

VIOLET JOKONYA  
versus  
THOMAS PAVARIVEGA

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 26, 28 January 2016 and 2 February, 2017

**Family law court-trial**

*M Hungwe*, for the plaintiff  
*V Makuku*, for the defendant

CHITAKUNYE J: In 1996 the plaintiff and the defendant entered into an unregistered customary law marriage. Their union was blessed with one child born on 29 January 2009.

During the subsistence of the union the parties acquired both movable and immovable properties.

On 11 January 2011 the plaintiff issued summons from this court seeking, *inter alia*:-

1. Dissolution of the unregistered union;
2. Distribution of the properties acquired during the subsistence of the marriage,
3. Custody of the minor children with defendant being granted rights of access;
4. Maintenance for the child in the sum of USD100-00 per month till the child attains majority status or is self supporting; and
5. Maintenance for the plaintiff in the sum of USD150-00 per month.

It was apparent that *ex facie* no clear cause of action was disclosed in the summons and declaration despite this court's clarion call on legal practitioners to realise that the mere existence of an unregistered customary law union or marriage is not on its own a cause of action upon which to claim the distribution of assets of parties to that union. This court has in a number of cases implored legal practitioners dealing in unregistered customary law unions to always plead a recognised cause of action. In *casu*, the plaintiff's legal practitioner was under an erroneous impression that the union was recognised as a marriage in terms of the

Matrimonial Causes Act, [*Chapter 5:13*] when that is not so. It was due to such wrong impression that a claim was made for the dissolution of the unregistered union on the basis of irretrievable breakdown of the marriage.

The defendant, nevertheless, pleaded to the summons on 3 February 2011 without excepting or raising the lack of a clearly defined cause of action. It would appear that the defendant's legal practitioners were also of the view that this was a valid marriage hence in his plea the defendant conceded that the union had irretrievably broken down and so it should be dissolved.

On 8 November 2013, the plaintiff filed an amended summons and particulars of claim in which the cause of action was now disclosed clearly. The plaintiff's claim in terms of the amended summons was now restricted to a claim for the distribution of assets of the union on the basis of a tacit universal partnership.

But for the amendment of 8 November 2013, the action would have been thrown out as not disclosing clearly the cause of action being relied upon.

In the amended summons the plaintiff alleged that she entered into a tacit universal partnership with the defendant in 1996. During the subsistence of the partnership certain properties were acquired which must now be distributed between the parties as the partnership has come to an end.

The movable properties acquired during the partnership comprised:-

- (a) A herd of three cattle consisting of 2 cows and a bull and 30 goats;
- (b) Hiace kombi;
- (c) A kombi blue in colour;
- (d) A Taxi (*sic*);
- (e) A lorry;
- (f) Household goods and effects.

The description of some of the items was so imprecise that only the parties would know what these referred to yet these pleadings were drafted by a legal practitioner. It is incumbent upon legal practitioners to ensure that items are adequately described in pleadings so as to leave no doubt in the mind of the reader as to what item or items are being referred. For instance, in this case, one is left wondering what the item called 'Taxi' is.

The immovable properties acquired during the partnership comprised:

- a) A rural home with 5 roomed house, at Rusitu Dairy Farming Scheme called Plot No. 37, area E;
- b) A 13 roomed house being Stand number 1955 Gaza 'O', Chipinge;
- c) A 4 roomed house being Stand number 3264 ZBS, Chipinge;
- d) A stand with a 2 roomed cottage being stand no. 3588, Gaza 'E', Chipinge;
- e) 5 roomed house being stand no. 5195, Gaza 'E', Chipinge;
- f) A tuck-shop and Flea market in Chipinge Town;
- g) A tuck-shop at Rimayi in the valley
- h) Ten (10) tuck shops and a phone shop in South Africa.

The defendant in his plea indicated that some of the properties were no longer in existence whilst others did not belong to the partnership. He indicated those he deemed available for distribution.

On 3 March 2015, a pre-trial conference was held at which the following was agreed:-

1. The parties were in a tacit universal partnership
2. The partnership was entered into in 1996 and was dissolved in 2011
3. The plaintiff has abandoned claims relating to the tuck shops and flea markets in Chipinge, Shops in Rimayi and the 10 Tuck shops in South Africa
4. The household goods in House No. 1955 Gaza 'O' Chipinge be awarded to the plaintiff.

The Issues on which the parties could not agree and hence referred to trial were as follows:

1. Whether or not the following properties claimed are subject to distribution between the parties:
  - (a) Stand 3588 Gaza 'E' registered in the name of Tinos Pavarivega;
  - (b) Stand 5195 Gaza 'E'
  - (c) Stand 5126 Gaza 'E' registered in plaintiff's name
  - (d) A lorry registered in the name of Wonder Sithole
  - (e) Kombi Hiace
2. Whether the parties own 2 Cows, a bull and 30 goats as per plaintiff or 2 cows and 2 goats as per the defendant.
3. How the following property is to be distributed between the parties:
  - (a) The rural home
  - (b) Stand 1955 Gaza 'O' Chipinge
  - (c) Stand 3264 ZBS,Chipinge

4. How the following movable properties should be distributed:

- (a) Kombi Hiace
- (b) Kombi Hiace.

Though at the pre-trial conference the parties had indicated that each would be calling many witnesses, the plaintiff five and defendant six, on the trial date only the plaintiff and the defendant testified.

It is pertinent to note that by agreeing that they were in a tacit universal partnership the parties were accepting that they recognised the contributions made by each party in the acquisition of the properties in question. As aptly stated by GARWE J in *Mtuda v Ndudzo* 2000(1) ZLR 710(H) at 716E-G:-

“What amounts to a tacit universal partnership has been considered in several decisions of the courts of 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.”

The history of the partnership is that at the time of inception in 1996 the parties lived in a pole and dagga hut in the rural area. As a result of their thrifty and industry they grew their union’s estate to the current state whereby a number of properties, both movable and immovable, were acquired.

From the properties accumulated the plaintiff sought to be awarded the following immovable properties:

1. Stand number 1955 Gaza ‘O’, Chipinge
2. Stand number 3264 ZBS, Chipinge; and
3. Stand number 5126 Gaza ‘E’, Chipinge.

Out of the three properties the defendant conceded to the plaintiff being awarded Stand 3264 ZBS, Chipinge and Stand number 5126 Gaza ‘E’, Chipinge.

The only contentious stand is thus Stand 1955 Gaza ‘O’ Chipinge.

The plaintiff's evidence was to the effect that at the time of marriage they both had no assets of value but lived in a two roomed pole and daga house. The defendant was employed as a security officer in South Africa whilst she was unemployed and staying at the rural home.

It was common cause that the parties were operating tuck shops and flea markets in Zimbabwe and in South Africa. Though the defendant alleged that the tuck shops in South Africa were operated in partnership with a third party, this assertion was without substance. He clearly was intent on distancing the tuck shops from the distribution table.

The plaintiff confirmed that during the pre-trial conference it was agreed that they were in a *tacit universal* partnership and that such partnership had come to an end. As a consequence of the negotiations she abandoned her claim for the numerous tuck shops that were being operated during the subsistence of the partnership and defendant can have them. She also abandoned her claim for the flea markets that they had been operating in Chipinge.

The plaintiff's evidence was also to the effect that she contributed towards the purchase of the properties in that she operated tuck shops and flea markets here in Zimbabwe. She acknowledged that the capital to start the projects came from the defendant but she ensured the business was operated efficiently to realise a profit which they used to acquire the properties. She would also go to South Africa to assist the defendant in the business there.

On stand 1955, the plaintiff said that this is the house she is living in as the matrimonial house. It was acquired from proceeds of their business. She thus asked to be awarded this property as well since the defendant will retain other immovable properties.

On stand 5126 the plaintiff said she acquired this stand on her own in her own name after obtaining a loan from the defendant. She invested that loan in some venture and used the proceeds there from to pay for the stand. She later repaid the loan to the defendant and so this property must be considered as her property and not a property of the partnership.

On stand 3264 ZBS, Chipinge, the plaintiff stated that though this property is registered in the defendant's name, it was acquired by the parties using proceeds from their partnership business. They acquired this property as their first house in the urban area through a mortgage bond which the defendant obtained and was serviced from proceeds of their business. She indicated that it is the house they stayed in first when they came to live in town.

Apart from these three properties, the plaintiff testified that there were other immovable properties that the defendant will retain. Though some of these are in other people's names they are, in fact and in truth, the couple's properties.

In this regard there is stand 5195. This is the property where the defendant is currently staying with his second wife. According to the plaintiff, this property was bought using proceeds from their partnership after she had indicated to the defendant that she was not prepared to live under the same roof with his second wife. As far as she is concerned the property was purchased from the partnership's funds and not that the second wife had contributed anything. It is thus a property that must be considered in the distribution of the assets.

On the defendant's defence that this property is in the name of his child with the second wife and so it should not be considered, the plaintiff maintained that it was acquired from proceeds of her sweat and that of the defendant. The fact that the defendant chose to put the house in the name of a two year old child with his second wife on the agreement of sale did not take away the fact that it was acquired from proceeds from the partnership.

The plaintiff further stated that there is also stand number 3588 Gaza E which the defendant will retain. It was her evidence that though this property is in the name of the defendant's young brother, Tinos Pavarivega, it was in fact their property.

The history of this property was that the local authority was offering stands to Civil Servants. The defendant's young brother, Tinos, was a teacher and so the plaintiff and the defendant decided to use Tinos' name to acquire this stand. To buttress her stance the plaintiff indicated that since its purchase she has been the one in charge of the stand and all the developments on that stand. She thus refuted the defendant's contention that this property was purchased by Tinos Pavarivega. This is a property she said the defendant can have.

Another immovable property to be awarded to the defendant is the rural plot, Plot 37 Risitu Dairy Farming Scheme on which was constructed a 5 roomed house and another 2 roomed house/cottage during the subsistence of the partnership. The plaintiff stated that besides the 2 houses the property has a precast wall. It is thus a valuable property.

#### On Movable Property

The plaintiff claimed a lorry/truck, a kombi Hiace motor vehicle, a share of the cattle and goats that she said were at the rural plot.

She however conceded that the lorry/truck they initially had was sold and was replaced by the one which is in Wonder Sithole's name. The plaintiff was not insistent on this motor vehicle and seemed prepared to let the defendant have this truck.

The plaintiff was also not insistent on the kombi Hiace motor vehicle. For instance, when asked, in evidence in chief, if she wanted the two kombi Hiace motor vehicles shared her response was that the court can award the motor vehicles to the defendant.

On the question of livestock, the plaintiff was not certain as to how many cattle and goats there were because she was barred from going to the plot by the defendant. In the absence of proper evidence on the number of cattle and goats available for distribution it becomes tricky to attempt to distribute basing on the number of goats that plaintiff said were there sometime in the past. It was in this light that when asked if she wanted the livestock to be awarded to the defendant all she could say was that she wanted court to assist her. I am of the view that the plaintiff be awarded one cow whilst the defendant retains the rest of the livestock.

The defendant's evidence on the immovable properties was to the effect that:-

Stand number 3588 is registered in his young brother's name and so it belongs to that young brother. The defendant's stance on this stand was rather shaky. Whilst maintaining that the stand belonged to his young brother he could not explain away the fact that his wife, the plaintiff, had categorically stated that she had been responsible for the developments on that stand. All he could say was that the plaintiff and Tinos knew each other better. He could not with any credence rebut the plaintiff's version on how that stand was acquired and developed since its acquisition. The plaintiff made it clear that the defendant had tried to sell the stand to Tinos but Tinos had refused. It was thus for the defendant to call Tinos as a witness on this aspect but he did not.

It was evident that the defendant was not comfortable in answering questions on this aspect and he kept on fidgeting. As he stood on the witness stand one could easily see that he was uncomfortable when answering questions on the aspects of putting assets in the names of other people and then asserting that the assets were owned by those people.

The defendant confirmed that he bought stand 5195 at about the time he took on a second wife. That was after the plaintiff had clearly indicated that she did not want his second wife under the same roof with her. Though he purported that he bought it for his child, clearly this was meant for the second wife as this is where she has been staying with the defendant. I did not hear the defendant to suggest that the second wife contributed anything towards its

purchase. It was his evidence that he used money from his South African tuck-shops to buy this property.

It was clear that this stand was acquired as defendant's stand to accommodate the second wife. Like some people do, upon accumulating some wealth through the labour and toil of the partnership with the plaintiff, the defendant took on a second wife but the plaintiff would not accept to live under the same roof with her hence the need for this stand. It was a stand bought from the fruits of the business of the plaintiff and the defendant and so it must be recognised as the partnership's property. The fact that the defendant chose to put it in the name of his child with the second wife should not prejudice the plaintiff.

It may also be noted that the Memorandum of Agreement on this stand cites Thomas Junior Pavarivega as the purchaser. This is the child who was then two years old and with no capacity to enter into a binding contract. The agreement does not state that the child was represented by anyone. Even where the parties to the contract appended their signatures, the signature endorsed for the purchaser does not show that it was by someone representing the child. It may also be noted that initials endorsed on the pages of the document for the purchaser are 'T.J.P', which stands for Thomas Junior Pavarivega, the child. The child could surely not have endorsed its initials at a tender age of two years. I am of the view that this property, for all intents and purposes, belongs to the defendant. The endorsement of the name, signature and initials of the child may have been a ruse to distance the property from claims by the plaintiff on the pretext that it belonged to the child.

It was also the defendant's evidence that he purchased stand 5126 for the plaintiff in appreciation of what had the plaintiff had contributed to the partnership. When it was put to him that the plaintiff had said that she is the one who bought this property solely from her savings, the defendant denied this and contended that, she did not pay back the money he had given her. It was his evidence that he decided that this property be in the plaintiff's name since all other properties were in his name. In a way, he impliedly admitted that it is the plaintiff who bought it and that she had not repaid him the money.

This is a property that both parties agreed should be awarded to the plaintiff.

It was common cause that Stand 3264 was acquired by the defendant through a bank loan. The loan was paid off using proceeds from their business. It is a property the defendant offered the plaintiff and so it is not in issue.

On the contentious Stand 1955, the defendant's evidence was to the effect that he bought this property without the plaintiff's contribution. He used money from the South

African tuck shops. However, under cross examination the defendant conceded that the plaintiff did contribute towards the purchase of this property as well. The following exchange confirms this:

- “Q. Stand number 1955 you acquired it before marrying the second wife?  
A. Yes  
Q. you both contributed towards its acquisition?  
A. I am the one who saw it and I told her it was being sold and she accepted.  
Q. you both contributed directly and indirectly?  
A. yes  
Q. the second wife was not in the picture?  
A. yes  
Q. is it not just and equitable to leave it in plaintiff’s name?  
A. no”

It is clear from the above that the plaintiff did contribute to the acquisition of the stand. This stand was bought from proceeds from the parties’ business and so it was for the partnership.

It is pertinent to note that whilst the defendant agreed that they were in a tacit universal partnership, on the acquisition of properties he sought to limit the plaintiff’s contribution to that of offering advice only whenever he asked her. This, in my view, is not consistent with an acknowledged tacit universal partnership and the fact that it was common cause that the plaintiff was also operating flea markets and tuck shops. Clearly the plaintiff contributed through her labour and industry to the properties of the partnership.

The evidence showed that the couple operated as a family business. The plaintiff concentrated mainly on flea markets and tuck shops locally whilst the defendant concentrated mostly on the South African side of the business. The plaintiff would also see to the development of the properties they acquired using earnings from their business.

The defendant did not deny that at the inception of the customary law union they lived in a pole and daga house and that all the assets in question were acquired during the subsistence of the union. It was clear from the evidence adduced that for the 15 years the union subsisted the plaintiff was engaged in income generating activities to the defendant’s acknowledgement. It was in acknowledgment of this that he said stand 5126 was registered in the plaintiff’s name as all other properties were in his names. The question one would ask is: which are these ‘all other properties’ that were in his names? According to his list only Stand 3264 and Stand 1955 were in his name.

The impression I got from the defendant's evidence and demeanour was that the defendant was not being candid with court at all. He appeared to succeed in distancing movable properties from the distribution table on the pretext that he acquired them using proceeds from his partnership operations with third parties. On savings, the defendant said that he was making savings to buy assets from his South African tuck shops as if the tuck-shops and flea markets on the Zimbabwean side were not making profits. The plaintiff had stated clearly that all these tuck shops and flea markets were for their union and the defendant was deliberately including third parties to deny her a meaningful share.

The same scenario obtained in respect to immovable properties. For instance, after acquiring stand 3588 using his young brother's name, who was a civil servant, the defendant sought to deny that this property was for their union; yet as testified to by the plaintiff, she has been responsible for the stand from the time of purchase to now. The developments on the stand, which include a cottage, were effected by her. The defendant had no explanation for this serve to say that his young brother and the plaintiff knew each other better as to why that was the situation. Clearly that was the situation because the property was bought by the plaintiff and the defendant and the plaintiff, just like in their other local properties, was the one responsible for them.

As already alluded to above, on stand 5195, the agreement of sale purports to have been entered into by a child of two years old at the time. That child's name, signature and initials are endorsed. Surely this could not be true as the child was too young to endorse its signature or even endorse its initials. In any case, the child had no contractual capacity. The child needed to be represented by someone with the requisite capacity and authority. This was clearly the defendant's ploy to portray the property as belonging to this child when in fact it is his property. Unfortunately he could not adequately cover his tracks.

I am of the view that the machinations by the defendant to distance properties from the distribution table can only serve to show his desire to deny the plaintiff a just and fair share in the properties acquired by the partnership.

I thus conclude that given the circumstances of this case, and the fact that the plaintiff has given up on most of the movable properties and businesses she would have been entitled to had the defendant been candid, it is only proper that stand 1955 be awarded to the plaintiff.

The defendant will retain Plot 37 at Rusitu Dairy Farming Scheme; Stand number 3588 Gaza "E", Chipinge and Stand 5195 Gaza "E", Chipinge.

On the motor vehicles the plaintiff said the defendant can have them and so the motor vehicles will be awarded to the defendant.

Accordingly it is hereby ordered that:-

1. The plaintiff be and is hereby awarded the following movable properties:-
  - (a) All household goods in house number 1955 Gaza 'O' Chipinge
  - (b) One cow
2. The defendant be and is hereby awarded the following movable properties:
  - (a) All livestock at Plot 37 except for the one cow awarded to the plaintiff above.
  - (b) All the motor vehicles in issue ( 2 Kombi Hiace and lorry)
3. The plaintiff be and is hereby awarded the following immovable properties:-
  - (a) Stand number 5126 Gaza 'E', Chipinge
  - (b) Stand number 3264 ZBS, Chipinge
  - (c) Stand number 1955 Gaza 'O', Chipinge
4. The defendant be and is hereby awarded the following immovable properties:
  - (a) Stand 3588 Gaza 'E', Chipinge
  - (b) Plot 37, Area E, Rusitu Dairy Farming Scheme
  - (c) Stand 5195 Gaza 'E', Chipinge.
5. The defendant is awarded all business operations under the style of tuck shops or flea markets that the partnership operated during its subsistence.
6. The defendant shall, within 60 days of this order, sign all necessary documents to enable transfer or change of ownership into the plaintiff's name in respect of Stand 3264 ZBS, Chipinge and Stand 1955 Gaza "O" Chipinge. Failing this, the Sheriff or his deputy be and is hereby directed to sign all the necessary documents to effect transfer or change of names in the defendant's stead.
7. The costs of transfer or cession, as the case maybe, shall be met by the parties in equal proportion.
8. Each party shall bear their own costs of suit.

*Hungwe & Partners*, plaintiff's legal practitioners  
*Bere Brothers*, defendant's legal practitioners