HB 90/16
HC 2667/12

L. SACRE KWETE MINGA

Versus

ITAYI MATIVONESE GUNDA

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 29 & 30 OCTOBER 2015 & 24 MARCH 2016

Civil Trial
G. Nyathi for the plaintiff
S. Hlabangana for the defendant

TAKUVA J: There is little or no love lost between plaintiff and defendant. The former instituted summons proceedings against the latter seeking:

"(a) An order for the sharing of the parties' property on the basis of the parties' tacit universal partnership in terms of paragraph 8 of the plaintiff's declaration.
(b) Costs of suit on an ordinary scale."

Paragraph 8 of plaintiff's declaration states:

"8. It would be just and equitable that the immovable property listed in paragraph 6 above be shared in the following manner between the parties on the basis of tacit universal partnership:

- House number 13496 Nkulumane, Bulawayo be sold and the net proceeds thereof be shared between the plaintiff and the defendant in the following manner: plaintiff to be awarded 75% share of the net value thereof and the defendant be awarded the other 25% share of the net value thereof.

- Phase 2 stand 70 Unity Village, Bulawayo be sold and the net proceeds thereof be shared between the plaintiff and the defendant in the following manner: plaintiff to be awarded 75% share of the net value thereof and the defendant be awarded the other 25% share of the net value thereof."

Plaintiff avers in this declaration that the parties had a customary law union since 2004 after all customary rites in terms of the parties' customs and traditions were performed. The union was blessed with one minor child namely Blessed Mikobi Kwete (male) born on 29 January 2007. Further, he averred that the customary union between the parties has irretrievably

broken down to such an extent that there are no prospects of restoration to a normal union more specifically in that:

- "The parties have since separated and the plaintiff moved out of their home in 2007.
- As a result the plaintiff has lost love and affection for each other (*sic).*

6. During the substance of the customary union the parties established a tacit universal partnership where the parties acquired the following property;

- House number 13496 Nkulumane, Bulawayo
- Phase 2 stand number 70 Unity Village, Bulawayo.

7. The plaintiff had a direct and indirect contribution towards the acquisition and purchase of the above listed property."

Plaintiff's synopsis of evidence is that plaintiff and defendant met in or about 2003 and started dating each other. They then moved to stay together at number 2 Charlotte Street, Saurstown, Bulawayo. While staying together, they pooled their financial resources together and bought house number 13496 Nkulumane, Bulawayo.

In her plea to the summons and declaration, defendant stated the following:

(1) that house number 13496 Nkulumane, Bulawayo and the "flea market" stand number 70 Phase 2 Unity Village were acquired by defendant "alone before the commencement of the parties' customary union.
(2) plaintiff never made any direct contributions to the maintenance, acquisition and or development of the properties.
(3) there is therefore no legal basis for the parties to share properties that were acquired before the parties' customary union and where the plaintiff never made any direct contribution towards the purchase, maintenance and or development of the properties.
(4) defendant prayed for the dismissal of plaintiff's claim with costs.

The parties attended a pre-trial conference where the following were agreed as issues for determination in this trial;

"(a) whether house number 13496 Nkulumane, Bulawayo and stand number 70, Phase Two Unity Village, Bulawayo was (*sic*) acquired jointly by the plaintiff and the defendant.

(b) whether the house number 13496 Nkulumane, Bulawayo and stand number 70 Phase Two, Unity Village, Bulawayo was (*sic)* acquired during the subsistence of the parties' customary union.

(c) whether a tacit universal partnership existed between the plaintiff and the defendant.

(d) whether plaintiff is entitled to a share of 75% of the net value of the house and the stand at Unity Village respectively on the basis that the money used to acquire the properties came from the plaintiff."

R. H. Christie, *Business Law in Zimbabwe* 2nd Edition Juta & Co Ltd 1998 at p 358 defines a joint universal partnership as follows:

> "Universal partnerships may be of two types. In a partnership in all business affairs or *societas universorum qual ex quaestu veniant*, the partners retain their separate individual estates in respect of their private affairs, and this type of partnership will be presumed to be intended when a partnership is entered into without definition of the proposed extent of its activities. The second type of universal partnership, the *societas universorum bonorum*, is truly universal in that the partners draw no distinction between their business and private affairs but own everything in common."

Further, in the same work, the learned author states, "It may be, however, that the relationship must be <u>created expressly, except between spouses</u> married out of community of property (as in Zimbabwe), putative spouses and probably a man and a woman living together as if they were married, in which cases, a tacit universal partnership is possible. The possibility of proving a tacit universal partnership may be to the advantage of a wife on divorce, as giving her

a claim to half the matrimonial property and this possibility has been considered in a number of cases: *Horne* v *Hine* 1947 SR 128; *Jirira* v *Jirira & Another* 1976 (1) RLR 715 – 7; *Chiromo* v *Katsidzira* 1981 (4) SA 746 (ZA). In each of these cases a tacit universal partnership was not found to exist, either because it was not pleaded or because the facts did not support the claim, but it is suggested that such claims should more frequently be made and upheld."

In *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 (H) GARWE J (as he then was) laid out the essentials of a tacit universal partnership as:

> "(1) each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether it be money, or labour or skill; (2) the business to be carried out should be for the joint benefit of the parties; (3) the object of the business should be to make a profit; and (4) the agreement should be a legitimate one. In addition, the intention of the parties to operate a partnership is also an important consideration. An ordinary marriage does not in itself found a tacit universal partnership. This does not mean that a wife seeking a division of property after divorce is not entitled to make a claim, provided she bases her claim on a suitable cause of action. Where a cause of action is established, the court is entitled to assess the extent of the wife's contribution and make an order accordingly."

In *Maenzanise* v *Ratcliffe NO & Anor* 2001 (2) ZLR 250 (H), CHINHENGO J (as he then was) held that:

> "While a marriage relationship should not be recklessly converted into a business partnership *ex post facto*, if a wife makes a substantial financial contribution or regularly renders services exceeding those ordinarily expected of a wife, a court may be persuaded to imply a partnership agreement."

The courts are loath to reduce a marriage relationship to a mere commercial relationship just because there is a need for the division of property acquired during the relationship. The comments of MCCREATH J in *Muhlmann* v *Muhlmann* 1981 (4) SA 632 (N) reinforce the caution that the court must adopt. At page 634G – H, he stated that:

> "In the situation where one has to do with a relationship between spouses and there is no express agreement between the parties, the court must be careful to ensure that there is indeed an *animus contrahendi* and that the conduct from which a contract is sought to be inferred is not simply that which reflects what is ordinarily to be expected of a wife in a given situation."

See also Hahlo's *South African Law of Husband and Wife* 4 ed at p 290 where the learned author states:

> "However, there must be something to indicate that the parties intended to operate as a partnership, the mere fact that the wife worked in her husband's business without pay is not sufficient. Unless it can be shown that she made a substantial financial contribution or regularly rendered services going beyond those ordinarily expected of a wife in her situation, the courts will not be readily persuaded to imply a partnership agreement."

Plaintiff gave the following evidence at the trial. In 2003, he met defendant at a flea market in Bulawayo. Defendant's sister was operating stand 52 at that flea market while defendant was looking after her sister's children. Plaintiff used to supply goods to hawkers at the flea market. The two then fell in love in 2004 and shortly thereafter the defendant's sister left for the United Kingdom. Plaintiff said he asked the sister for permission to operate stand 52 but when defendant returned from Chinhoyi she told him that there was another stand namely stand 70 which was being used by her sister. In 2004, plaintiff gave defendant goods valued at Z$10 million to sell. The parties travelled to Zambia where they bought goods for sale. It appears from plaintiff's evidence that there was a time when defendant travelled to Zambia to buy bags which defendant did not show plaintiff. Be that as it may, the parties embarked on another trip to Zambia where defendant introduced plaintiff to her friends as her "future husband". They started staying together in 2004 at house number 5663 Luveve, Bulawayo. According to plaintiff since defendant told people in Zambia that he was her husband, he took it that they were husband and wife from that time. Plaintiff said there were numerous other trips to Zambia to buy goods for resale. He said they had agreed to operate as partners although there was no arrangement on sharing profits because they wanted to settle as a family.

As regards stand 70 at Unity Village, plaintiff stated that he bought the stand with his own money and defendant did not contribute "directly" but only did so "morally i.e. cooking etc". Later, he explained that the money used to purchase this stand i.e. R10 000,00 was from

the business transactions in which he had injected capital. When it was put to him that defendant would testify that the stand was purchased by her alone well before the customary union commenced, plaintiff said "she introduced me to her parents and friends in 2004 as he husband". by this plaintiff believed that they were indeed husband and wife.

Commenting on how house number 13496 Nkulumane was acquired, plaintiff said he paid for defendant's trip to Dubai which trip made her "very rich" and they opened a shop at Bulawayo Centre. While he was in South Africa on another business trip in October 2005, defendant used the proceeds from the sale of goods from Dubai to buy a house without his consent. Upon his return he confronted defendant about the missing money but defendant was evasive until defendant's sister met plaintiff and congratulated him for purchasing a house. He then confronted defendant who told him that she had done so as an "investment for our future" in view of the high rate of inflation. Defendant then took plaintiff to a lawyer called Zenzo Moyo where she again introduced plaintiff as her husband. Later, they developed the property by constructing a durawall. All in all plaintiff said, he sired 7 children as follows:

(a) 4 he brought to Zimbabwe from the DRC;
(b) 1 son with defendant and
(c) 2 with another woman. He lives with all the children except defendant's son.

Under cross-examination plaintiff conceded that he paid "lobola" or "roora" in 2006 when defendant was pregnant but quickly pointed out that negotiations started in 2004 when he met defendant's father in Luveve and was made to pay some money before he could be allowed to enter the house. Because of this, he believed that he paid "roora" twice, once in 2004 and secondly in 2006 in Chivhu when defendant was pregnant. When asked whether they sat down and decided to enter into a partnership, his reply was; "I do not know how to explain … but the relationship was that of husband and wife doing things together." The union lasted four years from 2004 to September 2006. Asked about further details pertaining to the ticket for the Dubai trip plaintiff's answer was simply that defendant "knows better". He said defendant would buy clothes and food for the family, while rentals were paid for from the business operations.

Further, he said the business made no profits resulting in the failure to work out the formula for sharing profits. Finally, he stated that there was a lot of interference from defendant's relatives in their business operations.

Plaintiff called Mr Malaba, the erstwhile chairman of Masakhane Traders Association which owns stands at Unity Village. He said he used to see plaintiff and defendant moving together in 2005 at the flea market at Unity Village. Parties applied to purchase shares in respect of sand 70 and the application was approved leading to a deposit being made into Beverly Building Society. He would not recall who completed the application forms but he remembered that they were together. He was not aware of any policy that barred foreigners from purchasing shares in order to own stands belonging to Masakhane.

Plaintiff's last witness was Padey Kabambi who referred to plaintiff as his brother since they both hail from the Democratic Republic of Congo. He came to Zimbabwe in 2003 and met defendant in 2004 in the company of plaintiff. The latter introduced former as the woman he would like to marry. Later in 2006, plaintiff told him that the two had formed a partnership. According to him plaintiff and defendant were "husband and wife doing their things together". Under cross-examination, he conceded that he did not know the source of the money that was used to purchase the stands and the house in dispute.

Plaintiff closed his case and defendant opened her case by giving the following evidence. In mid 2004 while she was visiting her brother in Chinhoyi, plaintiff phone her and gave her his name. She fell in love with the plaintiff in 2005 and got married to him customarily in 2006. Meanwhile, she had purchased stand 70 Unity Village in June 2005 and house number 13496 Nkulumane, Bulawayo on 5 October 2005. These properties were acquired from the proceeds of sales at stands 52 and 70 Unity Village as well as from her family business at Bulawayo Centre. She referred to this shop as "Gunda Family Business". She said her sister who now resides in the United Kingdom contributed Z$250 000,00. She later said the correct figure was Z$240 million. Asked about plaintiff's contribution towards the purchase of these properties, she said plaintiff never paid a cent since at that time they were just lovers who were not even staying

together. Defendant and her sister started operating stand 52 and 70 as way back as 1995. When she fell in love with plaintiff in 2005, she already had her goods that she was selling at stand 70. When she found a house to buy, she took Z$250 million from "businesses" negotiated the price down to Z$240 million and she then bought the house.

Defendant stated that she would frequently go to Tanzania via Zambia for purposes of buying goods for resale back home. She admitted travelling in the company of the plaintiff. In her own words, she said "I agree we were moving together because we were in love but each one was involved in his or her own business. He had not married me and we were not in partnership at all." Defendant also admitted travelling to the Democratic Republic of Congo to see plaintiff's parents' home before he married her. The Dubai trip was admitted but defendant denied that plaintiff sponsored it. She said when they were in the Democratic Republic of Congo, plaintiff bought laptops while she bought "worms". Each was using his or her money. When it was put to her under cross examination that the partnership started in 2004 and the property was acquired in 2005, her reply was; "No I was never in partnership in business with anyone else except my siblings". As regards the improvements, she admitted that plaintiff accompanied her to buy bricks but he did not give her the money. He simply accompanied her since they were lovers. At times her sister in the United Kingdom would send her money since she was not only involved in the family business, but had also left her three minor children in defendant's custody. Defendant stated that they were engaged in two different lines of business with the plaintiff in that, the latter was selling skin lotions, creams, socks for both men and women, African attire, cell phones and laptops, while defendant sold clothes.

She admitted that after their marriage in 2006, plaintiff would give her money to buy food but not to buy goods for sale. In terms of the agreement of sale for the house, defendant is indicated as the buyer. The same applies to ownership documents for stand number 70 Unity Village. As regards the improvements to house number 13496 Nkulumane, all the receipts for materials purchased are in her name.

Defendant's next witness was Walter Darlington Nhika who is married to defendant's sister. He was involved in the "roora" negotiations in 2006 in Masasa, Chivhu. Mr Nhika said the process started in 2006 and he was not aware that plaintiff and defendant lived together before 2006 as he was only introduced to plaintiff by defendant in 2006. Defendant closed her case after the evidence of this witness.

Facts that are common cause

1. Plaintiff and defendant were lovers who subsequently entered into a customary law union.
2. The union was blessed with a son namely Blessed Mikobi Kwete-Minga, born on 29 January 2007.
3. The union collapsed in 2007
4. The agreement of sale in respect of house number 13496 Nkulumane, Bulawayo, shows the defendant as the sole buyer of that house
5. In terms of documents kept by Masakhane Association that administers Unity Village Flea Markets defendant is the sole registered owner of stand 70 Phase Two Unity Village.
6. Both, plaintiff and defendant were cross border traders or hawkers.
7. Plaintiff and defendant travelled together to Democratic Republic of Congo for purposes of meeting plaintiff's parents and buying merchandise.
8. Defendant's sister used to run stand 70 Phase Two Unity Village before she migrated to the United Kingdom.

Turning to the disputed facts, the issues were set out in the joint pre-trial memo. I shall start with issue (b) relating to whether or not the property in dispute was acquired "during the subsistence of the customary law union". It is indisputable that the house was purchased in October 2005, while stand 70 was purchased in June 2005. Plaintiff admitted that he paid "roora" in Masasa in July 2006 when defendant was pregnant. However, plaintiff, in a bid to prove that the property was acquired during the subsistence of the customary union, backdated the date of the commencement of the union to 2004. His evidence on this aspect was that

negotiations started in 2004. I am not persuaded by this argument for a number of reasons. In the first place, the plaintiff in paragraph 3 of his declaration stated:

> "3. The parties have a customary law union since 2004. All the customary rites in terms of the parties' customs and traditions were performed in accordance." (my emphasis)

Yet in his evidence in chief he said he considered defendant to be his "wife" because she "introduced him to her parents and friends as her husband". Later he said negotiations started in 2004 when he was asked under cross-examination, to explain what exactly started in 2004, his answer was both vague and contradictory in that he said this was when he paid damages to plaintiff's father after being introduced to him in Luveve. However, he contradicted himself by stating that he paid damages in 2006 in Masasa.

More importantly, plaintiff does not explain or provide reasons why these negotiations would be so protracted as to last two years in light of defendant's evidence that she loved plaintiff very much and was happy to be his wife. Further plaintiff does not mention who he was negotiating with, he does not disclose the go between, he does not state where these negotiations took place. Also, he said he was made to pay "roora" twice without giving full details of where the 1st payment was made and to whom it was paid. He also does not say who was present when it was paid.

It is trite that a customary law union is created upon payment and acceptance of "roora" at a ceremony involving the groom or his relatives and the father, guardian or some relative of the bride. The parties negotiate through a go-between whose services are paid for by the groom's family. *In casu*, plaintiff paid "roora" in 2006 when defendant was already pregnant. This explains why according to plaintiff on the list of items to be paid appeared "damages". I agree with Miss Hlabangana that this, in Shona culture as in most Bantu traditions occurs when the bride to be is pregnant. See *Mvana and their children: The language of the Shona people as it relates to women and women's space,* where Moreblessings Busi-Chitauro-Mawena of the African Languages Research Institute, University of Zimbabwe states:

> "Damage is payment paid by a man to the father of the woman he has impregnated, for having 'damaged' her (physically, taken her virginity, metaphorically damaged her reputation and that of her family). Consequently, the man responsible has to pay the girl's father for making his daughter "damaged goods". This 'damage' is believed to compensate the father for his child's defilement by a man who has not married her."

Plaintiff's evidence on when the union commenced is totally unsatisfactory. I am satisfied from the totality of the evidence that whatever association plaintiff and defendant engaged in prior to the payment of "roora" in 2006 did not create a customary law union. If at all they lived together or had sexual intercourse as evidenced by the pregnancy, they were simply co-habiting – hence the penalty of "damages" imposed on the plaintiff. For these reasons, I take the view that plaintiff was an incredible witness

In my view, the two properties were acquired before the parties were customarily married. The house was purchased in October 2005 while the stand was acquired in June 2005. The customary law union was entered into in July 2006. I take the view that for these reasons issue (b) must necessarily be answered in the negative.

Issues (a) and (c) ask the same question. I therefore deal with these two as one consolidated issue, namely whether a tacit universal partnership existed between the plaintiff and the defendant. The question here is whether the facts in casu support a conclusion that a tacit universal partnership existed between plaintiff and defendant. Can it be inferred or implied from the parties conduct that indeed there was *animus contrahendi*? Can it be said defendant rendered services going beyond those ordinarily expected of a boyfriend in his situation? Bearing in mind that the onus is on the plaintiff to prove on a balance of probabilities that there was a tacit universal partnership, it is instructive to examine the plaintiff's evidence closely in order to answer the above questions. On plaintiff's evidence he gave defendant goods worth Z$10 million to sell. He said he considered this to be "capital injected into the business". What he does not say is what agreement if any had been reached between the two of them. Under cross-examination, he stated that he gave defendant the goods because she had "no goods to sell". Even if it is accepted that he gave her goods to sell, can it be concluded that the sole reason was to create a partnership? I think not because it could be that plaintiff simply gave his girlfriend a

donation i.e. a *donatio inter vivos*. It is not unusual for people in love to exhibit a great deal of generosity driven by nothing else but love. It may also stem out of pure liberality.

Defendant denies that such a contribution was ever made. I must say that the probabilities in this case favour her version in that at the time she met plaintiff, she already had expertise to run her own business, having done so for some years with her sister. She had the infrastructure in the form of two stands, and she could rely on funds from her sister in the United Kingdom. If indeed she had entered into an agreement with plaintiff she would most probably have done so expressly in a written document. Defendant's version that although they were deeply in love, each was conducting his or her own business, with plaintiff supplying hawkers at the flea market with goods especially electrical gadgets while she concentrated on buying and selling clothes is credible. Plaintiff failed to provide proof of how much money they made from the so called partnership. There is no proof that the parties intended to bind themselves into a partnership. It is most unlikely that defendant would enter into such an agreement involving a business owned not by herself alone but by her sister and other siblings.

It is strange that plaintiff did not indicate how he benefited from this partnership during its short life. Before the acquisition of the property in dispute, the alleged partnership had been in existence for barely 1 year. It lasted for another year after the property had been acquired. While a tacit universal partnership can be created between putative spouses and between a man and a woman living together as husband and wife, in my view the duration of such a relationship is a relevant consideration. *In casu*, it is difficult to conclude that plaintiff in a space of 12 months or less rendered substantial financial contributions exceeding those ordinarily expected of a boyfriend. It would be a sad day indeed if an ordinary love relationship is recklessly converted into a business partnership. There is no express agreement *in casu* and I am not persuaded that I must imply one. Logically issue (d) falls away in that plaintiff is not entitled to a share of the net value of the properties.

In the result, the plaintiff's claim is dismissed with costs.

Sansole & Senda, plaintiff's legal practitioners
Legal Resources Foundation, defendant's legal practitioners