

MRS LOKIA JUMA PHIRI

versus

SMM HOLDINGS (PRIVATE) LTD
(Under Reconstruction) t/a SMMH PROPERTIES

HIGH COURT OF ZIMBABWE
WAMAMBO J & ZISENGWE J.
MASVINGO, 22, July 2020 and 4 March 2021

Civil Appeal

C. Ndlovu for the applicant
J. Chipangura for the respondent

WAMAMBO J: This matter came up as an appeal from a judgment of the Magistrates Court sitting at Masvingo on 2 March, 2018. In the court *a quo* the now respondent applied for and obtained an order of eviction against the now appellant. The background of the matter is as follows:-

The respondent is the owner of 18 Msasa Road, Westonlee, Mashava which was built to house its employees. The said house was allocated to Juma Phiri then an employee of respondent. It was tied to his employment it being understood that the said house remained the property of respondent and applicant would recall the house at the expiry of the contract of employment or death, whichever came earlier. Appellant was residing with Juma Phiri as his wife.

Juma Phiri sadly passed on on June 20, 2016, after he had already been discharged from employment.

Appellant's position was that when her late husband Juma Phiri left employment respondent wrote to her and ultimately the parties entered into a lease agreement. The respondent owed her husband and she should be paid his outstanding terminal benefits or be allowed to reside in the house until the terminal benefits are exhausted. She disagrees that she was ever offered an alternative house.

In the notice and grounds of appeal the appellant raises two grounds of appeal formulated as follows:-

1. *The learned magistrate erred at law in granting the application when it was fatally defective since the respondent did not cite the estate of the late Juma Phiri. The learned magistrate should not have lost sight of the fact that the appellant occupied the premises on the strength of her marriage to Juma Phiri.*
2. *The learned magistrate erred at law in failing to appreciate that the death of Juma Phiri did not terminate the lease since there was no agreement to that effect.*

Mr Ndlovu strenuously argued that because Juma Phiri is now deceased his death suspended all legal proceedings against him.

His estate should have been cited by the respondent. He placed reliance on an excerpt from **Christie Business Law in Zimbabwe** wherein the learned author discusses what happens when either party to a lease dies.

Mr Chipangura on the other hand submitted that the appeal is unmeritorious and further that the lease agreement was between Juma Phiri and the respondent. That appellant was not party to the contract. He cited authorities to buttress his argument principally *Chetty v Nandoo* 1974(3) SA 13 and *Frank Nyaku Badza v SMM Holdings (Pvt) Ltd (under reconstruction) t/a SMM Properties* HMA 20/17.

The Magistrate's ruling describes the issues to be determined as simple and straightforward. The learned Magistrate found that the *Frank Nyaku Badza* case (*supra*) clarifies the position of tenants of the respondent's company. The Magistrate went further to find that the appellant cannot benefit from a contract she was not party to.

Appellant apparently base their argument principally on the except found in **Christie Business Law in Zimbabwe** at page 197 which reads as follows:-

“The death of either party terminates the lease only if it was so agreed in the lease, either expressly or impliedly (as when to the knowledge of the tenant) the landlord is usufructuary, or when the lease was at the will of the deceased. An express stipulation that the lease shall terminate on the death of either party is binding on the deceased’s executor and trustee in insolvency In all other cases the deceased’s rights and obligations under the lease pass to his estate.”

The respondent avers through the founding affidavit of Patrick Muguti in paragraph 5 that when the house in question was allocated to Juma Phiri it was on the understanding that among other conditions appellant was free to recall the same upon the expiry of the contract of employment or the death of the employee which occurred first.

Although the lease agreement itself was not produced, appellant did not dispute that the house would be recalled upon the expiry of the lease or death of the employee whichever occurred first.

I find in the circumstances that this was the understanding. Therefore there was no need to cite the estate of the late Juma Phiri.

When deceased died the respondent indeed recalled the house through a letter dated 24 August, 2016 which letter reads on the relevant portion as follows:-

“This is a formal notification advising you that, following the death of your husband on 12 June, 2016 we would like to point out that you will

- *Be permitted to stay in the company house for one month and handover the keys to the Human Resources Secretary/ Community Services Officer on 24 September, 2016. Should you have any queries regarding the foregoing please contact the undersigned.”*

The said document reflects that it was received by the recipient on 24 August, 2016. This amount to a reasonable notice to vacate an owner’s premises.

In *Frank Nyaku Badza v SMM Holdings (Pvt) Ltd (under reconstruction) t/a SMM Properties* HMA 20/17 MAFUSIRE J. at page 3 said;

*“Whatever the case, the determination of the lease would be the justification for the eviction if the common-law applied. This is so because one of the incidents of ownership of a thing is the owner’s entitlement to the exclusive possession of the res. The law presumes possession of the thing as being an inherent nature of ownership. Flowing from this, no other person may withhold possession from the owner unless they are vested with some right enforceable against the owner: see **Silberberg and Schoeman’s The Law of Property**, 5th ed., at p 243. Otherwise an owner deprived of possession against his will can vindicate his property wherever found, and from whomsoever holding it.”*

Clearly appellant was not an employee of respondent. Her claim to the right to occupy the house in question is through her deceased husband who himself had resigned from respondent's employ at the time of his death.

Appellant clearly has no claim to the right to occupy the house in dispute.

The question of the money allegedly owed to the deceased does not necessarily have to be offset through appellant residing in respondent's house. If such a claim indeed exists there are other avenues of exploring it other than through occupation of respondent's house in the circumstances of this case.

In passing I note that the appellant is cited as Mrs. With the rather unusual names that we sometimes bear in our country, I was of the initial view that Mrs was her first name. Though not justified it appears that the Mrs in the citation was not erroneously entered. It was probably meant to emphasise the basis of her purported right to the house in dispute. In other words her claim is based on her being the wife of the deceased. One only can imagine if all matters would have such titles as Mr, Miss, Mrs and so forth.

A reading of the Magistrate's judgment reflects that it was properly considered and correct. In the circumstances we are also persuaded by the arguments by *Mr Chipangura*.

In the circumstances we find that the appeal is unmeritorious and order as follows:-

The appeal is dismissed with costs.

ZISENGWE J. agrees

Ndlovu and Hwacha, appellant's legal practitioners
Chuma, Gurajena and Partners, respondent's legal practitioners