

IN THE COURT OF APPEAL OF BOTSWANA HELD AT LOBATSECOURT OF APPEAL
CIVIL APPEAL NO.17/95

In the matter between:

IVY MBENGE - Appellant

and

JELE MBENGE - Respondent

Mr. Z. Makwade for the Appellant
Mr. M.P. Phumaphi for the Respondent-----
J U D G M E N T
-----CORAM: Amissah, JP
Wylie, JA
Steyn, JAWYLIE, JA:

In the Court a quo the Appellant had sought an order for equal division of all the property acquired by the parties while living together as husband and wife from 1958 to 1986 as well as progeny of the livestock from 1986 to the date of division as well as the proceeds of all property disposed of by either party up to the division of the property, and costs. Aboagye J. delivered a judgment in favour of the Respondent on 15 September 1994 in which he dismissed her claim but on account of the special relationship which had existed between the parties, he ordered each party to bear his or her own costs.

The plaintiff/appellant had based her claim on the assertion that she was married to the defendant/respondent and was accordingly entitled to claim 50% of the property he had acquired during the

period they were married. She repeated throughout her evidence that this was the basis of her claim. "I regard myself as a wife and therefore having a share in the defendant's property." The evidence disclosed however that no marriage had ever taken place and this was conceded by counsel before the Court a quo on her behalf. The basis of the decision of the learned Judge a quo is set out as follows in the judgment.

"The evidence clearly shows that the plaintiff has ignorantly elevated her adulterous cohabitation with the defendant to the status of a lawful marriage in community of property. In that situation, I have no doubt in my mind that whatever she did whilst she was with the defendant was regarded by her as normal contribution of a wife to the establishment of a happy family life without any profit motive.

As the basis of the plaintiff's claim, according to her evidence, is at variance with what is stated in her declaration the claim must fail and it is hereby dismissed."

The facts as disclosed by the evidence are that in 1958, when the appellant was employed as a housemaid and the Respondent was employed as a bus driver, the parties began living together as husband and wife in Cape Town. She gave up her employment to do so at the instance of the Respondent. Together they set up a grocery business in Cape Town and operated it until it collapsed in 1965. They left Cape Town and came to Botswana, where they lived initially in Tutume with the Respondent's two sisters, to whom the Respondent introduced the Appellant as his wife, as he did to all his relatives. In 1967 they set up their own home in Tutume.

Unfortunately the house that had been erected, only one room of

which was roofed by iron sheets, collapsed during the rainy season, and the appellant built a hut in the yard. In 1969 a more substantial dwelling was built from building blocks purchased from the State Prison in Francistown, later extended by two additional rooms in 1978.

Throughout this period, when the parties were living in Botswana, they lived together as husband and wife and the appellant also played her part in the running of various commercial enterprises. She was involved in the purchase and sale of livestock, made possible by the proceeds of a thatching grass business in which both parties were engaged. She moved to a cattlepost at Semaone when the cattle were moved there in 1977, where she dug a well. She left the cattle post to start a general dealer's shop in Dukwi. These business activities flourished to the extent that by the time the appellant left for South Africa in November 1981 another shop had been acquired at Bushmen's Mine.

The appellant maintained that all these activities were directed towards the maintenance of the parties and their two children, and that by tacit agreement a universal partnership had in effect been created. These circumstances, it was maintained, entitled her to an appropriate share of the respondent's assets notwithstanding that they were not validly married to each other. Since it was impossible to quantify the contribution of each of the parties it was argued that the Court should make a finding that they had contributed in equal proportions, up to the time the appellant left for South Africa. They did not resume


cohabitation when she returned to Botswana in April 1986 by which time the Respondent was living as husband and wife with a Mrs. Masico in a house which he had since built. As to the circumstances in which the Court will hold that a universal partnership exists, and how it determines an appropriate division, see the decision Isaacs v. Isaacs 1949 (1) S.A. 952 at pages 961/962.

In certain respects this has been an unsatisfactory case. When it initially came before this Court Respondent's Counsel, whilst not abandoning his client's case, found it difficult to resist the contention that the evidence did indeed establish a universal partnership and that some apportionment should be decreed. Because we were of the view that the parties would be in a better position to determine what a practical division of assets should be, we ordered that the matter should stand over to 2 February 1996 to give the parties the opportunity, with their attorneys to reach a sensible compromise. We were informed however that this is not possible as the respondent had been morooned at his cattle post, but counsel on both sides, "in view of the urgency of the matter" have requested the Court to reach a decision.

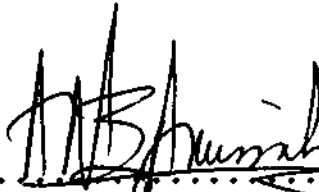
I am satisfied, on a reading of the evidence and having considered the Heads of Argument on both sides that the learned Judge a quo erred in placing undue emphasis on the plaintiff/appellant's evidence that her claim was based essentially on the assertion that she was the wife of the Respondent. In my view the equities of the situation require

that she be found entitled to a 50% share of the respondents assets acquired by the joint efforts of the parties up to November 1981. I would accordingly allow the appeal, and order a finding to that effect. As in the Court below there will be no order as to costs.


Delivered in open court this ^{5th} day of February, 1996.


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LORD N. WYLIE
JUDGE OF APPEAL

I agree.


.....
A.N.E. AMISSAH
JUDGE PRESIDENT

I agree.


.....
J.E. STEYN
JUDGE OF APPEAL