NOMSA ALMERO
versus
JOHANE SITHOLE

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 18 November 2022 & 31 January 2023

Pre-Trial Conference- amendment of summons

Mr *R A Sithothombe,* for the plaintiff
Mr *I Murambasvina,* for the defendant

MUCHAWA J: The plaintiff and the defendant were in a customary law union with effect from 2010 when the defendant paid lobola for the plaintiff. They lived as husband and wife from then and three children were born to them namely, Nicole, Norah and Fortune. During the subsistence of their union, the parties acquired various assets which include an immovable property known as No 29 Robert Mugabe Road, Kadoma, household goods and effects and there is a mining business set up which the defendant was running.

There have been certain unhappy differences between the parties and on 20 June 2018, the plaintiff instituted an action in which she sought the following;

1. A dissolution of the customary union as between parties.
2. An order for the custody of, access and maintenance in respect of the minor children as set out in the declaration.
3. An order for post- divorce spousal maintenance as claimed in the declaration.
4. An order for contribution towards the plaintiff's legal costs as claimed in the declaration.
5. An order that there be a division of the parties' assets as set out in the declaration.
6. Costs of suit.

Plaintiff claims custody of the children with defendant exercising reasonable rights of access. The claim for distribution of assets is premised on the Matrimonial Causes Act, [*Chapter 5:11*] as read with the Constitution of Zimbabwe. She wants the immovable property declared as her sole

and absolute property. She wants a motor vehicle allegedly confiscated by the defendant declared her sole property. She wants the defendant to set up a business for her capitalized at no less than $100 000.00 or alternatively that she be paid her share of the value of the business assets. She wants post- divorce spousal maintenance in the sum of $3 500.00 per month until her death. For the children, her claim is maintenance in the sum of $750.00 per month per child until they reach the age of 18 or become self- supporting, whichever is sooner. In addition, the plaintiff wants the defendant to be wholly responsible for each child's school fees and related costs including university fees and related costs. The defendant is to retain each child on medical aid and hand over the medical aid cards to her until they attain majority age or become self- supporting. Another claim is that the defendant should pay $750.00 per child every May, for the purchase of winter clothes and another $750.00 per child in August for summer clothing. $750.00 per child is expected by 15 December each year for the children's Christmas celebrations. The defendant is expected to pay the household domestic staff of a maid, gardener and security who are deployed at the house. The plaintiff wants the defendant to contribute $5 000.00 towards her legal costs and pay costs of the divorce action.

In his plea, the defendant denied that there was any divorce to talk about as the parties were in a customary law union and this had been dissolved by the giving of a divorce token to the plaintiff by the defendant on 3 January 2018. The rest of the plaintiff's claims were denied. The defendant averred that he no longer had a duty to provide the plaintiff with accommodation after the dissolution of the customary law union. He had instituted eviction proceedings targeted at the plaintiff and not his children. Further, he stated that there was no need for distribution of assets as the plaintiff had never contributed to the acquisition of these, either directly or indirectly. It was also stated that the immovable property was encumbered and not available for sharing. The defendant however stated that if the court was of the view to share property then an equitable distribution should be done of the movable assets only. The defendant averred that he properly provides for his children and sought their custody. In the event of custody being awarded to the plaintiff, the defendant offered to pay maintenance of $150, 00 per child per month. He also offers to directly purchase the children's clothing as he alleges that the plaintiff will convert the money to her own use On spousal maintenance, it was averred that the plaintiff is a mature adult capable

of working for herself and should not expect to be maintained by the defendant who was no longer her husband and there was no legal basis for the claim.

The mining business was alleged to be wholly owned by a duly registered company in which the plaintiff was neither a director nor shareholder. It was also stated that the business had been running well before the union of the parties.

Defendant prays for dismissal of the plaintiff's claim.

On 25 April 2019, the plaintiff amended her summons and declaration and she then premised her action on an order that there was a tacit universal partnership between the parties and/or alternatively that the defendant will be unjustly enriched if there is no equitable distribution of the assets. Otherwise, she persisted with her claims.

In his plea and counterclaim to the amended summons, the defendant denied that there was any tacit universal partnership between the two and claimed there was no basis for sharing property as claimed by the plaintiff. He retained his earlier position on the rest of the issues and sought the eviction of the plaintiff from the immovable property.

In pleading to the defendant's counterclaim, the plaintiff avers that the giving of "*gupuro*" or a divorce token was outlawed as a valid termination of a customary marriage by the Constitution of Zimbabwe which in s 3 (1)(g) provides for gender equality and also s 16(1) as the cultural practice does not enhance the dignity, well-being and equality provided for therein. Other Constitutional sections allegedly breached are said to be s 19, 26, 44, 51, 56, 69 and 71. She persisted with her claims.

The matter was referred to me for the holding of a pre-trial conference. On 13 October 2022, the plaintiff filed a further notice of amendment to her declaration. It is fitting ton reproduce the amendment sought by the plaintiff. It states as follows;

"TAKE NOTICE THAT AT THE PRE-TRIAL CONFERENCE OF THIS MATTER, THE PLAINTIFF WILL APPLY TO AMEND HER DECLARATION AS FOLLOWS:

1. By the addition of para 3.1 to the Declaration as follows:

   3.1 ALTERNATIVELY, that the relationship between the parties constitutes a civil partnership as envisaged in section 41 of the Marriage Act [Chapter 5:15] and that the Matrimonial Causes Act, [Chapter 5:13] applies to the dissolution of the partnership.

2. By the amendment of paragraph 9 of the plaintiff's declaration by deleting it and substituting it as follows:

9. In terms of the Matrimonial Causes Act, [*Chapter 5:13*], as read with section 41 of the Marriage Act, [*Chapter 5:13*] and ss 25, 26, 56 and 80 of the Constitution of Zimbabwe, it would be fair, just, reasonable and equitable, particularly taking into account the defendant's gross conduct during the subsistence of the civil partnership as particularized in para 6 hereabove, and taking into account the provisions of s 41 of the Marriage Act aforesaid, that the parties' assets be shared as stated in sub-para(s) (a) to (c) of the original para 9 of the declaration.

3. By the deletion of "post-divorce spousal maintenance" in para 10 (a) and the substitution thereof with "as post dissolution of the civil partnership maintenance."

4. by the deletion of the relief sought in the declaration and the substitution thereof as follows: "Wherefore plaintiff claims:

a) A dissolution of the civil partnership as between the parties;
b) An order for the custody of, access and maintenance of the children born of the civil partnership as claimed in the declaration
c) An order for maintenance post the dissolution of the civil partnership between the parties.
d) An order for contribution towards the plaintiff's legal costs as claimed in the declaration
e) An order that there be division of the parties' assets as set out in the declaration, as amended.
f) Costs of suit."

The defendant filed a notice of opposition to the amendment sought and raised that the amendment sought was bad at law as the parties were in an unregistered customary law union and not a civil partnership as envisaged in s 41 of the Marriage Act,[*Chapter 5:15*] and therefore the Matrimonial Causes Act, was not applicable. It was averred the unregistered customary law union had been lawfully terminated by the giving of "*gupuro*", way before the coming into effect of the Marriage Act, [*Chapter 5:15*].

The parties agreed to file written submissions and that I should then decide the application on the papers.

It is contended, for the plaintiff, that in terms of r 41 (1) of the High Court Rules, 2021, that a party to any proceedings is entitled to amend any pleading or document which is not a sworn statement and this can be done in terms of r 41 (10) which reads as follows;

> "10) The court or a judge may, notwithstanding anything to the contrary in this rule, at any stage of the proceedings before judgment, allow either party to alter or amend any pleading or document, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

Further, it was argued that a judge seized with such an application enjoys a wide discretion to allow or disallow an amendment of this nature and should be guided by the need to ensure that the real question of controversy between the parties is resolved. Reference was made to the case of *Cheney* v *Cheney (nee Turner)* HH 78/18 and *Whittaker* v *Roos & Anor* 1911 TPD 1092 @ 1102-1103.

The real issue of controversy was alleged to be premised on s 26 (d) of the Constitution of Zimbabwe, 2013, which caters for protection of the children and spouses upon dissolution of marriage by divorce or death. The Marriages Act, [*Chapter 5:15*] is argued to be a result of giving effect to the constitutional provision. It is argued that such protection is extended to spouses who are customarily married even though their marriage was not solemnized in terms of the law. The union of the plaintiff and the defendant is said to qualify as a civil partnership as provided for in s 41 of the Marriages Act, [*Chapter 5:15*]. And would therefore qualify at law for consideration as such for purposes of dissolution of the marriage relationship, distribution of parties 'assets, maintenance, custody and access rights.

It is contended that as s 26 (d) of the Constitution came into being in May 2013, during the subsistence of the union, therefore the plaintiff was entitled to the necessary protection. The case of *Magurire & Ors* v *Cargo Carriers International Haulers (Pvt) Ltd T/A Sabot* CCZ 15/16 was pointed to, to argue that the Constitution is the Supreme law of the land and the principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorized by it must conform. Further, it was contended that the legal system is one, wholesome and indivisible and the plaintiff is therefore entitled to the protection set out in s 26 (d) of the Constitution as now spelt of in s 41 of the Marriages Act as her marriage was

already in existence when the 2013 Constitution came into being and the Marriages Act was promulgated after she had already issued summons.

Additionally, it was argued that issues to do with division of the parties 'assets, maintenance, custody and access would be conveniently and cost effectively dealt with, were the amendment allowed and this would be in the best interest of the children as they would not be addressed piecemeal. The children's right to parental care as provided in s 81 (1) (d) of the Constitution as including custody, guardianship and access was harped upon.

On distribution of assets, it is argued that it would be an injustice if the plaintiff was to walk away with nothing as she contributed to the acquisition of the assets both directly and indirectly. Reference was made to the case of *Usayi* v *Usayi* 2003 (1) ZLR 684 (S). It is contended that the defendant will be unjustly enriched if the amendment is not allowed and there is no prejudice to be suffered if the amendment is allowed.

Per contra, the defendant's submissions are that what existed between the parties was a customary law union and this was before the promulgation of the Marriage Act [*Chapter 5:15*] which only came into effect in or about October 2022. It is argued that it is incompetent for the plaintiff to seek to amend a valid customary law union that came into existence in March 2011 into a civil partnership by virtue of an October 2022 law.

Reference is given to s 17 (3) of the Marriages Act, [*Chapter 5:15*], which recognizes the existence of unregistered customary law unions by providing that,

> "Failure to register marriage contracted at customary law does not affect the validity of the marriage with respect to the status, guardianship, custody and the rights of succession of children of such marriage."

Such recognition is said to be interestingly separate and distinct from a civil partnership under s 41 (1) of the same Act wherein a civil partnership is a relationship between a man and a woman above 18 years of age and which has nothing to do with issues regarding the status, guardianship, custody and rights of succession of the children of such a relationship.

Furthermore, it is submitted that the customary law union between the parties was lawfully terminated at the instance of the defendant by the giving of a divorce token, "*gupuro*" to the plaintiff way before the Marriages Act, [*Chapter 5:15*] was enacted. Reference is made to the case of *Chapeyama* v *Matonde* 2000 (2) ZLR 356 (SC) @ 362-363.

The amendment sought is also impugned as an attempt to smuggle in the provisions of the Matrimonial Causes Act, [*Chapter 5:13*] to determine the property rights of the parties. This, it is argued, is prejudicial to the defendant and it is prayed that the application should be dismissed with costs.

Despite all the lengthy submissions, there is just one crisp issue for my determination. It is whether when new legislation is introduced for the first time, it ought to deal with and change the character of past transactions which were carried out upon the faith of the then existing law. If the answer is in the affirmative, then the plaintiff's application for amendment will be allowed and if not, it will be dismissed.

In the case of *Greatermans Stores (1979) (Pvt) Ltd T/A Meikles Stores & Anor* v *The Minister of Public Service, Labour & Social Welfare & Anor* CCZ 2/18 the legal position is set out clearly as follows;

> "There is a principle of construction of statutes which has been adhered to with great strictness by the courts in deciding whether a statute is or is not retrospective in effect. It is to the effect that laws by which human action is to be regulated look forward not backwards. The Legislature should be presumed to intend its legislation to operate prospectively. It is an aspect of the rule of law and is the most important practical constraint on retrospective civil legislation. Statutes should be so construed as to prevent them from operating retrospectively, unless the Legislature expresses the intention that the statute operates retrospectively in sufficiently clear and unambiguous language. In that case, the statute is effective according to its terms."

The rationale for this is also set out;

> "A number of reasons have been suggested as bases for the hostility to retrospective legislation. The most fundamental reason why retrospective legislation is said to be suspect stems from the principle that a person should be able to plan his or her conduct with reasonable certainty of the legal consequences. Closely allied to this factor is mankind's desire for stability with respect to past transactions. To the extent that statutory law should serve as a guide to individual conduct, the purpose is thwarted by retrospective enactments. See Charles B Hochman "*The Supreme Court and the Constitutionality of Retroactive Legislation*" 73 Harv. L. Rev. 692 (1960) pp 692-693.
> It must be emphasised that the presumption against retrospectivity of a statute applies in the absence of clear evidence of the intention of the Legislature to have the civil legislation operate retrospectively. The reason is that the objections to retrospective statutes are neither totally absent from prospective legislation nor are they totally persuasive. Where the statute expressly provides that it operates retrospectively, the presumption is rebutted and falls away. There is no question of interpretation. See *Curtis* v *Johannesburg Municipality* 1906 TS 308 at 311; *Nkomo and Anor* v *Attorney-General and Others* 1993 (2) ZLR 422 (S); *Zimbabwe Phosphate Industries Ltd* v *Elias Matora & Others* 2005 (2) ZLR 233 (S). "

GUBBAY CJ had this to say in the case of *Nkomo and Anor* v *Attorney-General and Others* 1993 (2) ZLR 422 (S) at 428H-429C:

> "It is a cardinal rule in our law, dating probably from *Codex 1:14:7*, that there is a strong presumption against a retrospective construction. See *Agere* v *Nyambuya* 1985 (2) ZLR 336 (S) at 338G-339G. Even where a statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in any way affecting acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided, unless such a construction appears clearly from the language used or arises by necessary implication. See *Bell* v *Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 684E-F; …"

This position is put more explicitly in the case of *Glens Removal and Storage (Pvt) Ltd* v *Patricia Mandala* CCZ 6/17 wherein they the court quoted with approval from *Phillips v Eyre* [1870] LR 6 QB1;

> "… the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

In *casu* the plaintiff wishes to have this court allow her to further amend her summons and declaration so that the Marriages Act, [*Chapter 5:15*] deals with the customary law union between the parties which came into being in 2010 and was terminated by the giving of a customary divorce token on 3 January 2018. In essence, this would change the essence of the already completed transactions which the parties carried on upon the faith of the then existing law. Such a position is undesirable and roundly condemned in the case law cited above. This is so because it has not been averred that the new Marriages Act of 2022 expressly provides for retrospective application. In the words of GUBBAY CJ, which I associate with, this new law is not to be treated as in any way affecting acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided, unless such a construction appears clearly from the language used or arises by necessary implication.

As pointed out by the defendant in his submissions, the parties' unregistered customary law union does not fall into the category of a civil partnership whose requirements in s 41 do not include the payment of *lobola*. Rather s 47 (3) still recognizes the existence of unregistered customary law unions which were contracted before the date of the coming into operation of the

Marriages Act in 2022 and gives parties an opportunity to secure the registration of their unregistered customary law unions.

The plaintiff's summons and declaration as they currently stand, seek an order that there was a tacit universal partnership between the parties and/or alternatively that the defendant will be unjustly enriched if there is no equitable distribution of the parties' assets. What she is in fact saying is that she contributed to the property and she seeks an equitable distribution of that property so that she gets what is rightfully hers. Various decisions of our courts such as *Mashingaidze* v *Mugomba* 1995 (1) ZLR 219, *Chapeyama* v *Matende & Anor* 2000 (2) ZLR 356 (S), *Mtuda* v *Ndudzo* 2000 (1) ZLR 710 (H) and *Matibire* v *Kumire* 2000 (1) ZLR 492 (H) have discussed claims such as the plaintiff's . Whilst observing that the Matrimonial Causes Act is not applicable their position is this;

> "The cumulative effect of the various judgments emanating from this court is that a wife in an unregistered customary union who is disentitled to a share in the matrimonial property on dissolution should be afforded protection, taking into account relevant considerations such as her level of contribution, duration of union, etc. To do otherwise, would be to promote an injustice that has been occasioned by traditionally accepted notions of the gender roles of a husband and wife."

The plaintiff's argument that she is totally without protection is therefore without any basis. She simply has to prosecute her matter on the basis of the law which was in existence at the time of the filing of her summons. She cannot sneak in the Matrimonial Causes Act, as she had initially done before her first amendment.

Issues of custody, maintenance, access and guardianship are unaffected by the amendment sought as in children's issues, the paramount consideration is the best interests of the children. The legislature has attempted to provide what should guide the courts by enacting such laws as the Maintenance Act, [*Chapter 5:09*]; the Guardianship of Minors Act, [*Chapter 5:08*]*;* the Children's Act [*Chapter 5:06*] and the Child Abduction Act, [*Chapter 5:05*]. The courts have also interpreted their understanding of how the common law, customary law as well as statutory law applies in different situations which children might find themselves in. The best interest of the child was the main criterion employed in disputes relating to the custody of children, to the exclusion of any rule of customary law. Therefore, the criterion, irrespective of the type of marriage contracted, and

irrespective of whether or not the parents are unmarried, or *lobola* has been fully provided, applies to all disputes concerning children. (See *Dangarembizi* v *Hunda* HH 447/18).

In the circumstances, it is my finding that the plaintiff has not advanced any sound legal basis for the amendment sought Costs follow the cause. I accordingly dismiss this application with costs.

Mtetwa & Nyambirai, plaintiff's legal practitioners
Murambasvina Legal Practice, defendant's legal practitioners.