provided by her at the prevailing interbank rate.

7. The defendant shall pay the outstanding maintenance of US\$400.00 which the defendant has not paid for the upkeep of the minor child as per agreement by both parties during Pre- Trial Conference as well as any other maintenance amount which is outstanding as of the date of this order.
8. Each party shall pay their own costs.

Mudede & Associates: Plaintiff's Legal Practitioners