

TINASHE CHIKARA

VERSUS

VENNAH MATIKA

HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 25 FEBRUARY AND 3 MARCH 2011

Mr S. S Mazibisa, for the plaintiff

Mr V. Majoko, for the defendant

CIVIL TRIAL

MATHONSI J: The plaintiff instituted proceedings against defendant alleging in the declaration that the 2 were customarily married in 1998 and that during the subsistence of that union they acquired items of property namely stand 4013 Nkulumane Bulawayo, mazda 323 motor vehicle, fridge, stove, kitchen unit, colour television, cellphone and line and lounge suit.

He averred that the parties had entered into a universal partnership to own the property in question jointly and that as the union has been dissolved he was entitled to a share of that property. He claimed 60% of stand 4013 Nkulumane Bulawayo, a 6 roomed house which, at the time it was purchased in January 2003 was a "match box house" of 3 rooms. He also claimed a lounge suit.

In further particulars he supplied at the behest of the Defendant, the plaintiff averred that it was only on 14 December 2003 that the customary union was formalised and that stand 4013 Nkulumane Bulawayo (the house), was purchased for Z\$8 000 000-00 which was paid in instalments. He further averred that the Mazda 323 motor vehicle was purchased from the Defendant's uncle for Z\$4 000 000-00.

The defendant contested the claim averring in her plea that she did not enter into a customary union as alleged as she was only 15 years old in 1998 and therefore incapable of contracting. She denied ever entering into a universal partnership with the plaintiff or ever purchasing any property with the plaintiff.

At the pre-trial conference held before a Judge, the issues for trial were identified as follows:

1. Whether the parties were customarily married during the period specified in the declaration.

2. Whether the parties pooled their resources together to form a partnership and bought the property set out in the declaration.
3. Whether the Defendant was unjustly enriched at the expense of the plaintiff.
4. Whether it would be just and equitable in the circumstances to divide the property as claimed by the plaintiff.

The plaintiff gave evidence and in the process of doing so, he abandoned his claim to the movable property and appeared to revise his claim from 60% to 50% of the house. His evidence is to the effect that he met the defendant in 1998 and they fell in love. Soon after that defendant's father discovered the affair and severely assaulted her before banning her from leaving their home in Luveve. She was grounded.

At that time the plaintiff was already married to someone else, a police officer based at Western Commonage police station, in terms of the Marriage Act, Chapter 5:11, which marriage did not permit the plaintiff to have a second wife.

Sometime in year 2 000, he left Zimbabwe to go and work in the United Kingdom where he remained working hard 18 hours a day for 7 months trying to make as much money as possible. During that time he would send money to the defendant via, Western Union money transfer, for her upkeep. He produced 3 copies of Western Union invoices showing that he had sent to Florence Matika (defendant's sister), BP 25-00 and to the defendant BP70-00 and BP 50-00.

He went on to say that he was in contact with the defendant whom he requested to search for a house to buy and the defendant advised him that houses were then going for Z\$40 000-00 to 45 000-00. He then sent money to the defendant, surprisingly in Zimbabwe currency, in the sum of \$45 000-00 through Abraham Chikozho. The defendant used that money to purchase a 2 roomed house in Nkulumane, Bulawayo but did not give him the details of the house, how much it had cost and did not even show him the purchase documents of the house.

According to the plaintiff, the defendant informed him she had used that \$45 000-00 to purchase the house, settle her outstanding account at Topics Store and the balance was used to set her up in a money changing business she is still engaged in to this date. Sometime in 2001 he left the United Kingdom enroute to Zimbabwe via Canada where he spent 2 months on holiday.

When he finally arrived in Zimbabwe he was so busy with his company business he did not immediately find time to view the house and see the paper work for it. On 14 December 2003, he and his relatives met the defendant's family members at their Luveve 5 house to formalise the Customary Union. He was charged lobola, paid part of the money and told to

return at a later date to finish off what was due. He produced an unhelpful document which he claimed was written by Victor Muchichwa recording the customary transaction. Unfortunately, although he had promised to call that individual as a witness, he was never called.

After the Customary Union, in December 2003, he requested to be given his wife, the defendant and together they moved to a house in Cowdray Park, Bulawayo where they commenced living together. Sometime, on an unknown date, he requested the defendant to take him to the house she had purchased which she did and he beheld a 2 roomed unplastered house being No. 4013 Nkulumane, Bulawayo. They could not move into that house because the defendant told him that there were tenants who needed to be given notice.

He stated that he stayed with the defendant in Cowdray Park for 3 or so months before the defendant deserted while he was away in Harare. Quizzed by counsel for the defendant about the period of their cohabitation, he said he could not remember and could not dispute that it was actually only one month.

Much later, he was attending a funeral next door to the house when he discovered it had been extended to a 5 to 6 roomed house. He did not contribute anything towards the development of the house. He prayed that he be awarded 60% and under cross examination he revised that figure to 50% of the house. Asked how he could have paid lobola of 8 cattle at Z\$800 000-00 per beast as recorded on the document he produced (which means that he paid lobola of \$6 400 000-00) at a time he claimed to have purchased a full house for less than \$45 000-00, the plaintiff mumbled something to the effect that this was a hyper inflationary period. He did not give a clear explanation.

The plaintiff called Abraham Chikozho who confirmed having been sent by the plaintiff to deliver \$45 000-00 to the defendant in 2001. After failing to locate the defendant he handed the money over to the defendant's sister, one Florence Matika. He did not know what the money was for and whether it was passed on to the defendant. He did not explain how a sum of Z\$45 000-00 was sent from the United Kingdom.

The defendant also gave evidence. She had a love affair with the plaintiff commencing in 1998 when she was still 15 years old. The plaintiff left for the United Kingdom in 2 000 and whilst there he would send her some money as gifts between lovers. She admitted receiving the \$45 000-00 from the plaintiff through her sister Florence in 2001 and stated that the money had been brought by Chikozho who had visited the United Kingdom but it was in the form of BP30-00. Her sister, who was engaged in the money changing business (before she also started doing that business herself), converted the money to the local currency and gave her \$45 000-00. It was not a lot of money.

She used the money to settle her account at Topics Store as it had been outstanding for some time, to purchase airtime to telephone the plaintiff in UK and the rest was pocket money.

At no time did the plaintiff request her to look for a house to purchase and he certainly did not ask her to use that money to purchase any house. It was simply too little to buy a house.

She had always known the plaintiff to be married although he claimed that he was on separation in the process of divorcing. She confirmed that the plaintiff also sent her some money through Western Union as a gift.

The plaintiff returned to Zimbabwe and immediately started harassing her. They quarrelled when the plaintiff severely assaulted her for questioning him after he had received a call from another woman as they sat in a vehicle. After he had assaulted her he forcibly took away from her BP50-00 and Z\$250 000-00. She then broke up with him.

She was already in the money changing business when they broke up and sometime in January 2003 (after they had separated), she purchased from one Precious Mavone, house No. 4013 Nkulumane, Bulawayo which then was a "match box" 3 roomed house. The money she used was from her own sweat without any input from the plaintiff and the purchase price was Z\$2,1 million. She paid a deposit of \$1,5 million with the balance being paid in monthly instalments of \$300 000-00.

She produced an agreement of sale signed between herself and the Bulawayo City Council in January and February 2003 showing that as the time she purchased the house. Months later in November 2003, the plaintiff returned to her life and pleaded with her. They reconciled and he insisted on being introduced to her parents. Before that he took her to his home in Masvingo where his sister confided in her that the plaintiff was married. He was introduced to her parents in December 2003, did not pay any lobola because in her culture as people of the apostolic faith, lobola is unknown. All he did was to buy groceries and give her aunts some money in recognition of the introductions.

She did not disclose to him that she had acquired a house during the time they had broken up. When he requested to move in with her, he did not have anywhere to take her. She then requested a relative of hers to allow them to move into her furnished house in Cowdray Park. They did not acquire any property together. Barely a month after they started living together they broke up and this time permanently. She had been given money by a client in the money changing business and the plaintiff staged a robbery which resulted in her losing all the client's money. She is so sure the plaintiff was behind the robbery because she saw him communicating with the robbers signalling where the money was in the car and he refused to drive away as the robbers closed in on them. He immediately left for Harare to spend the money while she remained behind licking her wounds. She left him.

The plaintiff did not impress as a good witness and his case is fraught with inconsistencies and contradictions. While in the pleadings he claimed that he entered into a customary union with the defendant in 1998, when he gave evidence this turned out to be December 2003. In the pleadings he claimed that the house and indeed all the other property,

was acquired during the subsistence of the union, the evidence shows that the house was acquired in January 2003 long before the Union was formalised.

He claims in the pleadings that the house was purchased for \$8 million but in his evidence he claims it was bought for less than \$45 000-00. His pleadings state that the 323 vehicle was bought for \$4 million yet he would have us believe in his evidence that the house was bought for just a fraction of the price of a small vehicle.

While he claims to have sent \$45 000-00 from the UK, it has not been explained how this was possible as one would have expected him to send the money in British Pounds. In addition, he did not bother to check the documents recording the purchase, did not even know the house and what it cost.

Glaringly he did not even have the correct description of the house. He testified that it was a 2 roomed unplastered house at the time of purchase and that it is now a 5 or 6 roomed house. It turns out that when it was purchased it was a 3 roomed house and that 3 more rooms have since been added. To say he lacked knowledge because he was busy at his company is simply disingenuous.

The plaintiff could not explain why they did not move into the house from 2002 when he returned to Zimbabwe when they appeared to struggle for accommodation, if indeed they had a house of their own. I find it extremely amazing that the plaintiff would insist that the house was purchased during the subsistence of a union which subsisted for only one month.

Equally amazing is his insistence on a claim of 60%, or is it 50%, of the house when, by his own admission, he was not involved at all when it was extended to what it is today.

On the other hand the defendant was clearly an impressive witness who did not attempt to distort the facts at all. She struck me as a very truthful witness and I have no hesitation what- so ever in accepting her evidence. She readily accepted that the plaintiff sent her money from the UK, even the \$45 000-00 which was not documented which she could have easily denied. She stated however that the money was a gift.

Regarding her relationship with the plaintiff, she did not deny that it commenced in 1998 even as she was 15 years old. She again readily accepted that the plaintiff was introduced to her parents and that she moved in with him albeit for 1 month, even as he was already married to someone else.

It has been submitted on behalf of the plaintiff that the parties entered into a tacit universal partnership to own the house and that upon its dissolution the plaintiff is entitled to a share. Alternatively that the defendant has been unjustly enriched and equity demands that the plaintiff be given a share.

The requisites of a tacit universal partnership were set out in *Mtuda v Nduduzo* 2000(1) ZLR 710 at 716 E-G where *Garwe J* (as he then was) stated;

“What amounts to a tacit universal partnership has been considered in several decisions of the courts in this country and in South Africa. The four requisites for a partnership maybe summarised as follows:

(a) 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;

(b) the business to be carried out should be for the joint benefit of the parties.

(c) the object of the business should be to make a profit; and

(d) the agreement should be a legitimate one.

In addition the intention of the parties to operate a partnership is also an important consideration. See *Muhlmann v Muhlmann* 1981 (4) SA 632 at 634; *Mashingaidze v Mashingaidze* 1995 (1) ZLR 219.”

In *casu*, the plaintiff’s claim fails the first hurdle because I am not persuaded that he contributed anything. I reject the evidence of the plaintiff that the \$45 000-00 he sent to the defendant was for the purchase of the house. His case is compounded by the fact that he did not even attempt to lead evidence to prove that the money was enough to purchase that house.

Having come to that conclusion the matter should really end there. I wish to comment however on the legitimacy of the agreement which is one of the requirements for a valid partnership. For times without number this court receives litigation from the likes of the plaintiff who, while married to someone else in terms of civil rights, they proceed to purchase property for a paramour and when the relationship gets sour they still proceed behind the back of their spouse to litigate claiming a share of that property. Finding it difficult to premise that claim such litigants would allege a variety of issues including a tacit universal partnership.

In my view, it is completely against public policy for such people to approach the court when in the majority of cases they would be cheating on their spouses and amassing wealth behind them. Even where an agreement exists with the paramour, such cannot be said to be legitimate as it is illegal. How can a person whom the law prohibits from having a second wife proceed to have one against the law and then approach a court of law seeking redress?

In applying the principles of a tacit universal partnership, the courts cannot be seen to be legitimising what is otherwise illegitimate. Accordingly even if the plaintiff had proved contribution in this case, his claim would still fail on the basis of illegitimacy of the agreement.

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

Messrs Cheda and Partners, Plaintiff's Legal Practitioners

Messrs Majoko and Majoko, Defendant's Legal Practitioners