SHAKESPEAR PILIME
versus
BESTER CHISVO

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 14 February 2006 and 23 February 2007

Civil Trial
Mr Muvirimi, for plaintiff
Defendant in default

CHATUKUTA J: Plaintiff issued summons claiming from the defendant-

(a) payment of $72 000 000;

(b) interest at the prescribed rate from the date of demand of full payment; and

(c) costs of suit.

The issues that were referred to trial were:

"(i) Whether or not Plaintiff contributed to the purchase of Stand Number 6888, Zimre Park, Ruwa and to the developments therein, and if so, to what extent.
(ii) Whether the Plaintiff is entitled to 40% of the value of the house or any other percentage thereof."

The matter was initially set down for hearing on 9 January 2006. On that date a postponement to 13 February 2006 was granted following an application by the defendant's legal practitioners to enable the defendant to attend trial. On 13 February, *Advocate* Takaendesa, for the defendant, applied for a postponement of the matter *sine die*. *Advocate* Takaendesa submitted that the defendant was in the United Kingdom and she had not been given adequate notice of the trial to enable her to mobilize resources for her travel to Zimbabwe to attend trial.

The application was vehemently opposed by the plaintiff. *Mr Muvirimi*, for the plaintiff, submitted that the defendant's lawyers were well aware that the defendant was granted political asylum and therefore her chances of attending trial in the near future were virtually near to non existent. It was submitted that the plaintiff would be prejudiced by the postponement as the value of the property in dispute had risen and was continuing to

rise. It was further submitted that the matter had been dragging on for six years and there was need to bring the matter to finality.

Advocate Takaendesa was given an opportunity to confirm the status of the defendant in the United Kingdom. He subsequently confirmed that defendant had indeed applied for and had been granted political asylum.

Following these submissions, the application for postponement was dismissed on the basis that the defendant had been given ample notice by the court to enable her to attend the trial. There was need to bring the matter to finality. Thereafter the court ruled that the defendant was in default. The plaintiff proceeded to give evidence to prove his claim.

The plaintiff testified that in 1992, the plaintiff married the defendant under customary law. At the time when the plaintiff and the defendant married, the plaintiff was married to another woman in a civil marriage. In 1998 he jointly purchased the property in issue, Stand No 6888, Ruwa, with the defendant for $58 000. The plaintiff testified that he paid $30 000 towards the purchase price as his contribution. The property was registered in the defendant's name in view of the civil marriage to another woman. The plaintiff produced an agreement of sale indicating that the property was indeed registered in the defendant's name.

It was the plaintiff's evidence that in 1999 the defendant obtained a loan from her employer, CBZ in the sum of $800 000 which loan the parties were to service on an equal basis. The loan was utilised to construct a house on the property in issue. The plaintiff testified that the parties agreed to service the loan together in equal shares. CBZ would deduct the monthly repayment amount from the defendant's salary and the plaintiff would reimburse the defendant by way of deposits into the defendant's bank accounts with CBZ and Barclays Bank of Zimbabwe and by cheques directly to the defendant. The monthly repayment was $10 800 and the parties were each to pay $5 400. The plaintiff testified that although the loan was adequate to complete the construction of the house, the defendant obtained another loan from her employer. Plaintiff further testified that he paid the full amount of $37 000 towards the construction of a durawall around the property. On

completion of the construction of the house, a certificate of occupation was issued in defendant's name.

The plaintiff produced a copy of an application form for a mortgage loan completed by the defendant. The application is dated 18 July 2000 and was being made to First National Building society. He also produced a copy of a mortgage bond made out in favour of the defendant executed on 31 January 2001. According to the schedule to the bond, the capital amount was $1 003 330. It is indicated on the schedule that this was the defendant's first bond. Monthly repayments of the loan were $24 007 93 payable with effect from 1 December 2000.

In proof of his contributions, the plaintiff produced copies of 13 deposit slips reflecting cash deposits into the defendant's CBZ account dated between 29 July 1999 and 25 August 2000 amounting to $42 010. The two deposits amounted to $10 800. One of the deposits was made by the plaintiff and the other by one Lloyd on 25 November 2000 and 20 December 2000 respectively. The other six payments were made by way of cheques issued in defendant's name amounting to $16 200 made out between 26 February 2000 and 26 July 2000. Lastly plaintiff produced cash sale receipts issued by Builders Hardware and Walling in plaintiff's name and a copy of a cheque made out to Builders Hardware and Walling by the plaintiff.

The plaintiff testified that he claimed only 40% instead of 50% because the defendant paid the balance of the loan on her own outstanding after the separation.

The plaintiff therefore sets out the legal ground upon which he can claim relief as the tacit universal partnership. The plaintiff testified that he married the defendant under customary law. The question which arises is whether or not a plaintiff in an unregistered customary law union, is entitled to successfully claim his/her rights under the principle of tacit universal partnership. Whilst there is a plethora of cases on the issue, with divergence views, am persuaded to follow the approach set out in *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219 (H), which sates that an unregistered customary law union on its own does not entitle a party to do so. ROBINSON J stated at p222 that-

> "On the merits, the application is ill-founded in that it seeks to apply a general law concept, namely, the concept of a tacit universal partnership, to an unregistered customary law union which has come to an end, without attempting to lay a foundation for applying general law to the facts of this case in lieu of the application of customary law, in accordance with the choice of law rules prescribed by sec 3 of Part I …..of the Customary Law Primary Courts Act 6 of 1981."

This is further articulated by CHINHENGO J in *Chapendama v Chapendama* 1998 (2) ZLR 18. At p28 he states-

> "This is not a case in which the common law concept of a tacit universal partnership would ordinarily be invoked without laying the foundation for doing so and without regard to the choice of law rules of our statutes."

I assume that it is in realisation of the limitation of the plaintiff's evidence in laying a foundation that a tacit universal partnership existed between the plaintiff and the defendant that the plaintiff changed in its closing submissions the basis upon which his claim is based from tacit universal partnership to unjust enrichment. *Mr Muvirimi* for the plaintiff, submitted that the plaintiff and the defendant were cohabiting during the period between 1992 and 2002. These submissions are a clear departure from the plaintiff's evidence that he paid lobola and was therefore married to the defendant in an unregistered customary law union.

The submissions by the plaintiff that his claim is based on unjust enrichment must fail. This is a new cause of action. The cause of action was never pleaded.

The defendant is accordingly granted absolution from the instance with costs.

Scanlen and Holderness, applicants' legal practitioners

Honey & Blanckenberg, respondent's legal practitioners