

HB 350-17
HC 2624-15
XREF HCA 216-08
XREF RF 105-12
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XREF HC 583-14

BASIL MUTIZWA MAPFUMO
and
TENDAI BIBI (NEE MAPFUMO)
and
CHENAI MOYO MAPFUMO
and
CORINNE MICHAELA DOMINGO
versus
TINASHE OSMOND MAPFUMO
and
FARAI MBERIKWAZVO MAPFUMO
and
ESTATE LATE TRACY MAPFUMO DRBY 216/08
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 31 OCTOBER 9 NOVEMBER 2017

Opposed Application

G Nyathi for the applicant
S Siziba for the 1st respondent

MATHONSI J: This matter concerns a dispute by siblings over the deceased estate of their parents. The applicants have brought an application seeking an order compelling their two brothers, the first and second respondents, to sign an agreement of sale between them and the fourth applicant who has purchased stand number 10786 Bulawayo Township also known as No 3 Banbury Road, Southwold Bulawayo (the house) in terms of an order issued by the magistrates court on 23 November 2012. In that order the court directed that the house in question be sold and the proceeds shared between the children of the late Tracy Mapfumo.

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Subsequent to the grant of that order, the same house was placed under judicial attachment by the Sheriff of the High Court in pursuance of a writ issued following a judgment taken against the first respondent by Sino-Zimbabwe Cement Company (Pvt) Ltd. What led to that unfortunate turn of events is quite detailed but in brief, the late Tracy Mapfumo survived her husband Mberikwazvo Barnabas Mapfumo who died on 10 April 1996 with whom she had sired children who are parties to this application. After his death Tracy inherited her husband's estate and had the house transferred to her name on 2 July 2004. She held title to the house by deed of transfer number 2073/2004.

In turn Tracy died intestate on 16 May 2006 and was survived by the first three applicants and the first and second respondents. Her estate was registered with the Additional Assistant Master in Bulawayo as DRBY 216/08. In due course the first respondent, as the eldest son was appointed as executor of Tracey's estate by letters of administration issued by the Additional Assistant Master on 29 September 2008. The estate was being administered at the magistrates court in Bulawayo.

At some stage during the winding up of Tracey's estate the first and second applicants as well as the first respondent deposed to affidavits which were submitted to the Additional Master in Bulawayo, worded almost the same. They said;

"I have sat down and discussed with my brothers (and sister) and have agreed that the title deeds of the house, No 3 Banbury Drive should be transferred to Tinashe Osmond Mapfumo".

Although they were beneficiaries to the estate the third applicant and the second respondent did not sign such affidavit neither did they consent to the alienation of their share of the estate. On the basis of those affidavits the Additional Master approved the first and final distribution account authorising the transfer of the house from the estate to the first respondent. Acting as the executor of the estate the first respondent then signed a power of attorney granting a conveyancer power and authority to convey title of the house to himself, never mind the

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obvious conflict of interest. The house was then transferred to him by deed of transfer number 108/2011.

The first respondent did not waste time. Apparently he was running a company known as Builders Depot (Pvt) Ltd which became the vehicle through which he secured credit of \$30 000-00 from Sino-Zimbabwe Cement Company (Pvt) Ltd. As security for the debt he gave the house. Whereupon Sino-Zimbabwe Cement Company (Pvt) Ltd registered a Surety Mortgage Bond number 1210/2014 on 16 October 2014. The applicants say that they only authorized the first respondent to hold title in trust for all the beneficiaries in his capacity as the first born son and not for himself. The first respondent had no authority to mortgage the house as he did for his personal benefit in his business.

As so often happens, the first respondent defaulted in his repayment of what he owed Sino-Zimbabwe Cement Company (Pvt) Ltd which litigated against him and his company in HC 1255/15, took judgment and proceeded against the house held as security for the debt. This happened despite the magistrates court having ordered the sale of the house for the benefit of all the beneficiaries in 2012. It was when the house was due to be auctioned that the applicants intervened and negotiated with the creditor through its legal practitioners, Danziger and Partners, for the withdrawal of the house from a public auction in favour of selling it by private treaty.

The creditor agreed to that arrangement on condition of course that the other beneficiary consented that the proceeds of the sale be apportioned first and foremost towards the liquidation of the debt owed to the creditor. A sale agreement was concluded with the fourth applicant for a purchase price of \$34 000-00. Although the full purchase price has been paid, part of which has already been remitted to Sino-Zimbabwe Cement Company (Pvt) Ltd to clear the first respondent's liability to that company, the first respondent has refused to sign the sale agreement leaving the entire settlement made for his own benefit in limbo. Talk of an ungrateful person wanting to have his cake and eat it at the sametime.

The applicants have brought this application seeking to compel the first and second respondents to sign the agreement in order to move the case forward. The basis of their

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application is that all the beneficiaries are entitled to equal shares in the house by virtue of the court order issued on 23 November 2012. I must state that the court order in question was granted following an application made to that court by the first applicant who had made it clear in an affidavit deposed to on 29 October 2012 that the family had agreed that the first respondent would hold title in trust for all of them. He had complained that with time the first respondent had started claiming exclusive ownership and attempting to evict the other family members. He prayed for an order that title be shared between them or alternatively that the house be sold with the proceeds being shared equally between all the children of the deceased.

At the hearing of the matter, the first respondent was in attendance. The proceedings are recorded as follows:

“COURT PROCEEDINGS

Applicant’s claim as per summons

Amendments: Nil

Respondent’s plea: I was appointed executor. I am against the sale of that house since we will have nowhere to stay.

COURT: Who is staying in that house?

A: Myself and the youngest born in our family.

Applicant’s reply: We are all adults so I suggest that that house to be sold so that we each get a share from the proceeds of that house so that if anybody needs a place he can buy a stand and buy his own house.

COURT: How old is the youngest child in your family?

A: He is 22 years old.

Q: Did you fail to resolve that issue as a family?

A: I feel we have failed since we are no longer speaking to each other.

By Respondent: We had agreed that the youngest brother stays in that house since plaintiff was moving to Harare and I was staying in South Africa.”

It was at the conclusion of that hearing that the court ordered the sale of the house. I have deliberately reproduced the record of proceedings which led to the grant of the order upon which the applicants have sought to sell the house mainly to demonstrate the falsity of what the first respondent, who is the only one opposing the application, has stated in his opposing affidavit. In

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that affidavit the first respondent now claims that he did not hold title in trust for all the surviving children but that the house is exclusively his.

The first respondent now claims that his other two siblings had agreed that the house be transferred to him as his personal property because he had paid it off when their father died in 1996 leaving a debt owing to the Ministry of Public Construction. Although part of the purchase price came from their late father's pension, his view is that the house was transferred to their mother because she was still alive and the Ministry was only willing to transfer to the surviving spouse. In other words he is claiming ownership even though the house already belonged to their mother before her death.

It is remarkable that the first respondent is only raising this defence for the first time now. When the matter was heard before a magistrate he was meek when he pleaded to be allowed to continue staying in the house because he had nowhere else to stay, even as there was a glaring contradiction in what he said. At the same time he claimed that he was living in South Africa. Therefore the first respondent is being dishonest. The claim that he had paid part of the purchase price is certainly an afterthought by someone who would do anything to appropriate the entire estate of their late mother and in the process disinherit his siblings.

Let me add that when the court order was granted at the magistrates court the first respondent tried to contest it. He filed two applications, the first being an application for condonation of the late filing of a rescission of judgment application while the second was an application for rescission of judgment. When both his applications were dismissed by a magistrate on 18 January 2016 mainly on the ground that the judgment had not been granted in default and could not be rescinded and that if aggrieved by it he should have appealed, the first respondent appealed against that decision to this court in HCA 9/16. The notice of appeal was filed on 2 February 2016. On 10 November 2016 the appeal was deemed abandoned and dismissed. Nothing has been done about that outcome since then. The stark reality therefore is that there is an extant court order regulating the rights of the parties to that house.

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While on the face of it there may appear to be a dispute of fact as may not be determined on the papers, such dispute is in fact illusory. As stated by GUBBAY JA (as he then was) in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339 C-D;

“It is, I think, well established that in motion proceedings a court should endeavor to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact.”

Thus, the resolution of the dispute without doing an injustice to the other party is one of the prime considerations in allowing or disallowing the use of application procedure. See *Ex-Combatants Security Co v Midlands State University* 2006 (1) ZLR 531 (H) at 534 F. In the present matter I am satisfied that there would be no injustice done to the first respondent by adopting a robust and common sense approach to the dispute of fact because the dispute is no dispute at all.

What is apparent from the submissions made by the first respondent before the magistrates court is that it was in fact common cause that he held title in trust for all the beneficiaries. It is for that reason that he did not allege ownership and only pleaded to be allowed to live in the house as he had nowhere to go. He later changed and pleaded for the last born to be allowed to stay.

Now that the first respondent's own turpitude had put the parties in the unenviable position they are in, he having mortgaged the house and failed to pay his debts leading to its attachment for sale in execution, he has no moral or legal standing to contest the grant of the order sought. If anything, he remains the biggest beneficiary after his debts eroded the parties' entitlement. I therefore have no hesitation in concluding that the applicants have made a case for the relief of sought.

In the result, it is ordered that;

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1. The first and second respondents be and are hereby directed to attend at Messrs Sansole and Senda legal practitioners at Suite 601, 6th Floor, Charter House, Corner Leopold Takawira Avenue and Fort Street, Bulawayo and there sign the agreement of sale dated 3rd August 2015.
2. Should first and second respondents fail to act in terms of (1) above the Assistant Sheriff of Zimbabwe, Bulawayo is hereby authorised and directed to sign in their stead.
3. The first respondent be and is hereby directed to attend at the fourth respondent's offices and there sign all transfer papers to effect transfer of number 3 Banbury Drive, Southwold, Bulawayo to the names of the fourth applicant within 7 days of service of this court order, on the first respondent.
4. Should the first respondent fail to act in terms of 3 above, the Assistant Sheriff of Bulawayo be and is hereby authorized and directed to sign the transfer papers in the first respondent's stead.
5. The first respondent shall pay the costs of this application.

Sansole and Senda, applicant's legal practitioners
Messrs Ndove Museta & Partners, 1st and 2nd respondents' legal practitioners