

CECILIA GWARADZIMBA
versus
MUNYARADZI KADUNGURE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 6 February, 2014

FAMILY LAW

R. Nemaramba, for the plaintiff
C M Chikore, for the defendant

CHITAKUNYE J. The plaintiff and defendant lived together as man and wife in an unregistered customary law union from 1995 to 2009 when they separated. Three minor children were born from their union. On 19 January 2011, plaintiff sued defendant for the sharing of the property that had been acquired during the subsistence of their union. She alleged the existence of a *tacit universal* partnership between them. In furtherance of that partnership they had pulled their resources together for the benefit of their union. In his plea defendant did not deny the existence of the tacit universal partnership but queried the extent of the property acquired during such partnership and the extent of plaintiff's contribution in respect thereof. At a pre-trial conference the parties agreed as follows:

1. That the parties were in a tacit universal partnership from 1995 to 2009
2. That the tacit universal partnership has been dissolved
3. The parties shared the following movable property at the time of dissolution of the partnership-
4. **a) For Plaintiff-**
 - a) Upright fridge,
 - b) 21" television set,
 - c) Kitchen unit,
 - d) 6 blankets,
 - e) Half of the kitchen utensils.

b) For Defendant-

- f) Room divider,
- g) 4 blankets,
- h) DVD player,
- i) Curtains,
- j) Radio,
- k) Wardrobe.

The parties could however, not agree on the sharing of the following pieces of property, a double bed, a three plate stove and Stand No. 21989, Unit G Extension, Chitungwiza. The issue for determination is thus on how this property should be shared.

The plaintiff argued that she should be awarded the double bed because she is the one who bought it without defendant's contribution. Regarding the three plate stove she said that both parties contributed towards its purchase in that defendant paid part of the purchase price and she paid the balance. The defendant on the other hand contended that he should be awarded these items as he is the one who bought them. There was not much from the evidence adduced on these items to confirm which of the parties actually bought the items.

As for the immovable property that is House No. 21989, Unit G Extension, Chitungwiza the plaintiff argued that a fair and equitable distribution of this asset would be for each party to be awarded a 50% percent share. The defendant contended that plaintiff was not entitled to a 50% share as her contribution toward this asset was not much.

The acceptance by the parties that they were in a tacit universal partnership implies acceptance that each partners came into the partnership with something to contribute towards the partnership and did so. It is an acceptance that the partners pooled their resources for their common enjoyment. They were clearly in the partnership for the purposes of their livelihood and maintenance of their common household.

In *Marange v Chiroodza* 2002 (2) ZLR 171 (H) MAKARAU J (as she then was) discussed a number of case authorities dealing with the principles required to establish a tacit universal partnership where parties lived together under an unregistered customary law union. At p 180C the learned judge concluded the discussion by stating that:-

“As I have demonstrated above, in this jurisdiction universal partnerships have been declared to exist in circumstances where the parties did not run a commercial venture but pooled their resources for their common good. In my view, the implication of so declaring is to hold that where the spouses pool their resources for their common enjoyment, even if they are not involved in a commercial venture for profit, they are in a universal partnership for the purposes of their livelihood and the maintenance of their common household.”

At p 181G the learned judge went on to say that:-

“In Roman Dutch law there is no presumption of equality of shares in a partnership, but the share of each partner is in proportion to what they have contributed.”

It is in this light that evidence on the nature and extent of each partner’s contribution is important.

The plaintiff’s evidence was to the effect that for the 14 years their union lasted she was never a full time house wife who relied on handouts from defendant. In the period 1997 to 2002 she was a vendor involved in buying and selling various wares in such centres as Beitbridge and Chitungwiza. The money she realised from her business was used to buy food for the family and clothes for their children. Part of her money was set aside together with part of defendant’s income as savings. When an opportunity to purchase an immovable property came they used their joint saving as a deposit for the property. In 2003 she started cross border trading that is, going to South Africa and bringing products for resell. Initially she had no passport and so used an Emergency Travel Document. In 2005 she obtained a passport and continued with the cross border trade. The proceeds from her business were used towards the construction of the property in question and other needs of the family. As their money was being pooled together it is defendant as the head of the family who did most of the purchases of the building material hence most of the receipts are in his name. The few items she bought and on which her name was indicated included 20 bags of cement. She tendered copies of pages from her passport to confirm the trips she made to South Africa and also declaration forms showing some of the wares she brought from South Africa for resale.

It was however apparent that plaintiff had difficulties in quantifying her contribution *vis-a-vis* defendant’s contribution to the purchase and development of the immovable property. Thus she could not state the amounts or whether her contributions were at par

with defendant's contribution. Her insistence was that as the union lasted for 14 years she deserved a 50 per cent share.

As regards the bed and the three plate stove, plaintiff contended she bought the bed and contributed towards the purchase of the stove.

The defendant's evidence, on the other hand, was to the effect that he indeed stayed with plaintiff as husband and wife in an unregistered customary law union from 1995 to 2009. The plaintiff was a fulltime house wife. In lieu of plaintiff's indirect contribution in washing for him, looking after their children and buying 20 bags of cement he initially offered plaintiff a 20% share. When she could not accept it he increased it to 30% but plaintiff still refused.

It was his evidence that the percentage he wished to retain was because he is the one who had bought the immovable property and developed it to its present state. Initially he was employed at the Egyptian Embassy and then at the Kuwait Embassy as a driver. He was paid in foreign currency. During that time he earned about 188 United States dollars per month which upon conversion to Zimbabwe dollars was a lot of money. This is the money he used to purchase the Stand in question. In support thereof he tendered receipts showing payments totalling about 147 000 Zimbabwe dollars paid in instalments towards the purchase price of the Stand. The receipts were all in his names. After leaving employment with the Kuwait Embassy he was given his terminal benefits which he used to buy building materials in 2006. Soon thereafter he left for South Africa where he was employed as a driver. He was again earning in foreign currency. It was then that he would invite plaintiff to South Africa to see him and collect groceries for the family.

When it was pointed out that the plaintiff's passport showed she also went to South Africa before defendant had gone there defendant said he would have sent plaintiff and not that plaintiff was involved in cross border trading.

It was apparent defendant would not accept that plaintiff did any cross border buying and selling. He however, could not proffer any reasonable explanation for some of the wares that plaintiff brought in terms of their nature and quantity. Clearly some of these could have been for resell as suggested by plaintiff.

It is apparent to me that whilst plaintiff may not have been in a brisk income generating business she did engage in buying and selling as a way of raising income. The challenge is, however, on quantifying her income from such trade. Plaintiff herself could

not state the amounts she realised even as average income per trip. The question of the viability of her business was thus not confirmed.

From the evidence adduced there is no doubt in my mind that defendant's contribution towards the acquisition and development of the immovable property was greater than plaintiff's contribution. The assessment of the quantum of contribution by a partner is a question of value judgment. It is not as easy as adding up figures. *In casu*, I am of the view that in as far as the partners share must relate to their respective contributions, plaintiff cannot be entitled to a 50 percent share. Her share must be less than that of defendant as I have made a finding that defendant contributed more. The plaintiff's argument that the partnership lasted for 14 years and therefore she should be awarded 50% is untenable. It is true the duration of the partnership must be considered but in these circumstances it would not be so much as to tilt the scale to 50:50.

I am of the view that a 35% share would meet the justice of the case.

Regarding the movables evidence showed that plaintiff exchanged the partners' bed with the one she bought. The three plate stove was partially paid for by defendant from his employer and plaintiff paid the balance. It is my view that it is only proper taking into account the evidence adduced and the distribution already made on the other movable property that plaintiff be awarded the double bed whilst defendant is awarded the three plate stove.

In the result it is hereby ordered that:

1. The plaintiff is hereby awarded the following movable items-
 - a) 1 double bed,
 - b) Upright fridge,
 - c) 21" television set,
 - d) Kitchen unit,
 - e) 6 blankets,
 - f) Half of the Kitchen Utensils.

2. The defendant is awarded the following-
 - a) Three plate stove
 - b) Room divider
 - c) 4 blankets
 - d) DVD player
 - e) Curtains
 - f) Radio
 - g) Wardrobe
3. On the immovable property:-
 - a) The plaintiff is hereby awarded a 35 percent share of Stand No. 21989 Unit G, Chitungwiza.
 - b) The defendant is hereby awarded 65 percent share of Stand No. 21989 Unit G, Chitungwiza
- 4 The defendant is hereby granted the option to buy out plaintiff in respect of her 35 per cent share in Stand 21989 Unit G, Chitungwiza.
 - a) The parties shall agree on the value of the property within 14 days of the date of this order. If the parties fail to agree on the value they shall appoint a mutually agreed evaluator to do the evaluation within 28 days of the date of this order. Should the parties fail to agree on an evaluator, the Registrar of the High Court shall be and is hereby directed to appoint an independent evaluator from his panel of evaluators to evaluate the property. The parties shall share the cost of evaluation as per their respective share; that is 35:65.
 - b) The defendant shall pay off plaintiff her 35 percent share of the net value within 12 months from the date of receipt of the evaluation report unless the parties agree on a longer period. Should the defendant fail to pay plaintiff's share within the stated or agreed period the property shall be sold to best advantage by a mutually agreed estate agent or one appointed by the Registrar of the High Court should the

parties fail to agree, and the net proceeds there from shall be shared in the ratio 35:65.

5. Each party shall bear their own costs of suit.

Chihambakwe, Mutizwa & Partners, plaintiff's legal practitioners.
C. Mutsahuni, Chikore & Partners, defendant's legal practitioners