

**Padayachy v Pool  
(2008) SLR 283**

Frank ALLY for the plaintiff  
William HERMINIE for the defendant

**Judgment delivered on 30 October 2008 by:**

**RENAUD J:** The plaintiff is claiming from the defendant an undivided share in Title S4043 or the house thereon and R 50,000, or the sum of R 450,000.

The plaintiff is an executive secretary and the defendant is a taxi driver. The parties were in a common law relationship (concubinage) for 7 years and 6 months until the Family Tribunal made an interim protection order against the defendant restraining him from approaching the house or removing any fixtures from the house and as a result thereof their relationship came to an end. Out of their relationship a child was born, namely, Dwayne Pool who is still a minor. The defendant is the registered proprietor of the land comprised in Title S4043 situated at Montague Posee, Mahe, on which stands a house which the parties resided in and occupied during their relationship. The plaintiff was in gainful employment during the subsistence of their relationship.

The plaintiff alleged that she used her income, several loans which she borrowed and repaid, and monies obtained as part of the settlement from her previous marriage in sums exceeding R 20,000 and her labour to invest in the said house and the health and welfare of the defendant and the family. The plaintiff particularized her alleged investment, expenses and domestic services. She alleged that the value of the house is R 800,000. She also alleged that during their relationship and immediately after the defendant had harassed and ill-treated her, which resulted in the protection order of the Family Tribunal, which act amounts to a faute in law. On the basis of all her allegations, the plaintiff averred that based on her investments and the defendant's present ownership of the said title, the defendant has been unjustly enriched to her detriment. Further and alternatively to these allegations, the plaintiff averred that based on her investments and the necessity of an equitable distribution of the said property she is entitled to an undivided half share in Title S4043 or half share in the present market value of the house based on her contributions or be reimbursed her contribution at the present market value. The plaintiff claimed to have suffered loss and damage as follows:

- (i) Contributions at present  
market value R 400, 000.00
  
- (ii) Moral damage for  
ill-treatment R 50, 000.00

The defendant claimed to have already been the owner of the house when he met the

plaintiff. The defendant also contended that the house belongs to him and that the plaintiff is not entitled to any share therein.

The defendant further denied each and every material allegation of the plaintiff and put her to strict proof thereof.

Prior to the hearing, this Court granted an inhibition order in favour of the plaintiff restricting any dealing in Title S4043.

One Alexis Buron applied for and was granted leave to intervene in the matter. He claimed to have, in good faith, purchased the property Title S4043 in the intervening period from the defendant for consideration, and, that his intervention would be necessary in order for him to defend and protect his interest.

The plaintiff and the defendant are not married and the property in issue is not deemed to be matrimonial property. As such this Court cannot resolve this matter in terms of the Matrimonial Causes Act which is applicable to the settlement of matrimonial property.

There have been various cases of a similar nature which had come up before the Court for adjudication. I will cite some notorious ones and how the Court adjudicated in each of those cases.

In the case of *Payet v Larame* (1987) SLR 78 the Court in awarding the plaintiff a 30% share of the value of house and car, held,

- (1) An immoral association would disqualify a claim based on a contract if the cause of the contract was remuneration for the immoral association.
- (2) The present action was not based on the immoral association but was claim for what the defendant benefited out of the help provided by the plaintiff.
- (3) On the evidence the plaintiff had suffered an impoverishment of her patrimony and had a cause of action under article 1381 CCsey.

The case of *Payet v Larame* (1987) SLR 78 is distinguished for the reason that the parties therein lived together for 10 years and during that period the parties bought the land on which later a house was built, and purchased a car which was used by the defendant as a taxi. In the present case the defendant had bought the land in his own name and had already built a house, and was the owner and operator of a taxi before he met with and started living with the plaintiff. At the most the present plaintiff can only claim contributions she made towards any addition, upgrading and alteration to the existing house.

In the case of *Dodin v Malvina* (1990) SLR 288 - the parties had lived together for about five years in a house built with the respondent's money on land which he had purchased. The plaintiff claimed a share in the property on the ground of her

contribution to the household. After reviewing the case of *Hallock v D'offay* (1983-1987) 3 SCAR (Vol 1) 295, the Court held that the plaintiff was not entitled to any share in the property.

The case of *Dodin v Malvina* (1990) SLR 288 can also be distinguished from the present case, in that the plaintiff in the case cited was claiming a share in the defendant's property on the ground of her contribution to the household. This case established the principle that a plaintiff cannot in law claim a share in the property for any contribution made towards the day to day running of the household, which in my view includes expenses incurred for going on holiday etc.

In the case of *Cadeau v Leveaux* (1984) SLR 69 it was held that -

- (1) In an action de in rem verso a concubine could claim remuneration for domestic services in the paramour's house if she had suffered "appauvrissement" of her own "patrimoine".
- (2) Such a claim based on past immoral association should fail.
- (3) On the facts the defendant had looked after and maintained the plaintiff as wife and as such the plaintiff had not suffered any "appauvrissement" of her own "patrimoine".
- (4) The plaintiff was only entitled to the return of her movables which in this case was her bed valued at R 205.
- (5) The defendant had not proved any arrangement to bank money sent by him but all his payments were for the maintenance of the plaintiff and the home.
- (6) The defendant had failed to prove his claim or movables alleged to be in the possession of the plaintiff.

In the present case the plaintiff is not making her claim based on an action de in rem verso as she was in fulltime employment during the whole period that she was living in concubinage with the defendant. Therefore the principles enunciated in the cited case of *Cadeau v Leaveau* is not on all fours with the present case.

In the case of *Esparon v Monthy* (1986) SLR 124, the plaintiff lived in concubinage with the defendant for a period of about 15 years. During that period they started to run a shop and out of its profits erected a building on the defendant's land which was used to run the business profitably. Thereafter out of the profits of the shop they built a house on that land. The plaintiff assisted in running the shop as well as in the domestic tasks as a housewife. The concubinage ended in 1985, and the defendant threatened to evict the plaintiff from the house. The plaintiff claimed in that action her share in the property.

The Court held that —

- (1) The principles of division of property between married parties could not be applied between parties living in concubinage.
- (2) The intention of the parties determined the issues.
- (3) Where two parties by their joint efforts acquired property for their joint benefit it would be inequitable for the holder of the legal estate to deny the other party the beneficial interest.

In the case of *Albert v Hoareau* (unreported) SSC 1982, following the case of *Moutou v Mauritius Government Railways* (1933) MR 102, and *Naikoo v Société Héritiers Bhogun* (1972) MR 66, it was held that the relationship of concubinage was not one which was protected by law in the field of tort.

It is established therefore that the principles of division of property between married parties do not apply between parties living in concubinage. In the latter cases it is the intention of the parties which determined the issued. However, where two parties by their joint efforts acquired property for their joint benefit it would be inequitable for the holder of the legal estate to deny the other party the beneficial interest.

In the case of *Edmond v Bristol* (1982) SLR 353, the plaintiff and the defendant lived as man and wife for nine years during which they built a house on the property of the defendant's mother. The plaintiff contributed towards the cost of the house by working with the defendant at the business of buying and selling vegetables and in making vacoa bags herself and selling them. Her contribution was half the cost of the house.

After separating from the defendant, the plaintiff asked for a declaration of her share in the house and for an order on the defendant to allow her and her family to live in the house. In the alternative she asked that she be allowed to remove the house to her family land or for an order on the defendant to pay her the value of her share of the house.

It was held that -

- (1) The plaintiff did not have the same rights as a married woman would have in the matrimonial home and therefore could not claim a right to live in the house.
- (2) Where unmarried parties living together had separated, each of them could claim a partition of the properties if a partnership existed between them or the claim of each party could be dealt with under the principles of indivision or unjust enrichment.
- (3) In the instant case the defendant had been unjustly enriched to the extent of the contribution which the plaintiff had made in respect of the house.

(4) The plaintiff was entitled to recover the contribution from the defendant.

Some of the cases I have cited above although they are not on all fours with the present case, provide this Court with a wide field of reference when it comes to the adjudication of matters involving unmarried couples who have been living together in "concubinage" and were making claims against the other party.

In cases of this nature the contending parties always try to lay before the Court a load of evidence and something going as far as splitting hairs. I bear in mind that at the time the parties were happily living together they did not draw up documents for each financial transaction between themselves regarding their respective contributions towards the improvement of their house and household expenses. It is now for the Court to endeavour to discern the trees and not be encumbered by the forest.

I have observed both parties when giving evidence and I am satisfied that their common intention was to make inputs towards their house and household for their joint future wellbeing as well as that of their family.

I find that indeed the defendant had purchased the land and had built his house before he met the plaintiff. However, I also find that after meeting the plaintiff and after they started living together the standard of the original structure was further improved and an addition was also made to that structure. Other improvements were also made to the landscape.

As the law stands, supported by jurisprudence cited above, the plaintiff is not entitled to be reimbursed for any expenses she made towards the household during the time they were living together in concubinage. The plaintiff is entitled to claim only the contributions she made to the assets of the defendant the end result of which was that the defendant was somewhat enriched by those contributions. If the plaintiff is now to pack her belongings and leave the house to the defendant the latter would be richer through the inputs of the plaintiff. It is therefore for the plaintiff to prove to Court on a balance of probabilities that she made certain contributions towards enriching the defendant and she is now not able to benefit from the contributions she made towards enriching the defendant.

It is now for this Court to determine the contributions the plaintiff made towards the house of the defendant which stands on land Parcel 54043, which I will do based on the relevant evidence which I believe and accept.

Having meticulously analysed the evidence after hearing the parties and observing their respective demeanours I find and conclude that the plaintiff did indeed make certain contributions towards the improvement of the asset in issue, namely to the house of Parcel S4043 and their common intention was for both to benefit from such improvement. Now that the defendant is claiming the whole asset it is fair just and necessary that the defendant compensate the plaintiff for her contributions otherwise the defendant would be unjustly enriched to the detriment of the plaintiff.

The plaintiff reckoned that when she left the house, the market value, in her view was R 800,000. There is no professional evidence to support that valuation.

I also find that the plaintiff does not have any undivided share in the property S4043 apart from her contributions towards adding value to that property of the defendant to the detriment of her own patrimony. I also find that there is no basis for the plaintiff's alternative claim of R 450,00 against the defendant which I accordingly reject.

The plaintiff is claiming for moral damage for ill-treatment by the defendant. I do not believe that such claim would arise in a case for unjust enrichment following a concubinage relationship. I will make no award under this head of claim which I reject.

The plaintiff claimed to have contributed the whole amount of R 60,000 which she received from her previous marriage settlement. It may be true that she received such sum when her relationship with the defendant was on a level that she believed that the defendant would be living with her as husband and wife in the house in issue and that it would be in her interest to contribute towards the upgrading and extending the house. On the other hand I do not believe that a woman would invest every cent of that sum in the house. It is rational to believe that a woman would have other personal needs that she would have to attend to upon receiving such sum of money. I find that on a balance of probabilities that the plaintiff contributed some and not all of that money towards the construction of the addition to the defendant's house. I would adjudge it fair to conclude that the plaintiff contributed only half of that sum, that is, R 30,000 towards the defendant's house.

The plaintiff took certain loans from the Credit Union during the time she was living with the defendant. The evidence shows that on her application form for such loans she gave her reasons for applying for those loans, which reasons I will set out later. I do not see any reason why a person would apply for loans and give the reason she did were it not for the purpose she stated. In February 1997 she took a loan from the Credit Union of R 6,000 for "finishing of house". In January 2000 she took another loan of R 15,000 for "house extension". In September 2000 she took R 5,000 "to complete house extension". In July 2001 she took R 15,000 for "finishing of verandah extension". In January 2003 she took R 30,000 to "build a retaining wall". During the period February 1997 to January 2003 the plaintiff took a total of R 71,000 all for the purposes she stated. The plaintiff repaid all these loans by monthly instalments from her own means. The defendant denied that these were ever used towards the building of the extension to his house and retaining wall. I do not believe the defendant on that score. I find that on a balance of probabilities the plaintiff contributed the sum towards adding value to the asset of the defendant, namely the house in issue.

The defendant claimed that the house was worth only R 250,000 – the price that he sold the house for. From the evidence I find that the defendant, after purchasing the land for R 30,000, took a first loan of R 150,000 and an additional loan of R 50,000 from SHDC for the construction of the house. He also won R 50,000 from the Casino. He invested this total sum of R 280,000 towards the purchase of the land and the construction of the

house which he sold in July 2005 for R 250,000 together with its contents. Who would believe that? – definitely not this Court. It is a well-known fact that the value of property has increased more than two-fold over the last five years. He said that when he sold the house the property was cleared of any mortgage as he had already repaid SHDC for the loans, yet he said that it was after he sold the house and its contents for R 250,000 that he received the money to clear his outstanding loan from SHDC.

I also find that either the defendant or the intervener was not truthful to the Court with regard to the sale transaction. The defendant testified that he sold the house to the intervener for that price because the latter was a personal friend of his and he had known him for a long time and that he used to stay at his place when he went to England. Yet the intervener testified that he came to know the defendant through a friend of his who is a taxi driver who had informed him that the defendant had a property for sale. He is not a very good friend of the defendant and was not even aware that the defendant was "in trouble" with the plaintiff.

In any event even if the defendant had chosen to dispose of his asset for free this will not in any way affect the right of the plaintiff in the said asset.

I do not believe that in cases of this nature, reasonable deductions ought to be made for the period that the plaintiff lived in or enjoyed the use of that house for the simple reason that both the plaintiff and defendant lived together and contributed towards the household which included the child of the defendant from a previous relationship as well as the child of the parties. Both parties were then living as husband and wife and it was their joint intention for both to enjoy the house freely and they did so. It can therefore be said that both the defendant and the plaintiff enjoyed their respective contributions during that period.

In the final analysis I conclude and find on a balance of probabilities that the defendant had been unjustly enriched to the extent of the contribution which the plaintiff had made in respect of the house which sum I find to be R 101,000 with interests and costs.

I accordingly enter judgment in favour of the plaintiff as against the defendant in the sum of R 101,000 with interest and costs.

**Record: Civil Side No 272 of 2005**