

ANNA MAWARE
versus
EMMANUEL CHIWARE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 29 & 30 October 2018; 7 January 2019

Civil trial

Mrs *S. Moffatt*, for the plaintiff
The defendant in person

MAFUSIRE J:

- [1] For 31 years the plaintiff and the defendant lived together as husband and wife in an unregistered customary law union (“*the union*”). During the subsistence of the union the parties acquired a sizeable number of assets, both movable and immovable. The plaintiff said they pooled their resources and acquired those assets jointly. The defendant denied there was any such pooling of resources, and said that each of them acquired their own assets separately. He further said on the dissolution of the union the plaintiff took the bulk of such items as she herself had acquired.
- [2] The trial before me was the plaintiff’s claim for a redistribution of some of the assets acquired during the subsistence of the union. The claim was based on unjust enrichment. In the summons she claimed a lot more property. However, at the pre-trial conference, evidently with the direction and guidance of my Brother Mawadze J who presided over it, the parties reached agreement on the distribution of some of the assets that originally were in contention. The agreement was this:
- Of the 10 goats, each party to get 5 each;
 - Of the building materials, plaintiff to get 30 asbestos sheets; 6 window frames and 6 door frames, and the defendant to get the remainder (not specified), (originally the plaintiff claimed 20 asbestos sheets; 4 door frames and 3 window frames);

- Of the household goods and effects, plaintiff to get a 4-piece lounge suite; 1 table; 3 chairs; 4 blankets; 7 pots, water tins, dishes, plates, 10 chickens; 5 turkeys and 1 display unit.

[3] In passing, I make the comment that for a whole machinery of justice to be called upon to sit in judgment over pots, plates, chickens and turkeys, items over which the parties reasonably ought to have agreed between themselves and their legal practitioners, betrayed unnecessary stubbornness and vindictiveness.

[4] What remained for trial were these issues:

- How many cattle were there? Plaintiff said 30. Defendant said 14. Was the plaintiff entitled to a share of the cattle? Plaintiff said yes, and wanted 15, but would go down to 10 if it was shown they were only 14. Defendant said plaintiff was not entitled to any cattle, but was willing to donate to her 1 cattle *ex gratia*.
- How should the irrigation equipment, comprising a “*Jojo*” water tank and equipment installed at the former “matrimonial” home in rural Masvingo be redistributed? Plaintiff placed on it a value of \$10 000 and claimed half of that. Defendant said the whole equipment, comprising the tank itself (\$500); solar pump, panels and stands (\$2 800); pipes; sundries and labour, all cost \$4 000 to install. He said he was willing to refund plaintiff no more than \$1 000 which was her direct contribution.
- Were there 4 beds and 2 mattresses? How were these to be shared? Plaintiff said there were 4 beds and 2 mattresses and that she was entitled to 2 beds and 1 mattress. Defendant said there were no more beds for redistribution as he had donated one to a daughter, taken another to a town house and that none of those beds had any mattresses. Nonetheless, he was willing to offer the plaintiff 1 bed.
- Was an immovable property known as Stand 6681 Victoria Ranch, Masvingo that the plaintiff had been purchasing from some housing co-operative still available to her? Plaintiff said it had been re-possessed for failure to pay the instalments. Defendant said it was still registered in the name of the Plaintiff and was hers. Although none of the parties was laying claim to it, the defendant wanted it taken into account in the redistribution matrix.
- Should the immovable property known as Stand 19691 Chipembwe Street, Rujeko C, Masvingo (“*the Rujeko house*”), registered in the name of the defendant, be awarded to the plaintiff in its entirety, or shared? The plaintiff claimed it all on the basis that she had also contributed to its acquisition and development and that the defendant had been awarded their former “matrimonial” rural home which had been fully developed. Defendant denied plaintiff was at all entitled to the Rujeko house or any share of it given that she had not in any way contributed to its acquisition or development, except for a once-off supervision of the offloading and counting of bricks, a task for which he would be willing to make an *ex gratia* payment of \$500 (five hundred dollars). Of the

rural home, the defendant said the plaintiff could not possibly award him a communal lands property because it is State land, and that she had made no contribution to its development. Furthermore, the plaintiff had secretly acquired an immovable property of her own, known as Stand 3238 Victoria Ranch, which she had concealed from the pool of the assets to be re-distributed.

[5] The parties approached the case from various angles to justify their individual stances. These included the constitutional provisions; the general law of the land; their direct or indirect contributions; the law of equity as well as their treatment of each other during the 31 years of their union.

[6] In essence, the plaintiff said at first she was unemployed. But eventually she had improved herself by acquiring secondary and tertiary education, thanks to the financial assistance given her by her parents and siblings. She had eventually qualified as a school teacher. She made direct and indirect contribution to the acquisition and development of their various assets. With the irrigation equipment in particular, she had given the defendant some money towards the drilling of a borehole. During the subsistence of the union she was expending all her income towards the running of the household in food, school fees and other necessities. Above all, she was cooking for the family and the builders during the construction of the rural home. She also looked after the cattle and other livestock in times when there were no herdsman. She said the law of the land recognised such contribution in the re-distribution of assets in the event of dissolution of an unregistered customary law union. She claimed the defendant was abusive, at times violent and that he was so stingy that he would count the number of slices of bread the family should consume.

[7] In counter, the defendant said he was a very hard working person. He said even as he was still in secondary school he had managed to acquire some cattle of his own. He said the education and employment that the plaintiff was now flaunting was due to his singular effort. Not only had he conceived the idea that she should improve on her education after she had failed secondary school, but also that he had encouraged her to pursue further studies which he himself proceeded to sponsor. The defendant said the plaintiff kept her money to herself except on the one instance that she had given him an amount towards the irrigation equipment. His family was self-sufficient in food and

other necessities, thanks to his industry and prudent budgeting. He always employed herdsmen for the livestock. The plaintiff continuously complained of ill-health which forced him to employ domestic aid.

- [8] The defendant got his nephew, Pardon Chiware, and his (defendant's) sister, Vinegar Chiware, to testify in support of the narrative that he was a very hardworking person. They said of the cattle in his kraal and on the stock card, only 14 belonged to him . The rest belonged to other people, like his deceased mother and one of his deceased nephews.
- [9] I have considered it largely unhelpful, and even futile, to try and recall the parties' union of 31 years' duration, place it under a legal microscope and scrutinise who earned what salary, who paid for what, who had been the more hardworking, and the like. Thirty one years is by all accounts a very long time. At times during trial there were some gratuitous attempts by the parties to interest me with who had wronged who and in what manner; who had caused the breakup of the union and, in some cases they both hinted at episodes of unfaithfulness towards each other.
- [10] Redistribution of assets in a matter like this is not a matter of metaphysics. A plaintiff cannot be required to establish with some mathematical precision the causal link between his or her contribution, in cash or kind, to the acquisition of the assets and their subsequent appreciation or depreciation in value. After all is said and done the matter calls for a sensible retrospective analysis of what would probably have been the contribution of each party, what would be expected to occur in the ordinary course of human affairs.
- [11] I have considered the evidence placed before me in its totality. I have discounted the parties' emotional hyperbole evident from the breakup of the union. The parties must appreciate that divorce or the breakup of any conjugal relationship is costly. It is a drain on resources. It is a drain on emotions. It strains social relations. It costs money. Even though the dissolution might have been inevitable and probably the only reasonable way out of an impossible situation, it was nonetheless retrogressive. The parties were destroying what they had built over the years. It is therefore naïve for the one to think

that in parting ways they could get all what they want or what they perceive to belong to them, and for the other to think that they can retain all what they claim belongs to them.

[12] My decision in this matter is largely common sense. It is a value judgment. The parties invested their lives, their emotions, energy and resources in a conjugal relationship that lasted 31 years. By African custom, they were duly married. The relationship produced three children, all of them now grown up. The defendant thinks the plaintiff is being greedy and wants to reap where she did not sow. He insists all the assets in contention were acquired by him alone. He discounts almost to nothing the plaintiff's contribution during all those years, though at times he was forced to make some concessions.

[13] Both parties are, and have been school teachers. Admittedly, as headmaster, and one in formal employment for a longer period, the defendant's earnings and contribution to the acquisition of the assets were greater than those of the plaintiff. But beyond these general observations I have avoided getting bogged down in the nitty gritty of how each asset was acquired. The plaintiff is definitely entitled to more than what she has already got and what the defendant is offering. As to how much that is will be my value judgment as explained below.

[14] In the final analysis, my award is as follows

[i] *Cattle*

They were 30 when the plaintiff left. They are now 28. This is clear from the plaintiff's evidence and the stock card, marked exhibit 8. The plaintiff has failed to prove all 28 belong to the defendant. I am satisfied from the defendant's evidence that only 14 belong to him. Of these, plaintiff wants 10. That is too much. The defendant offers 1. That is too little. Given her efforts in generally looking after the union's household and tending to all aspects including livestock, and given the benefit that she herself must have derived from the livestock, like drought power and milk, I consider a fair award to the plaintiff to be 4 cattle, or their monetary value.

[ii] *Beds and mattresses*

I accept the plaintiff's evidence that there were an extra 4 beds and 2 mattresses when she left. The defendant said he donated one of the beds to their daughter. That was his generosity, but should obviously not be at the plaintiff's cost. I have not accepted that the beds had no mattresses. I accept the plaintiff's evidence that these were items that the family had been using. Therefore, the plaintiff should be entitled to 2 beds and 1 mattress, or their monetary values.

[iii] *Irrigation equipment*

The defendant demonstrably tried to downplay the value of the irrigation equipment. This probably stemmed from the plaintiff's persistent reference to the "Jojo" tank which cost only \$500. But it was clear the plaintiff was claiming half the value of the irrigation equipment and system as a whole. The plaintiff claimed \$5 000. The defendant offered \$1 000. Obviously with depreciation and appreciation the replacement value should be far different now from the installation cost. I consider the plaintiff should be entitled to one-third ($\frac{1}{3}$) of the value of the equipment at the time of this judgment.

[iv] *Stand 19691 Chipembwe Street, Rujeko C, Masvingo*

I reject the plaintiff's claim for the whole house. But I also reject the defendant's offer of a paltry \$500. I accept the plaintiff's evidence that Stand 6681 Victoria Ranch was repossessed and therefore cannot be taken into account in the redistribution matrix. I accept the defendant's evidence that the plaintiff acquired the other property, Stand 3238 Victoria Ranch during the subsistence of the union, despite the fact that the formal allocation agreement, exhibit 3, is post the breakup of the union. The agreement is dated 3 May 2017. The union broke up in April 2017.

I also take cognisance of the fact that apart from the fully developed rural homestead that the defendant retains, he also has another property, Stand 6725 Victoria Ranch. There were allegations by the defendant that the plaintiff did not refute that she also has a counter bottle in the rural areas. So taking all these factors into account I consider that a fair award to the plaintiff in respect of the Rujeko house is one third ($\frac{1}{3}$) of its value at the time of judgment.

[15] My judgment has to be efficacious. The defendant must deliver or pay within defined time limits. But he must know what to deliver or how much to pay. Unless the parties are able to reach agreement by themselves, it is necessary for the court to fix these. But there is no information to guide me. I have no evidence of the defendant's capacity. But that should not be a deterrence to a judgment that is effectual.

[16] Therefore, I direct that unless within thirty (30) days of the date of this judgment the defendant complies by delivering to the plaintiff the 4 head of cattle; the 2 beds and 1 mattress, and paying her the stipulated values of the irrigation equipment and the Rujeko house as shall have been agreed upon by the parties within the same time frame, the plaintiff shall be free to approach the Registrar of this court, or her Deputy, to appoint evaluators for the assessment of the values of the awards due to her in terms of this judgment, whereafter the defendant shall comply within a further sixty (60) days from the date the evaluation report is made available.

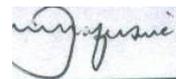
[17] Both parties claimed costs of suit, the defendant on an attorney and client scale. The Plaintiff has largely been successful, but only to the extent of roughly a third of her original claim. Therefore, she should be entitled to a third of her costs.

[18] In the final analysis the operative part of this judgment reads:

- i) Judgment be and is hereby entered for the plaintiff as indicated below.
- ii) The following assets are awarded to the plaintiff:
 - four (4) head of cattle;
 - two (2) beds;
 - one (1) mattress;
 - one-third ($\frac{1}{3}$) of the value of the irrigation equipment installed at the defendant's rural homestead at Nemarundwi, Zimuto, Masvingo;

- one-third ($\frac{1}{3}$) of the value of the immovable property situate Stand 19691 Chipembwe Street, Rujeko C, Masvingo.
- iii) Unless within thirty (30) days of the date of this judgment the defendant delivers to the plaintiff the awards aforesaid, or pays the values thereof in the ratios stipulated as shall have been agreed upon by the parties within the same time frame, the plaintiff may approach the Registrar of this court, or her Deputy, to appoint evaluators for the assessment of the values, whereafter the defendant shall pay within a further sixty (60) days from the date the evaluation report is made available.
- iv) The defendant shall pay one-third ($\frac{1}{3}$) of the plaintiff's costs of suit.

7 January 2019



Legal Resources Foundation, plaintiff's legal practitioners