

JM
versus
SM

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 2 October 2023 & 23 April 2024

Civil Trial

B Pabwe, for the plaintiff
J B Matandire, for the defendant

MAXWELL J: Plaintiff and defendant were customarily married on 27 February 2021. No children were born out of the union. On 8 September 2022 plaintiff sued out summons claiming:

- Confirmation of the existence of a tacit universal partnership
- Confirmation of the dissolution of the tacit universal partnership
- Distribution of the immovable property to the parties in equal shares of 50 percent each
- Distribution of the movable property and;
- Costs of suit.

In her declaration, plaintiff stated the following. The union was officially terminated by both parties by mutual consent sometime in March 2022. Plaintiff gave the defendant a token of termination in the form of US\$1. During the subsistence of the union, the parties pooled resources together for their joint benefit and acquired both movable and immovable property and entered into a tacit universal partnership. The parties lived a life alien to customary law through acquisition of immovable property and living in the city. The parties have always lived a modern lifestyle and did not have a rural home. She stated that she contributed directly and indirectly to the acquisition of the property through financial contributions from her employment. There was no express agreement as to the division of the assets between them on termination of the union, but it was tacitly agreed that division would be in equal shares. She proposed that she be given all the household furniture with defendant

getting some. She further proposed that she gets 50 percent of the immovable property being Number 8600 New Tafara, Harare.

Defendant gave notice of entering an appearance to defend the action. In his plea he disputed the mutual termination of the union. He insisted that it is still in existence. He stated that plaintiff unilaterally and without his knowledge and or consent ran away from home after testing positive for a sexually transmitted infection during medical tests investigating potential causes of the lack of pregnancy between the parties. Plaintiff ran away out of shame and a desire not to be questioned on issues relating to infidelity as he had tested negative of the disease. He denied receiving the US\$1 token and claimed it was a recently concocted falsity.

Defendant disputed the pooling of resources and the entering into a tacit universal partnership. He indicated that certain movable assets were bought by the plaintiff with her own personal monies and stated that such movables remain hers. He further indicated that the immovable property, Number 8600 New Tafara, Harare was acquired before the unregistered customary law union came into existence, during the time he was still living with his previous customary law wife. He asserted that the property was not a partnership property and is not available for distribution.

Defendant submitted that the parties strictly observed customary law and that is the reason why their marriage was concluded customarily. He indicated that he was not claiming any of plaintiff's "mawoko" property in the form of a television, laptop, kitchen utensils and a Jacuzzi.

In her replication plaintiff insisted that the union was terminated. She persisted in her claim for a share of immovable property. She stated that as a working woman there was no way she could have observed customary law.

A Pre-Trial Conference was held at which the following issues were referred to trial:

- a) Whether or not the parties entered into a tacit universal partnership.
- b) If so, whether the plaintiff is entitled to 50 percent of the developments in Stand Number 8600 New Tafara, Harare.

The plaintiff testified to the following effect. She is employed by CBZ Holdings as a universal banker. She joined CBZ Holdings in 2021. Prior to that she was employed by Homelink Private Limited. She started staying together with the defendant in 2020 February when she eloped. He went to pay the bride prize in February 2021. They stayed together for approximately two years. When she eloped defendant had Stand Number 8600 New Tafara,

Harare which was not developed. Defendant used his own money to develop the stand up to roof level. In April 2020 he borrowed \$3 000 from her sister X which he used for roofing. Between April 2020 and March 2021 nothing much happened. After the payment of the bride prize she started contributing to the building project. She finished the roofing and the outstanding jobs on the house. She used money from her salary and also sold some movable property to raise money to use in finishing the house. She also utilised rentals from Number 613 Reheem Destiny in Mutare. She paid for a Jacuzzi and a septic tank. She produced as exhibits proof of purchase of doors and curtain rods as well as receipts for the payment for the Jacuzzi and floor tiles. She also produced a statement from Western Union as proof of money sent to workers doing construction.

The union ended March 2022 after she gave defendant US\$1 as a divorce token. She had to pay back her sister's money after the termination of the union.

Defendant confirmed that he married plaintiff in February 2021. There were fertility issues and they sought medical help. They were tested for sexually transmitted diseases. Plaintiff tested positive but he was negative. Plaintiff failed to explain the discrepancy and she left for her rural home. After a week she came back and he asked her to explain the medical results. She could not explain and left for Chipinge. He disputed receiving a token of divorce. He produced the report for the Mercy-Care Fertility Labs dated 31 July 2021 showing that plaintiff was positive for chlamydia trachomatis.

Defendant testified that he bought a stand in 2012 with his first wife. They were not allowed to build then. They served money and in 2019 bought bricks. Construction started in 2020 and by June 2020 the house was complete. A certificate of occupation was issued before plaintiff was in the picture. Defendant produced the house plan which showed the dates inspections were done and also the certificate of occupation showing that as at 30 June 2020 seven rooms were certified fit for occupation.

Defendant conceded that plaintiff's relative did the household chores.

Section 3(1) of the Customary Law and Local Courts Act [*Chapter 7:05*] provides as follows:

“Subject to this Act and any other enactment, unless the justice of the case otherwise requires –

- a) Customary Law shall apply in any civil case where –
 - (i) the parties have expressly agreed that it should apply; or

- (ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that it should apply;
- or
- (iii) regard being had to the nature of the case and the surrounding circumstances that it appears just and proper that it should apply;
- b) the general law of Zimbabwe shall apply in all other cases”

The parties are not agreed on the applicable law. I am persuaded that general law is applicable in this case. I say so on the basis of the following:

- the plaintiff owned an immovable property prior to the commencement of the union.
- the parties did not own a rural home and lived in the city.
- the plaintiff was formally employed.

WHETHER OR NOT THE PARTIES ENTERED INTO A UNIVERSAL PARTNERSHIP

A tacit universal partnership exists where the following are present:

- a) Each of the parties bought something into the partnership or must bind himself or herself to bring something into it, whether it be money or labour or skill;
- b) The business or acquisition of the property is carried out for the joint benefit of the parties. The object of the partnership must be to make a profit; and
- c) The contract should be a legitimate one.

See *Mtuda v Ndudzo* 2000 (1) ZLR 710; *Mautsa v Kurebgaseka* HH 106/17. The words of MAKARAU J (as she then was) in *Marange v Chiroodza* 2002 (2) ZLR 171 @ 181 D – F are informative. She stated that:

“The argument 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 universal community of property between married persons. Marriage itself is a union for life in common household. The common estate may be built by the industry of husband and the thrift of the wife, but it belongs to them jointly as the one could not have succeeded without the other. As VAN DER HEEVER J put it in *Edelstein v Edelstein N.O. & Ors*, the husband could not have successfully conducted his trade if his wife had not cooked the 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.”

It is common cause that the parties started living together in February 2020 but the customary rites were performed in February 2021. Defendant confirmed the entering into a customary marriage which, in my view, confirms the existence of a tacit universal partnership. In addition he also conceded that plaintiff purchased moveable items for use in the family home, a television, Jacuzzi, kitchen utensils and tiles. He also confirmed the

plaintiff's performance of household chores through her relative. I therefore find that a tacit universal partnership existed between the parties.

WHETHER OR NOT THE PLAINTIFF IS ENTITLED TO A 50% SHARE OF THE IMMOVABLE PROPERTY

In *Mautsa v Kurebgabeka (supra)* it is stated that the finding that a tacit universal partnership existed does not necessarily translate to a half share of the assets as claimed by the plaintiff. 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. The assessment of the plaintiff's contribution is also based on the duration of the partnership. Her contribution during the two years of the union as testified does not entitle her to a 50 percent share in the property.

The level at which the property had been developed when the union commenced is in dispute. To that end plaintiff's evidence in that respect is not consistent. In her declaration she stated that movable and immovable property was acquired by the parties after pooling resources together during the subsistence of the union. In her summary of evidence she stated that when they got married defendant had a vacant stand and had not yet fully paid for it. She stated further that she used her package to develop the property together with the defendant. In her evidence in chief she stated that defendant developed the stand with his own money up to roof level. She further stated that she contributed to the roofing plumbing, skimming, flooring, ceiling, electrical connection and paid labour costs. This was clearly a departure from the founding papers.

Defendant on the other hand stated that the house was complete when plaintiff came on the scene. He produced the house plan that showed that the setting out was approved on 10 February 2020, window level on 30 March 2020, roof on 22 April 2020 and drain test on 29 April 2020. He also produced a certificate of fitness/occupation for seven rooms dated 30 June 2020. Plaintiff's evidence was that the union came into effect on 27 February 2021 even though she had eloped in February 2020. She indicated that prior to the payment of the bride prize in February 2021, she refused to contribute to the development of the property as she was not yet his wife. It therefore follows that her contribution is to be assessed from February 2021. It is trite that in civil matters in our jurisdiction the standard of proof is on a balance of probabilities. At the end of the day a court must be convinced that on the evidence it is more probable than not. See dicta in *Miller v Minister of Pensions (1947) 2 AllER 372*.

In view of the documentation produced by the defendant, when the plaintiff decided that she could start contributing to the welfare of the union, after the bride prize was paid, the property was certified fit for occupation. She did not therefore contribute towards the completion of the house as she testified.

It is not in dispute that she incurred some expenses related to movable items. The purpose for which funds were sent via Western Union to some individuals who plaintiff claimed to be construction workers was disputed. Defendant insisted that the payments could not be towards the construction of the house as it was complete by the time the funds were sent. The recipients of the funds were not called to confirm the purpose for which they were receiving them. The receipts from Western Union produced as exhibit 5 therefore do not take the plaintiff's case any further. I find that plaintiff did not discharge the onus of proving that she made a significant contribution towards the construction of the house at Stand Number 8066 New Tafara, Harare. Neither did she prove that she contributed significantly to the improvement of the said property.

I therefore find that plaintiff is not entitled to any share of Stand Number 8066 New Tafara, Harare.

DISPOSITION

The plaintiff's claim for a 50 percent share in Stand Number 8066 New Tafara be and is hereby dismissed with costs.

Venturas & Samkange, plaintiff's legal practitioners
Maja & Associates, defendant's legal practitioners