LAVREIL ELIZABETH MBARAIDZO
versus
YOSIA JOSE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, July 26, 27 2017 and January 26, 2018

Civil Trial

T. Maanda, for plaintiff
T. Mpofu with *A Rubaya* and *T. Tabana,* for defendant

CHITAKUNYE J. On the 27th July 2017 I dismissed the plaintiff's claim and outlined my reasons for that decision. My reasons for the decision were as follows:-

The plaintiff and the defendant lived together in the manner of man and wife from 2005. No child was born of their union.

On the 10th May 2016, the plaintiff sued the defendant for, inter alia, an order for dissolution of the customary law union; or alternatively dissolution of the tacit universal partnership; an order for the distribution of the property allegedly acquired during the subsistence of the union and costs of suit.

The defendant contested the claim and contended that parties did not enter into any customary law union but were simply engaged in a long period of concubinage which does not clothe such cohabitation with the virtues of a marriage under customary law. There was thus no basis for a claim of a share of the property in question. The defendant also pointed out that the plaintiff had not fulfilled the requirements of a tacit universal partnership to the extent that there was no cause of action warranting plaintiff to get any portion of the properties acquired by the defendant.

On the trial date counsel for the defendant raised the *point in limine* that there was no properly pleaded cause of action and that the plaintiff seemed to labour under the misconception that by virtue of an unregistered customary law union she was entitled to a distribution of the property as per her claim. Counsel alluded to a number of case authorities

were in this court has stated in clear terms that an unregistered customary law union is not on its own a cause of action for the distribution of assets which may have been acquired during its subsistence. He also argued that the alternative general law principles that plaintiff mentioned in the latter part of her pleadings would not hold water as they needed to be founded on facts alleged which would form the basis for such cause of action.

The plaintiff's counsel insisted that the plaintiff's papers as they are were adequate. He was also heard to say that one did not need to plead the general law principles but could cure that omission by evidence. In a bid to buttress his stance he also alluded to some decisions by this court which he suggested supported his stance on the point.

A cause of action maybe defined as the totality of the facts which are necessary to found a suit, in other words the facts or combination of facts which give rise to a right of action. In this case the facts must be in support of the general law principle the plaintiff chooses.
In *casu*, the facts giving rise to this suit as stated in the plaintiff's summons and declaration show that the plaintiff was under the misconception that the existence of an unregistered customary law union was adequate to found a claim for the distribution of the property she alleged was acquired during the subsistence of the union.

In *Feremba v Matika* 2007 (1) ZLR 337 at 341A-B MAKARAU JP (as she then was) in discussing the approach by this court in matters where parties are in an unregistered customary law union stated that: -

> "However, it is the agreed position at law that whatever legal vehicle is used to try and achieve equity between the parties, some legal principle must be pleaded. The union itself is not a cause of action at common law."

The learned judge went on to indicate that trial courts should not approach the distribution of assets of parties in an unregistered customary union as if they are apportioning the assets of a couple that is divorcing in terms of the Matrimonial Causes Act [chapter 5:13] and that:-

> "This court has on a number of occasions exhorted legal practitioners to always plead a recognised cause of action for the distribution of assets of parties in an unregistered customary union. See *Mashingaidze* v *Mugomba* and *Jengwa* v *Jengwa*.."
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> I repeat that exhortation herein to all trial magistrates before whom a claim as the one in this appeal comes. It is this: where one party to an unregistered union seeks to have the joint estate distributed before magistrates court, a justification for not applying customary law must be made and accepted by the court using choice of law considerations listed in s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*]. **When general law is the correct choice, then a recognised cause of action must be pleaded. Such a cause of action may be unjust**

> **enrichment, a tacit universal partnership or joint ownership. An averment merely to the effect that parties were in an unregistered customary union is not sufficient to found a cause of action at general law."** [emphasis is mine]

The above exhortation is most appropriate in the circumstances of this case.

In other cases where plaintiff has realized the lack of a clearly pleaded cause of action, amendments have been made thus resulting in this court proceeding to deal with the matter. For instance in *T Chauraya* v *P Makokoro* HH 362-13 MAWADZE J, after lamenting the failure by the legal practitioner to take heed of MAKARAU JP's exhortation in *Feremba* v *Matika* (*supra)* acknowledged that though initially there was an issue with the pleadings in failing to plead properly, the plaintiff had made amendments to cure the problem.

In *V Jokonya* v *T Pavarivega* HH52-17 at p1-2 of the cyclostyled judgement I stated the following:

> "It was apparent that ex facie no clear cause of action was disclosed in the summons and declaration despite this court's clarion call on legal practitioners to realise that the mere existence of an unregistered customary law union or marriage is not on its own a cause of action upon which to claim the distribution of assets of parties to that union. This court has in a number of cases implored legal practitioners dealing in unregistered customary law unions to always plead a recognized cause of action. In *casu*, the plaintiff's legal practitioner was under an erroneous impression that the union was recognised as a marriage in terms of the Matrimonial Causes Act, [*Chapter 5:13*] when that is not so. It was due to such wrong impression that a claim was made for the dissolution of the unregistered union on the basis of irreparable breakdown of the marriage.
> The defendant, nevertheless, pleaded to the summons on 3 February 2011 without excepting or raising the lack of a clearly defined cause of action."

In that case I alluded to the fact that the plaintiff had later amended the summons and declaration to clearly disclose the cause of action and because of that the action was not thrown out.

In casu, the facts are almost similar except that in this case the issue of lack of a cause, of action was raised in the defendant's plea. Despite that the plaintiff did not deem it fit to amend her pleadings. Before this court plaintiff's counsel only sought to remove in the prayer, the clause on the dissolution of the union.

The cause of action as pleaded by the plaintiff is based on the existence of an unregistered customary law union. This is made clear by paragraphs 3 to 6 of the plaintiff's declaration in the following terms:-

> "3. The plaintiff and the defendant were married to each other in terms of an unregistered customary law in 2005 and the union still subsists.
> 4. Although the union is not registered it is recognised as a marriage for purposes of distribution on its dissolution of property acquired during the subsistence of the union.

5..
6. The parties union has irretrievably broken down to such an extent that there are no prospects of restoration of a normal marriage relationship, more particularly, in that:
a) The parties have lost love and affection for each other;
b) Defendant treats the plaintiff with disdain, cruelty and lack of sympathy and feeling;
c) The defendant consorts and improperly associates with other women;
d) The parties are no longer compatible and have a different outlook of life;
e) The parties have not been living together as husband and wife for a continuous period of twelve months preceding the dates of this summons."

In paragraphs 7 and 8 plaintiff lists immovable and movable properties acquired during the subsistence of this union.

In paragraphs 9 and 10 she outlines how the properties listed in 7 and 8 should be distributed. In that regard she prefixes the list with these words:

"It will be just and equitable if the following property is awarded to the plaintiff/ defendant…"

It must be clear that just as in the case on *V Jokonya* v *T Pavarivega (supra)*, the plaintiff's legal practitioners were of the conviction that the union was a recognised union under the Matrimonial Cause Act hence the reference to irretrievably broken down and grounds thereof. It was in that regard that the dissolution of the marriage was sought and the distribution of the assets on a just and equitable basis is then suggested in paragraphs 9 and 10.

It is therefore clear that the action was fatally defective for lack of a recognised cause of action.

In his submission counsel for the plaintiff alluded to paragraphs 11 and 12 of the declaration as showing that unjust enrichment and tacit universal partnership were pleaded. Unfortunately, those paragraphs are submissions or conclusions and not assertions of the relationship that existed to give rise to either a tacit universal partnership or unjust enrichment. The facts from which such conclusions were derived are not disclosed in the declaration. The plaintiff's counsel also indicated that both tacit universal partnership and unjust enrichment were included as alternatives. I am of the view that for an alternative to be sustainable the facts constituting the alternative must be stated. The facts must relate to the requirements for the cause of action sought to be relied on.

In *casu*, the facts pertained to a recognised marriage in terms of the Matrimonial Causes Act. The grounds that would point to a tacit universal partnership or to unjust enrichment were not stated. It is in this regard that counsel submitted that that will be cured by evidence. But surely it was his responsibility upon being consulted to adequately advise and plead the proper cause of action and to lay the grounds for such cause of action.

I thus conclude that the action cannot be sustained in its current state

The plaintiff's claim be and is hereby dismissed as it does not clearly disclose a recognised cause of action.

Accordingly the plaintiff's claim be and is hereby dismissed.

Maunga Maanda and Associates, plaintiff's legal practitioners
Rubaya and Chatambudza Defendant's legal practitioners

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