

PERPERTUA NYAMUNOKORA
versus
CHARLES MAKOSI
and
SMART EXPRESS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 29, March and 29 April 2021

Civil Trial

B. N. Mungure, for the Plaintiff
V. Chinzamba, for the first Defendant
C. Ndlovu, for the second Defendant.

MUZENDA J: On 12 July 2019 the plaintiff caused summons to be issued against the first defendant, her Unregistered Customary Union husband claiming an assortment of household property, motor vehicle, ownership of 13 Longmore Crescent, Palmerstone, Mutare, half of shares in Smart Express (Private) Limited bus company consisting of 3 buses, an amount of US\$175 000. She claimed in the alternative 50 percent share of the estate and costs of suit.

On 22 July 2019 first defendant entered appearance to defend the action. On 17 February 2020 Smart Express (Private) Limited filed a Chamber Application for joinder in terms of order 13 r 87 (2)(b). Plaintiff and defendant consented to the Chamber Application for joinder and Smart Express (Pvt) Ltd) became the second defendant.

Background

Plaintiff and first defendant entered into an unregistered customary union in 2009 and parted ways in 2019. In 2016 Smart Express (Private) Limited was formed (hereinafter referred to as a “bus company”) and it is common cause that the first defendant and his mother, Aruma Mkwamba are the two shareholders, each having (1) share. The bus company’s registered office is given as 13 Longmore Crescent, Palmerstone, Mutare. The bus company used to have 10 buses, but currently only six (6) are operational.

During the period of the union two immovable properties were acquired, 13 Longmore Crescent, Palmerstone and 7594 Rhodesview, Mutare. Both houses are registered in first defendant's name. The parties also acquired various motor vehicles as well as household movables.

The plaintiff claims that she directly and indirectly contributed to the acquisition of the property, movables, the 2 houses and the bus company. Plaintiff bases her claim on unjust enrichment contending that if first defendant is allowed to take all the property, such enrichment is unjust to her because she laboured for such property's acquisition. In the *alternative* her claim is premised upon an implied term of universal tacit partnership, both intended to use the property together. She thus claims for the redistribution of the property acquired during the subsistence of the union.

In addition to all the household property at 13 Longmore Crescent, Palmertstone, the plaintiff claims a Toyota Revo, 3 buses, sole ownership of 13 Longmore Crescent, Cash payment of us \$175 000. In the *alternative* she claims 50 percent of the entire estate and costs of suit.

First Defendant's Plea

On 20 August 2019. First defendant filed its plea. First defendant avers that all the property was acquired through his own efforts and resources, except a few insignificant pieces, where the plaintiff contributed. All the cars and houses are registered in first defendant's sole name.

First defendant claims that he never agreed to form a bus company with the plaintiff, otherwise the plaintiff would have been a director or a shareholder in the bus company, he added that plaintiff was not formally or informally employed before. First defendant established a shop for her. Thus to the first defendant most of the cars and the houses were acquired without the contribution of the plaintiff. First defendant states in his pleas that plaintiff's contribution has been indirect and insignificant. To the first defendant plaintiff seeks to enrich herself and the proposed sharing will not be equitable given the fact first defendant has other wives. First defendant states that purely out of gratuity he would offer plaintiff 10 percent of the value of 13 Longmore Crescent, a Toyota Quantum, all household property at 13 Longmore and business and stock in trade at 10 Olympic Arcade, Mutare.

Second Defendant's Plea.

After the joinder of second defendant, the second defendant filed its plea on 12 March 2020. Second defendant contends that the Toyota Revo, belongs to the bus company. The same applies to the office furniture. Plaintiff was never involved in the formation of second defendant. All the buses are owned by the second defendant. Second defendant went on to add all the bus company assets belong to the company and not first defendant and denies that plaintiff either directly or indirectly contributed towards the acquisition of the assets. The second defendant thus contends that the plaintiff has no basis for claiming a share of the property which belongs to the company. It is the prayer of second defendant that plaintiff's claim as regards second defendant's property be dismissed.

Issues of Trial.

On 14 July 2020, all the parties agreed that the following constituted issues for determination by the trial court,

- 1. Whether or not there was a tacit universal partnership between plaintiff and first defendant. ?*
- 2. What properties and business were acquired during the subsistence of the unregistered customary law union between the plaintiff and first defendant?*
- 3. Whether the plaintiff's claims are sustainable as against the defendants and if so what will be fair just and reasonable sharing of the properties*

The onus was to start on the plaintiff.

Second Defendant's Exception

On 29 March 2021, the date of hearing, Mr C. Ndhlovu applied to pursue second defendant's exception. I ruled that the application was not properly before the court and ordered that the matter be heard on merits. I indicated that my reasons would follow in the main judgement, these are they:

On 12 March 2020 second defendant caused a Notice of intention to except to the plaintiff's claim to be issued by the Deputy Registrar where he impugned the poor quality of pleadings by the plaintiff. Second defendant contended that plaintiff did not properly plead in her papers an acceptable and recognised cause of action, her papers do not show the basis upon which the plaintiff's case was premised. As such it was the contention of second defendant that plaintiff's claim was bad at law and excipiable. Second defendant prayed that plaintiff's case be dismissed with costs.

The second defendant went on to prepare heads of arguments and served copies on the other parties, however on the same date it filed its exception, second defendant filed its plea, that is on 12 March. Plaintiff responded by filing its response to the exception which she subsequently withdrew. However her legal practitioners proceeded to file heads of argument about the exception. The matter developed further and flowed up to the pre-trial conference and was eventually referred to trial. The second defendant did not apply for a setdown date for the exception to be argued.

Order 21 of the High Court Rules, 1971 covers exceptions as an alternative to pleading. R 138 provides for an application for a special plea, exception or where such an application has been filed, what the parties ought to do. R 137 (b) further provides that failing to consent either party may within a further period of four (4) days set the matter down for hearing, within a stipulated period of four days, plead over to the merits and the special plea shall not be set down for hearing before the trial.

My understanding of Order 21 is that a party excepting to the pleading must file the exception serve it upon the other parties and, then, cause the exception to be set down for hearing on opposed roll where the plaintiff opposes the exception as in this case. If the exception succeeds then it disposes of the matter and that will be the end of the story¹. An exception is a pleading in which a party states his objection to the content of a pleading of the opposed party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain a specific defence relied upon.

In this matter second defendant pleaded over and went on to agree on joint pre-trial conference minute which outlined issues for trial, which issues are outlined herein above and coincidentally the exception does not form part of issues for trial. In my view the exception should have been set down well before the pre-trial conference and disposed of. It was not proper for second defendant to seek to argue the exception on the date of hearing. It is on this basis that I dismissed the application to deal with the exception on the date of trial and allowed the parties to be heard on the merits.

Plaintiff's case.

It is necessary to look at the evidence led on behalf of the plaintiff by herself and on her behalf by the witnesses. Perpetual Tawanda Nyamunokora gave evidence and told the court the following. She had been staying with first defendant since 2009 but separated in 2019.

¹ See *Webb and others v Local Authorities Pension Fund And Another* 2017 (2) ZLR 16 CH, *Blooming Lilly Investments (Private) Limited and Another v Ontage Resources (Private) Limited and 3 Others*. HH1/21

There are three minor children born out of the union. She owns a shop, situated at Olympic Arcade, where she is self-employed.

During the union, the parties acquired a house and then refurbished and extended it, that is 13 Longmore Crescent, Palmerstone, Mutare, they then acquired an undeveloped stand, 7594 Rhodesview, Mutare and fully developed it to completion. In 2016 she told the court that she participated in the formation of Smart Express (Private) Limited, a bus company. All the mentioned properties and company do not bear her name on the title deeds nor company documents. On the 13 Longmore Crescent property she told the court she contributed directly with an amount of \$23 000. As regards the company of buses, she told the court that, she provided moral support and labour for the benefit of company. Her contribution towards 7594 Rhodesview she told the court she contributed \$3 000 towards the purchase of the undeveloped stand, she also contributed by going both to Harare and other outlets to buy building materials. In addition she cooked for the manpower on site and supervised the project. On all other household assets she also contributed towards their acquisition as well as financially. She felt that she is entitled to the Revo Toyota motor vehicle. She claims sole ownership of 13 Longmore Crescent Palmerstone and to her 10 percent of that property value is not fair given the amount of contribution she sacrificed during the union. She denied that she was just but college student when she married first defendant but that she was already in the business of buying and selling. She added that she realised a substantial financial prowess from Olympic Arcade which facilitated the betterment of the family union. According to her, her claim was just.

Plaintiff called two witnesses Tariro Nyapokoto and Hellen Mashingaidze. The two confirmed the contribution of plaintiff through labour and supervision during the construction of 7594 Rhodesview. They told the court that on occasions they would separately accompany plaintiff to go and inspect, cook or supervise the work in progress at 7594 Rhodesview.

Plaintiff produced quotations relating to her work at second defendant, employee contracts, hiring contracts between second defendant and third parties. She also produced affidavits relating to 7594's acquisition. The production was by consent of both defendants. Plaintiff then closed her case.

First Defendant's Case

Mr Charles Makosi (first defendant) gave evidence. He bought No. 26 Sussex Yeovil, in 2006. He took occupation of that house. A problem arose pertaining to that property which

led to the cancellation of the agreement of sale. He managed to recoup part of the money. He disposed of his two cars so that he could purchase 13 Longmore Crescent, Palmerstone. The total purchase price was \$50 000. He denied that the plaintiff brought in \$20 000 when he married her. He further disputed that plaintiff contributed \$23 000 towards the purchase of 13 Longmore house.

As regards 7594 Rhodesview property, first defendant denied that plaintiff meaningfully contributed towards its purchase and development. He added that given the meagre income accruing to plaintiff, she did not substantially and financially contribute to its value addition. He however agreed that on occasions he would send her to purchase building materials and that plaintiff would visit the site to check on the builders. In principle as for both houses are concerned, he told the court that he solely acquired both, made extension to 13 Longmore and fully developed 7594 Rhodesview.

No 9 Olympic Arcade was acquired and registered in both parties names. In addition to the plaintiff, first defendant has five (5) other wives, though he could not remember the exact addresses where each one of them reside, he knows how to get there with the exception of the first wife, Margreth Mutsingo, who resides at 7594 Rhodesview.

First defendant denied that he was in tacit universal partnership with plaintiff over Smart Express (Private) Limited (the second defendant) second defendant belonged to two shareholders, first defendant and his mother. Plaintiff did not contribute anything when second defendant was formed. When plaintiff did work at second defendant first defendant would not be present and when he returned he would pay plaintiff allowances which were not wages nor salaries. He admitted to the existence of receipts contracts of employment and vouchers produced by the plaintiff but added that all that work would be done ordinarily by a way but not for a fee. In effect first defendant vehemently denied that plaintiff had anything to do with second defendant, nor to claim anything from it.

On the aspect of plaintiff's claim of \$175 000 first defendant denied that he had such an amount of money. He however admitted that he had \$23 000 in the safe which belonged to second defendant.

First defendant denied that he was a shareholder of second defendant and told the court that his position was that of an employee. The Toyota Revo was second defendant's property which he was given to use whilst on duty. He went on to put the current market value of 13 Longmore house at US\$ 100 000.

Under cross examination by Mr *Ndlovu*, first defendant told the court that his mother had her own money which was used to acquire the business belonging to second defendant. Initially the mother wanted to buy a house but later agreed to invest the money on buses, she would buy a house at a later stage. As a director of second defendant he would attend to those buses in need of attention, allocate duties to the employees, insure buses, procure permits and acquire new buses. In principle he admitted that he is effectively the Managing Director of second defendant. He added that his mother sometimes intercedes on behalf of the company.

During cross examination by Mr *Mungure* first defendant stated that his mother is a shareholder of the company. First defendant realises between US\$1 000 and US\$1 500 per month as an allowance from second defendant. His mother gets between US\$800 to US\$1 000 per month. He does not know how many shares he owns in second defendant. Aruma Makwamba, his mother is the sole owner of the company, second defendant.

On the \$23 000 he had in the safe, first defendant told the court plaintiff took it away. On the allowances she periodically paid plaintiff the amounts varied between \$300 to \$500 though he did not have any written document to prove that. He also admitted that though plaintiff performed duties ordinarily performed by an administrator, someone else performed that work. He further elaborated under cross examination that he got a refund of US\$25 000 from the cancelled sale of 26 Sussex house, got a total of US\$30 000 from the sale of his 2 cars and paid US\$50 000 towards the purchase of 13 Longmore Crescent, the balance of US\$5 000 went towards transfer costs. He bought 7594 Rhodesview stand from gold resales. After all had been said first defendant states that the offer of 10 per cent of the value of 13 Longmore Crescent was fair to him. The first defendant then closed his case.

Second Defendant's Case

First defendant's mother Mrs Aruma Makwamba testified on behalf of the second defendant. She told the court that she owns the second defendant. She got the money from her late husband. The idea of buying buses originated from her late husband. She told the court further that she did not buy the intended house. To her, first defendant did most of the papers that led to the formation of second defendant. She denied that plaintiff paid duty towards the importation of the second defendant's first bus. Instead first defendant played a pivotal role in settling the import duty. According to her testimony first defendant made an arrangement with a third party to pay duty and then use the bus for a period of six months to recover the money

where after he would release the bus to second defendant. The rest of the buses multiplied from the first.

She reiterated that she owns the business, although she does nothing in the company. Under cross-examination by first defendant's counsel, she told the court that when plaintiff married first defendant she was a college student and first defendant was already married to Cain's mother. At the time of the union, first defendant had a fleet of motor vehicles. Both plaintiff and first defendant were at Africa University. When plaintiff did work at second defendant, she would be paid some money, though she could not say how much and at what stage.

During cross-examination by the plaintiff's counsel, she told the court that it was first defendant who negotiated with a third party about duty for the first bus, not her. She does not know where the first bus was purchased nor does she know for how much. The same response was repeated for the rest of the buses subsequently purchased. She is not on pay-roll of the second defendant, she uses a bank card to draw money from the bank. She also stated that plaintiff was not entitled to any asset of second defendant, whenever she performed any work at second defendant, first defendant would pay her.

During clarification by the court, the witness told the court that first defendant signs at the bank, she did not recall which bank second defendant uses. She uses a Toyota Raum as her official car and generally does not want to smell diesel. Second defendant closed its case.

Analysis of Evidence

I have deliberately attempted to cover each witness' evidence in order to thoroughly analyse what each of them has said in court.

The plaintiff emphasised at length on what she did after the union, basically underlying the importance of a union. What is central to her was that the union lasted 10 years and she directly and indirectly contributed towards the acquisition of all the assets which are subject to her claim. She does not deny that she was at Mutare Teacher's College when she customarily married first defendant. She stated that she was in the business of buying and selling and had \$20 000 when she married first defendant. As regards 13 Longmore Crescent, she did not prove where she got \$20 000 and no bank statements, record of sales or loan or books of accounts were tendered to authenticate the existence and source of the \$20 000 or any other income that would enable her to accumulate \$20 000 which she eventually ploughed in towards the purchase of that property. I am satisfied that as far as 13 Longmore Crescent is concerned, the

plaintiff has failed to prove on a balance of probabilities direct monetary contribution towards its purchase. Her contribution is indirect by association and being first defendant's wife. On the aspect of 13 Longmore's extension and renovation, the plaintiff did not pinpoint how much she directly contributed, there is absolutely dearth of evidence on that fact. Even the pleadings are silent as to how much she contributed directly. However she was adamant about her direct contribution. In addition to being a housewife, she ran around buying building materials supervising builders and looking after Olympic Shop. I cannot rule out that some of the building materials might have been purchased with money from the family shop, but the onus was on the plaintiff to plead that and produce evidence to show as to how much she poured in towards the extension of the property. She again failed to do so and I conclude that the plaintiff's substantial contribution towards the extension and renovation of 13 Longmore Crescent was indirect.

As regards 7594 Rhodesview, plaintiff produced two affidavits relating to \$3 000. The payment of \$2 000 alluded to both plaintiff and first defendant. It is not clear even from plaintiff's closing submissions whether she wants the court to take the total payment of \$3 000 as having been paid by her solely or to prove that she pulled her resources together with first defendant to purchase 7594. Further it is not crispy clear whether the \$3 000 came from the Olympic Chop or was personally sourced by the plaintiff. The exhibits were just thrown before the court and were not utilised in advancing plaintiff's cause. I will however conclude that the plaintiff contributed directly and indirectly towards the purchase of stand 7594.

In as far as its construction and development is concerned plaintiff again came short of leading evidence (documentary) as to how much she solely contributed at the exclusion of the first defendant in order to rebut what first defendant has outlined in his defence that he single handedly and with the assistance of fellow wives contributed towards the development of 7594 Rhodesview. Her evidence remains a word of mouth not supported by bank accounts, bank statements, receipts in her name *etcetera*. It was the duty of the plaintiff to place all this information before the court to consolidate her claim. She faltered.

In as far as the development of 7594 is concerned I come to a conclusion that it was again constituted by indirect contribution and partly direct when she ran around to buy materials and visit the site and prepare food for the builders. As far as financial contribution is concerned she might have had some input but not so significant, documents could have been available for scrutiny.

The plaintiff wants a share of second defendant's assets. To her she stated that she agreed with first defendant to form second defendant. The plaintiff could not explain the absence of her name from second defendant's company documents. She did not meaningfully pursue the role she played in the formation of second defendant. She did not produce before the court proof of payment of import duty she allegedly paid towards the acquisition of the first bus. She could not produce any documents of the company where she sat in the meeting of second defendant as a stock holder. What she managed to prove in court was that she performed administrative work for the benefit of the second defendant and she was not paid. She thus directly contributed towards the running of the second defendant. The question is how can she be compensated for doing that? I conclude on facts that in supporting the first defendant's managing of second defendant company the plaintiff directly and indirectly contributed to the running of the second defendant and to its formation, she contribute indirectly as expected of a wife in her situation.

As far as Revo motor vehicle plaintiff did not manage to prove that it personally belonged to the first defendant, it remains that of the second defendant. I will also hasten to add that plaintiff failed to prove the existence of \$175 000 as being the amount of money on her declaration. It is not clear what that amount is for. Is it a pay-out or it was stashed in a safe at the time of separation or it is in lieu of something. The amount is just a figure being claimed, it is not ratified in the declaration to guide both the defendants and the court as to its basis. It is not explained either in the closing submissions, the court is urged to grant the order as per the summons. No evidence exists about \$175 000 and the court is left guessing how that amount was reached at. No assets evaluation was produced before the court and it remains a wonder what \$175 000 represents.

The first defendant's evidence turns more on credibility than documentary. No exhibits were produced. Presumably he did so because no onus lies on him. He however explained how he acquired all the property and most of his evidence was not disputed by the plaintiff. First defendant's challenge was lack of detail as regards his other wives. He professed ignorance of where the other four stay. He managed to talk of only one, the first wife who stays at the 7594 Rhodesview. I am in no doubt that the other four wives are fictitious maybe they are just paramours who have children with the first defendant. The first defendant was also economic on what contribution plaintiff did towards the acquisition of both 13 Longmore Crescent and 7594 Rhodesview. He basically underrated plaintiff's role. The first defendant overrated the role of his mother in second defendant's company. He contradicted himself and

the mother on how the company was formed and he could not explain the discrepancy in court. He could not also explain what he paid the plaintiff when the latter performed office work at second defendant, whether he paid her or if she was paid what the payment was for. These are the adverse aspects of the first defendant.

The evidence of second defendant's witness, in principle did not take second defendant's case anywhere. She totally showed that she is but a person included in first defendant's company for compliance with statutory requirements. In any case her evidence is not very critical to this case. The inclusion of second defendant in this matter is more legal than factual, save to mention that first defendant's mother's evidence exposed first defendant's case than assist him. She does not know how much "her" first bus was bought for, nor does she sign at the bank, literally her role was totally marginalised, she has no control over second defendant. She performed poorly on the witness box and deliberately protected first defendant.

Closing Submissions By Counsel

Mr *Mungure* for the plaintiff submitted that the civil standard of proof is that plaintiff's version

"must carry reasonable degree of probability but not so high as required in a criminal case evidence is that the tribunal can say 'we think it more probable than that' the burden is discharged, but, if the probabilities are equal it is not".²

He went on to outline what he perceives are issues of common cause and concluded that plaintiff immensely contributed towards the acquisition and development of both movable and immovable properties.

Plaintiff's counsel further submitted that the tacit universal partnership was born in 2009, when the union was formed. Plaintiff pulled her income, skill and resources with those of first defendant in order to work as husband and wife. He went on to cite the matter of *Mtuda v Ndudzo*.³

From the shop the couple realised profits which would equip plaintiff to make direct financial contributions in the acquisition of property. Plaintiff's counsel also added that in addition to financial contributions, plaintiff directly and indirectly contributed through supervision. She also contributed by rendering secretarial and administrative work to the second defendant company. Plaintiff was never paid and she performed her role as a wife to

² *Dudner v minister of Pensions* [1947] auer 372. At 374 per LORD DENNING MR

³ 2000 (1) ZLR 716 (H) per GARWE J (as he then was)

the first defendant and as such the plaintiff has satisfied all the requirements of tacit universal partnership and cited the matter of *Eddstein v Eddstein N.O and Ors.*⁴

It was also plaintiff's contention that if the first defendant was married to five other women, the other women's contribution was never brought to the court's attention and were never partners to the matter before the court. Plaintiff urged the court to disregard the position of other wives on the basis that their rights are insubstantial in the circumstances. Due to the duration of the union plaintiff expects something close to parity with the husband, it was further submitted on behalf of the plaintiff.

On the alternative claim of unjust enrichment, plaintiff's counsel submitted that the contribution which impoverishes a woman in an unregistered customary law union has been definitely recognised as not only a tangible contribution but intangible contributions as well.⁵ In this case, plaintiff's counsel went on, plaintiff directly and indirectly contributed to the incorporation and maintenance of second defendant. She risked future impoverishment in the event of divorce, and where she has made a contribution that impoverishes her, and will leave the husband enriched at her expense, an action for unjust enrichment should be extended to her. It would therefore be unjust if the plaintiff does not benefit anything from second defendant given her direct and indirect contribution, it was strongly argued on behalf of the plaintiff. She prayed that her alternative claim succeed as well.

Mr V *Chinzamba* for the first defendant submitted that plaintiff failed to prove that she made meaningful contributions towards the acquisition of the property. During a maintenance enquiry in the magistrates court she had actually provided information to the enquiry that shows that the income was paltry as compared to first defendants and first defendant urged the court to take cognisance of this fact.⁶

First defendant proceeded to cite a number of cases to advance his argument that plaintiff is entitled to a percentage to 13 Longmore Crescent but not sole ownership.⁷ Mr *Chinzamba* then concluded in his submission suggesting that it will be just and equitable if the plaintiff is awarded between 20 percent and 30 percent of the value of No. 13 Longmore

⁴ 1962 (3) SA 15 (A)

⁵ Ntuni v Masuku 2003 (1) ZLR 368 (H) 642 C-F

⁶ See Cabs Twinwire Agencies HB5/2004, and Mhungu v Matindi 1086 (2) ZLR 171.

⁷ Mautsa v Kurebwaseka HH 106/17

Ntuni v Masuku HB 69/04

Ncube v Ndlovu HB 16/04, Ncube v Maglazi HB 77/11

Ncube v Ndudzo *supra*

Crescent Palmerstone Mutare, household goods and the Toyota Quantum and Olympic Arcade shop.

On the other hand and to the *contra*, second defendant's counsel, Mr *Ndlovu*, submitted that the borne of contention as between plaintiff and second defendant is whether plaintiff's contribution or assistance can be interpreted to effectively imply that plaintiff had a share in the growth of second defendant company. Second defendant classifies plaintiff's role as ordinary clerical duties that any employee would effectively perform. Her only qualification, it was averred by second defendant's counsel, was that she was first defendant's wife. As a result it was further submitted by second defendant that plaintiff made insignificant contribution to the exponential growth of second defendant. To the second defendant, plaintiff did not do anything extraordinary.

Second defendant went on to emphasize the ancient importance of legal *persona* of a company and that shareholders do not own company property.⁸ In this case plaintiff did not establish the basis of piercing the corporate veil, it was submitted. Moreso second defendant cannot be said to be a sham company. Second defendant went on to add that the plaintiff has not pleaded nor proven a cause for piercing the corporate veil so as to say that first defendant is the same as second defendant so as to justify her claim of a share of second defendant's assets, otherwise second defendant's buses are protected by the corporate veil. See *Gonye v Gonye* SC 15/09. Second defendant prays that plaintiff's claim as against second defendant be dismissed with costs on a higher scale of legal practitioner-client scale.

The Law

In the matter of *Chapeyama v Matende & Another*⁹ it was held that

“Where, a husband and wife marry under customary law, and the marriage is not registered, customary law, will apply to a dispute arising out of the marriage or its dissolution. It is only possible to bring in the general law concept of a tacit universal partnership if the court lays a foundation for applying such law. Such a foundation had not been clearly articulated.

Further, that the foundation for applying the concept of a tacit universal partnership was provided in s 3 of the Customary Law and Local Courts Act [Chapter 7:05], which provides that unless the justice of the case otherwise requires, customary law applies in any civil case where the parties have expressly agreed that it should apply, or, regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed that it should apply. A general law concept such as tacit universal partnership may be relied on if in the circumstances the application of customary law would have led to injustice. Where the elements of tacit universal partnership have been established, useful guidelines may be found

⁸ Contract Hanhers (Pvt) Ltd v Close Proximity Enterprises (Pvt) Ltd HB 15/17.

⁹ 2000 (2) ZLR 356 (S) PER MUCHECHETERE JA at 356 F–H

in s 7 of the Matrimonial Causes Act [Chapter 5:13] in in considering the division of the matrimonial property”.

In the case of *Mtuda v Ndudzo*¹⁰ the requirements of a tacit universal partnership were crisply spelt out as follows:

- (i) Each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether money, labour or skill.
- (ii) The business should be for joint benefits of the parties.
- (iii) The object of the business should be to make profit.
- (iv) The agreement should be a legitimate one.

In *Matibiri v Kumire*¹¹ it was stated:

“Although there is no specific mention of the need to apply the general law to those cases where customary law was inapplicable, the section provides that customary law shall apply to the specific areas mentioned ‘unless the justice of the case otherwise requires’. In my view, the only logical construction to place on the phrase ‘unless the justice of the case otherwise requires’ is that if the application of customary law does not conduce to the attainment of justice then common law should apply.

This was precisely the case in *Chikosi v Chikosi* (1) 1973 (3) SA 142 (R) and *Chikosi v Chikosi* (2) 1973 (3) SA 145 (R) where it was held in essence that where the justice of the case requires common law principles shall apply..... The phrase ‘unless the justice of the case otherwise requires’ has remained in all Acts passed by Parliament including the current one namely the Customary Law and Local Courts Act [Chapter 7:05] which, as already seen provides for the circumstances in which customary ‘law applies unless the justice of the case otherwise requires’. What emerges is that for the one hundred years during which customary law has co-existed with Roman Dutch law, it has always been provided through legislation that where the customary choice of law rules were found to be inapplicable to the just decision of any matter in controversy, then in that event, resort should be had to common law principle”.

The law on an unjustified enrichment is now settled and in the matter of *Industrial Equity v Walker*¹² the requisites for liability for this action are:

- (a) The defendant must be enriched.
- (b) The plaintiff must have been impoverished by the enrichment of the defendant.
- (c) The enrichment must be unjustified.
- (d) The enrichment must not come within the scope of one of the classical enrichment actions.

¹⁰ Supra

¹¹ 2000 (1) ZLR 492 (H) at 497– 498B per CHATIKOBO J

¹² 1996 (1) ZLR 269 (H) at 270 C–F

- (e) There must be no positive rule of law which refused an action to the impoverished person.

Applying Law To The Facts

In her declaration attached to the summons commencing action, plaintiff and first defendant went into an unregistered customary union in 2009 and the union was dissolved in 2019. It is not clear as to whether proper “divorce” procedure under customary law was done or not. First defendant did not dispute this aspect so I can conclude that first defendant acknowledges and accepts that the union was dissolved. The plaintiff further pleads that customary law is not applicable in this case as it will lead to injustice, as such she contends that general law is applicable. The first defendant did not dispute this aspect. When second defendant later on was joined in the proceedings it did not challenge the choice of law applicable.

Having looked at the pleadings as well as how the parties were living, as well as the nature of the case before me I am satisfied that it will be in the interests of justice if general law is applied in this case. The plaintiff has managed to outline appropriate grounds relating to the choice of the law, more particularly when dealing with tacit universal partnership.

It is prudent in my view to deal with the alternative claim of unjustified enrichment before dealing with tacit universal partnership. The reason for this is if the plaintiff succeeds in the main claim under the auspices of tacit universal partnership, there will be no need to look at the claim in the alternative.

The requirements of unjustified enrichment as outlined in the *Mtuda v Ndudzo supra*, inter alia, spell out that plaintiff must establish on a balance of probabilities that the defendant was enriched and prove in my view the extent of such enrichment. Such enrichment must be at the expense of the plaintiff. In other words the plaintiff must establish the link between the enrichment and her impoverishment. Aligned to this requisite, plaintiff must be able to prove the quantum of damages. It must also be proved by the plaintiff that the enrichment was unjustified. The plaintiff should in addition explicitly prove and establish that the genre of her claim for unjust enrichment is not one that falls under classical enrichment actions and the claim must be a legitimate or legal one.

Plaintiff in her alternative claim wants half (½) share of first defendant’s shares in Smart Express or three buses and cash of US\$ 175 000. She claims alternatively further for 50 percent of the multi estate. Plaintiff in her pleadings did not apply for piercing of the corporate veil of

second defendant. Second defendant is and remain a separate legal entity separate from first defendant. In any case first defendant in terms of second defendant's company documents, holds one share of second defendant. It will be absurd for plaintiff to claim 50 percent of the whole estate well knowing first defendant owns one share of second defendant.

Plaintiff was aware of the legal status of second defendant right from its inception. She is educated and a teacher by profession and capably runs Olympic shop as a businesswoman, she ought to have known the legal consequences of having second defendant registered in other names excluding hers. I am not convinced by the plaintiff that she was impoverished by second defendant at all. The damage of such impoverishment were not pleaded. If there were determinable one would have expected some formula in the computation for example, her net salary per year which she lost whilst enriching the second defendant, the loss to her business whilst she was attending at second defendant's business. The requisites for unjustified enrichment were not exhaustively met by the plaintiff. She mentioned the class of the claim and then failed to prove the basis of such and the quantum, more so when she did not prove that she was a shareholder, or co-director at second defendant and further that's she was virtually at second defendant company all the material times. All that plaintiff managed to prove was that she assisted first defendant, through moral support, secretarial and administratively, as and when she could and when first defendant was out of the office. Can one say that that role entitles plaintiff to 50 percent of the estate? The plaintiff in my view failed to lay out the requisites and the alterative claim based on unjustified enrichment fails and is dismissed.

It is not disputed by both defendants that plaintiff was married to first defendant for a considerable period of ten years. She was already married to first defendant when 13 Longmore Crescent, Palmerstone was purchased. She was with first defendant when that house was extended. During the same period second defendant was incorporated, 7594 was acquired and developed. It is also not in dispute that the plaintiff was productively running the Olympic Shop, going to South Africa to buy spares for the buses, sleeping late fuelling the buses, doing some clerical and administrative work for the second defendant. First and second defendants do not controvert her role in all these activities. In fact first defendant acknowledges that input and offers plaintiff all the household assets, a car and 10 percent of the value of 13 Longmore Crescent. On the other hand the second defendant accepts that plaintiff did work for the company but she does not deserve anything because second defendant is a private company distinct from first defendant. What is critically significant is that first defendant seriously

perceives that plaintiff deserves a benefit or reward in *lieu* of what she contributed towards the accumulation of the property during the 10 years.

The problem as highlighted above is that plaintiff has not assisted the court with vital information notably her exact financial contribution pertaining to 13 Longmore property. The same applies to the amounts she contributed during extension and renovations. A further challenge equally applies to the amount she directly ploughed in towards the construction of 7594 Rhodesview. The lack of financial precision of such figures adversely compromises the attempt to apportion what share plaintiff should get *vis-à-vis* the houses.

In allocating an appropriate percentage to the plaintiff, I will look at the totality of her both direct and indirect contribution towards the acquisition and value addition of both houses, her work at second defendant's company, her contribution towards Olympic Arcade shop, her household chores, looking after first defendant, the children and home. I will also look at the duration of the union as contemplated by s 7 (1) of the Matrimonial Causes Act, *supra*, the contribution of each of the spouses and their income. Although second defendant is a legal *persona*, first defendant's benefits should obviously be enjoyed by the plaintiff, directly or indirectly and it will be indeed practical that if the first defendant earns dividends from his shares in second defendant, such earnings are subject to redistribution or the court will not ignore such an asset. In the same vein if the first defendant acquires any property with the income from second defendant such property is jointly owned by the family. It is not in dispute that first defendant owns a fleet of cars and is the Managing Director of second defendant. In my view the Toyota Revo is not something that is an unfair claim because when the first defendant was using it during happier times, plaintiff would utilise it. In any case the court must at least attempt to enable the plaintiff to at least live a life she was used to. I will award the Toyota Revo to the plaintiff and second defendant should facilitate change of ownership to reflect plaintiff's. That will accord well with the services plaintiff rendered to the second defendant.

First defendant proposed that the court awards plaintiff at most 30 percent of 13 Longmore Crescent. I do not see anything amiss about the proposal. However first defendant is silent on the contributions made by plaintiff towards 7594 Rhodesview. She is indeed in my view entitled to a portion of value of that house since the property was acquired during the tenure of the union. The real question is premised on quantum. I see nothing wrong if plaintiff is awarded 20 percent of that property. The effect of all this allocation is that first defendant is declared sole owner of 80 percent of Rhodesview house and 70 percent of 13 Longmore house.

Plaintiff is awarded 30 percent of 13 Longmore Crescent and 20 percent of Rhodesview property. All the household property and the car being used by plaintiff are awarded to her by consent of first defendant.

The first defendant proposed to pay off plaintiff within a period of 6 months. I call the parties to address me on the issue of the children's interest. The youngest is barely six years. All the children need accommodation until they attain majority or become self-supporting. I will order that if the first defendant pays off the plaintiff of her 50 percent share, plaintiff will be accorded a usufruct to stay at 13 Longmore Crescent until the youngest child attains legal age of majority or becomes self-supporting. Alternatively the parties have to wait for that event of attainment then assign an evaluator and then the first defendant will pay out the plaintiff.

As a result the following order is granted:

(1) Plaintiff's claim for the following property succeeds.

- (i) Toyota Revo AEQ 8886 and Toyota Quantum motor vehicle
- (ii) 1x80 inch television
- (iii) 1x65 inch television
- (iv) 2x32 inch television
- (v) 1x26 inch television
- (vi) 3x air conditioner
- (vii) 2x bedroom suites
- (viii) 3x³/₄beds
- (ix) 1x double bed
- (x) 1x trade mill
- (xi) 1x 6 piece leather lounge suite
- (xii) 1x subwoofer sound bar radio
- (xiii) 1x office desk
- (xiv) 3x office chairs
- (xv) 3 carpets
- (xvi) 5x DSTV decoders
- (xvii) Jacuzzi
- (xviii) Ceramic 4 plate hob
- (xix) Extractor Fan
- (xx) 2x microwaves

- (xxi) 1x Defy 4 plate stove
 - (xxii) Pressure cooker
 - (xxiii) Toaster
 - (xxiv) Rice cooker
 - (xxv) Double door fridge
 - (xxvi) Washing machine
 - (xxvii) 9kg gas tank
 - TV stand
 - (xxviii) Kitchen utensils
- (2) (a) 30 percent of the value of 13 Longmore Crescent Palmerstone Mutare.
- (b) 20 percent of the value of 7594 Rhodesview Mutare.
- (c) Both properties shall be evaluated by a Registered Estate Agent who is to be paid by both parties proportionately to each's share and the evaluation should be done when the youngest child attains the age of legal age of majority or becomes self-supporting where-after, plaintiff will be afforded first option to buy out first defendant and if she fails, first defendant within six months will be afforded that opportunity to do so, six months after the effluxion of the six months afforded to the plaintiff to buy out one, failing which the properties will be sold by private treaty and the parties paid out appropriately.
- (d) The plaintiff shall continue to stay at 13 Longmore Crescent until she buys out first defendant or she is paid her share.
- (3) First defendant is awarded 70 percent of 13 Longmore Crescent and 80 percent of 7594 Rhodesview.
- (4) The claim by plaintiff against second defendant for the Toyota Revo succeeds as per para (i) of this order.
- (5) Plaintiff's claim for buses and US\$175 000 lump sum be and are hereby dismissed with no order as to costs.
- (6) Each party to bear own costs.

Makombe and Associates, legal practitioner for the plaintiff
Mugadza Chinzamba & Partners, legal practitioners for the 1st defendant
Gonese & Ndlovu, legal practitioners for the 2nd defendant