

HELLIATE JEKE
versus
WITNESS ZEMBE

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 5 May 2018

Unopposed Application-Family Court

M.B Lunga, for the applicant

CHIRAWU-MUGOMBA J: Lawyers must exercise due diligence when representing clients and this includes ensuring that they file proper pleadings and that they seek appropriate relief. On the 15 of December 2017, the plaintiff issued summons against the defendant claiming an order for the dissolution of a customary law union; an order for sharing of property in terms of the declaration; an order for eviction and cost (*sic*) of suit. The plaintiff prayed for the following:

- a. An order for dissolution of the marriage.
- b. An order for custody.
- c. An order for maintenance
- d. An order for sharing of properties
- e. An order for eviction
- f. An order that each party bears its own costs.

The declaration averred that the plaintiff and the defendant were married in terms of an unregistered customary law union which had soured and that there were no prospects for restoration and cited the reasons which include infidelity; violence; loss of love and affection; separation and that married life had become untenable. The plaintiff averred that it would be in the best interest (*sic*) for the minor children if custody is awarded to the plaintiff with the defendant being granted reasonable access and that the defendant also pays maintenance in

the sum of US\$300 per month per child until they reach 18 or become self-supporting which ever happens first. In addition, the defendant should also pay school fees. The plaintiff listed movable and immovable property that was acquired by the parties during the subsistence of the union and whilst on separation. She sought an order sharing the property on the basis of equity. In paragraph (s) 13 and 14 of the declaration, the plaintiff made a case for the application of general law as opposed to customary law and further proceeded to make a claim based on unjust enrichment. The Form 30A summons and declaration were served on the defendant on the 16 of December 2017. On the 13 of April 2018, the parties filed a consent paper that regulates their relationship and other ancillary relief. On the 24 of April 2018 the plaintiff filed an affidavit of evidence and on the same date the defendant filed an affidavit of waiver. The plaintiff proceeded to set the matter down on the unopposed roll for the 3rd of May 2018. At the hearing, the plaintiff's legal practitioner handed in from the bar an amended draft order seeking a dissolution of the unregistered customary law union; custody of the minor children and that the consent paper signed by both parties regulates all proprietary rights, access rights, maintenance and other ancillary relief. The procedure and the pleadings filed would have been correct had this been for a marriage registered in terms of either the Marriage Act [*Chapter 5:11*] or the Customary Marriages Act [*Chapter 5:07*].

The plaintiff's legal practitioners filed Form 30A summons as specified in order 35 (Matrimonial Causes) Rule 269A. The procedure set out in that order is specific to registered marriages and in this regard, it was not proper to use Form 30A summons. Section 3(1) (a) of the Customary Marriages Act (*supra*) is clear that a marriage is not valid unless solemnized. The act gives limited recognition to an unregistered customary law marriage by recognising it for purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of children of such marriage. ¹

An unregistered customary law union (sometimes confusingly referred to as a marriage) is also recognised for the following purposes:

- a. A claim for adultery by a man who is in an unregistered customary law union against the man who engages in an adulterous relationship with his customary law wife (See *Carmichael v Moyo*)²

¹ Section 3(5).

² 1994(2)ZLR 176

- b. A claim for loss of support by a widower arising from the death of her customary law husband – See *Zimnat Insurance Co Ltd v Chawanda* 1990(3)ZLR 143(S)
- c. A claim by a customary law wife or husband for maintenance against the other (See section 6(3) (a) of the Maintenance Act [*Chapter 5:09*]).
- d. The right of a customary law wife or husband to inherit from each other’s estates even if their customary law marriage is not solemnised (See section 68(3) of the Administration of Estates Act [*Chapter 6:01*]).

There is a plethora of decisions on the sharing of property in unregistered customary law unions that ought to guide legal practitioners who wish to file such claims before the courts – see *Chapeyama v Matende and Anor*³; *Chivise v Dimbwi*⁴*Feremba v Matika*⁵; *Mandava v Chasweka*⁶; *Matibiri v Kumire*⁷; *Mtuda v Ndudzo*⁸; *Jengwa v Jengwa*⁹; *Marange v Chiroodza*¹⁰; *Mabuto v Bhila*¹¹ and *Ntini v Masuku*.¹²

The Matrimonial Causes Act [*Chapter 5:13*] does not apply to an unregistered customary law union due to the definition in s 2 of *an action for divorce, judicial separation or nullity of marriage; appropriate court and marriage*. Although the High Court has inherent jurisdiction, it was not appropriate for the plaintiff to bring an action seeking an order for dissolution of an unregistered customary law union as if it is a marriage. As aptly stated by MAKARAU JP (as she then was in *Mandava v Chasweka*¹³,

“It is still part of our law that unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act [*Chapter 5.13*]. Consequently, parties to such unions cannot be divorced by the courts and their joint estate cannot be distributed in terms of the divorce of this country. Trial magistrates who deal with the estates of parties to an unregistered customary union tend to fall into three errors. Firstly, they

³ 2000(2) ZLR 357

⁴ 2004(1) ZLR 12(H)

⁵ 2007(1) ZLR 337

⁶ 2008(1)ZLR 275

⁷ 2000(1) ZLR 492

⁸ 2000(1) ZLR 710 (H)

⁹ 1999 (2) ZLR 121 (H)

¹⁰ 2002(2) ZLR 171 (H)

¹¹ 2005(2) ZLR 257

¹² 2003(1) ZLR 638(H)

¹³ 2008(1)ZLR 275

tend to proceed to deal with unregistered unions as if they are registered. Secondly, they fail to avert to the choice of law provisions of our law and finally they tend to forget their monetary jurisdictional limit when distributing joint estates at general law”.

Although this was in relation to an appeal from the Magistrates Court decision, it is pertinent to note that the legal principles from that decision are that:

- (1) a customary law union is not a marriage
- (2) parties to such a union cannot be divorced by the courts
- (3) the Matrimonial Causes Act cannot be used to distribute their estate and
- (4) a choice of law process has to be pleaded to establish a cause of action.

The plaintiff sought to plead a cause of action much later in the declaration (in paragraphs 13 and 14) and yet this was supposed to be the main hurdle to overcome first-which system of law applies-customary or general law given the fact that customary law has no remedy and that the courts have applied judicial activism to deal with the *lacuna* especially to assist female litigants in such situations. This can only be done through invoking a choice of law process. From the decisions a pattern emerges on how to plead properly as follows:

- a. The parties must be in an unregistered customary law union. This may even be contested – See *Moyo v Chidumo*¹⁴ where the existence of the union was contested successfully. Certain customary law rites also have to be performed for an unregistered customary law union to be said to have come into existence.
- b. That the union has been terminated (this may also be contested) - See *Chikavanga v Kuyeri and Anor*¹⁵ where evidence on the termination formed a substantial part of the case. Section 16(1) (d) of the Customary Law and Local Courts Act [*Chapter 7:05*] gives jurisdiction to a community court presided over by a Chief to adjudicate upon marital relationships which though recognised by customary law have not been solemnised in terms of the Customary Marriages Act (*supra*). This means that such courts can adjudicate on the customary law rites regarding termination of a customary law union but this procedure is seldom used by parties in unregistered customary law unions- see *Pasipanodya v Mushoriwa*¹⁶ where the Supreme Court held that: “...a

¹⁴ HB-42-13

¹⁵ HH-319-12

¹⁶ 1997(2) ZLR (SC) at page 184 F

marriage under an unregistered customary law can be dissolved under customary law either by giving the wife 'gupuro' or before a customary law court."

- c. Advert to the choice of law rule in terms of Section 3 of the Customary Law and Local Courts Act (*supra*) to lay a foundation for the application of general law as opposed to customary law. ROBINSON J in *Mashingaidze v Mashingaidze*¹⁷ aptly stated as follows, "*On the merits, the application is ill-founded in that it seeks to apply a general law concept, namely the concept of a tacit universal partnership, to an unregistered customary law union, which has come to an end, without attempting to lay any foundation for applying general law to the facts of this case..*" As a result, he dismissed the application in which the applicant sought an order on the basis of a tacit universal partnership, awarding her a one-half share of all assets, movable and immovable, which she and the respondent had acquired during the subsistence of the union.
- d. After overcoming the hurdle in C above- state whether the claim is based on unjust enrichment; joint ownership or tacit universal partnerships, principles that have been used by the courts to share property acquired during the existence of an unregistered customary law union, i.e. pleading a recognised cause of action- See *Chivise v Dimbwi* (*supra*). It is pertinent to note that even when a litigant lays the foundation for using any of the three principles, they still have to prove their claim- see *Matibiri v Kumire* (*supra*) in which the plaintiff's claim based on a universal partnership was dismissed. Where the elements of a tacit universal partnership have been established (and indeed also unjust enrichment or joint ownership), useful guidance may be found in section 7 of the Matrimonial Causes Act (*supra*) in considering the division of the matrimonial property- see *Chapeyama v Matende and Anor* (*supra*). The Supreme Court however was quick to caution that, "*But there is a clear distinction between applying the provisions of the section as a matter of law (which would be incorrect) and using them as a guide when applying the common law principles*".¹⁸

Had the plaintiff's legal practitioners used ordinary summons, pleaded their client's case as outlined above and complied with all other procedural issues, the relief sought would

¹⁷ 1995(1)ZLR 219(H)

¹⁸ At page 363 D and E

have been granted. Given the confusion surrounding this aspect of family law, I join the clarion call that has been made in other decisions for law reform on the marriage framework in Zimbabwe. Organizations such as WLSA¹⁹ and ZWLA²⁰ have worked tirelessly to show the many problems caused by the non-recognition of unregistered customary law unions and have proffered suggestions on law reform. The Law Development Commission also produced an inquiry paper on the same issue²¹. In *Mashingaidze v Mugomba* ²²(*supra*) GWAUNZA J (as she was then) on p 21 of the cyclostyled judgement stated as follows:

“However, while I support the view that a proven unregistered customary union should be treated like any other marriage when it comes to dissolution and the division of assets jointly acquired by the parties during the subsistence, such view is currently not supported by the law. All that can be said is that time has surely come to actively consider reviewing the situation especially in the light of the increasing and not inconsiderable recognition being extended to unregistered customary law unions.”

Without law reform, litigants will continue to be short changed by legal practitioners who approach such cases as if they are registered marriages.

The plaintiff’s summons and declaration are flawed and in the result, it is ordered as follows:

1. The matter be and is hereby struck off the roll.
2. There shall be no order as to costs.

T. Kadhau and Associates, plaintiff’s legal practitioners

¹⁹ Women and Law In Southern Africa Research and Education Trust

²⁰ Zimbabwe Women Lawyers Association

²¹ See inquiry paper of 2002 titled, “Division of property on dissolution of unregistered customary unions.”