

SHIRLEY ODOOM
(represented by Archibald Mujeni by
Virtue of Power of Attorney)
versus
PATIENCE MAPHOSA
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 8 JUNE 2018 AND 15 JUNE 2018

Opposed Application

H Shenje for the applicant
M Dube for the 1st respondent

MATHONSI J: The applicant, a woman cherishing domicile far afield in Ghana, and the first respondent, another woman resident in Zimbabwe, have this exceedingly unholy alliance wherein as complete strangers and quite unrelated to each other in any way, jointly own a property in Zimbabwe, being Share number 14 of Stand 1213 Bulawayo Township. It is flat No 14 Cleedon House, Bulawayo which they hold by Deed of Transfer No 2001/01. It is the kind of arrangement which can only result in endless squabbles and litigation between them as their respective interests are certainly unlikely to dovetail. It was brought about by the first respondent's decision, in her wisdom or lack of it, to purchase the half share of the property then belonging to the applicant's husband, one Francis Kojo Odoom, at a public auction conducted by the Sheriff for Zimbabwe after the latter had failed to service a debt due to Zimbank which obtained judgment against him and sold his half share.

Apart from being a two bedroomed flat, the rest of the property from the other rooms all the way to the bathrooms, is indivisible, presenting the practical difficulty of how it can possibly be owned jointly and shared by strangers. The sooner the parties commenced and designed terms and rules of disengagement the better for them as the prevailing set up is definitely untenable. That is however for the attention of the parties themselves. Of immediate concern is

that the applicant has brought an application for an order directing the first respondent to account for all the rentals and expenses that have been received and incurred at the property from January 2009 to date, among other relief.

In her founding affidavit, deposed to by Archibald Mujeni, her father, by virtue of a power of attorney, the applicant states that as joint owners of the property, the applicant and the first respondent are entitled to share equally the fruits of their investments but the first respondent has been enjoying the benefits of the whole property on her own. The first respondent has been renting the property out and it is currently occupied by tenants installed by the first respondent who are accountable to the first respondent as they were not put there by joint effort or agreement between the joint owners. The tenants in question are paying all the rent to the first respondent who has never bothered to account to the applicant or to remit to her the half-share she is entitled to as joint owner.

The applicant would like the first respondent to render an account from January 2009, presumably the time of dollarization, up to now. In the event of the first respondent's failure to do so within thirty days from the date of the order of this court, the applicant would like this court to order that the first respondent's half-share of the property be transferred to her as recompense for the benefit which would have accrued to the applicant during the period of more than nine years. I must quickly dispense with the last claim as being incompetent because the applicant has not even attempted to prove it. The value of the property is unknown, the amount of benefit which accrued to the applicant during that period is unknown and as such there is no legal basis for ordering the transfer of the first respondent's share to the applicant on account of that. This court cannot divine.

The first respondent opposed the application. The basis of the opposition is that there are material disputes of fact as can only be resolved by oral evidence and not by affidavits. These relate to whether the first respondent has been receiving rentals for the whole property or not. The first respondent states that she has only be renting out half of the property and that the applicant is at liberty to occupy the rest. She did not disclose how she achieved that feat in respect of an indivisible property and did not even elaborate on what she means by reference to renting out half of the property. The first respondent did not even disclose the amount of rentals she is renting the property for.

The first respondent identified the second dispute of fact as being whether the applicant has been denied her right of occupation of her half-share or not. As shall become apparent later upon consideration of the law governing joint-ownership, it is not necessary at all to discuss the issue of whether the applicant has been denied access but more importantly, the first respondent appears to have misunderstood what constitutes a material dispute of fact as cannot be resolved by affidavits. You do not create a material dispute of fact by withholding information or by deliberate non-disclosure. The facts relating to how, to who, when and for how must the first respondent has been renting out the flat is within her knowledge. She should have disclosed it to the court in her opposing affidavit for consideration. Her refusal to do so cannot by any stretch create a material dispute of fact. I therefore reject that argument.

Other than making the point on dispute of facts, the first respondent did not say much in opposition. She only stated that it is the applicant who has failed to exercise her right to occupy the property while she has put tenants on her own half-share of the property for which she charges an undisclosed rental. No information is given on the set up of this tenancy and how the applicant can still enjoy her own half of the property. What is however clear is that the first respondent did not consult the applicant on allowing third parties to occupy the property and on how much they would pay. It was the first respondent's unilateral decision.

Mr Dube for the first respondent cited the following passage in the learned author Delports' book, *South African Property Practice and the Law*, at pp 28-29 which however does not support the position taken by the first respondent:

“Joint owners may regulate their rights and duties in respect of the joint property by agreement. In the absence of such agreement the common law principles regarding joint ownership would apply. These principles are, briefly put the following:

- (a) Each joint owner is entitled to make reasonable use of the property in accordance with the object for which the property is intended to be used. Thus where A and B are joint owners of a farm in equal shares, each can farm on the property provided they do not act unreasonably. It would for example, be unreasonable for A to plant crops on 90% of the farm, thereby drastically restricting B's use of the property ----.
- (b) One joint owner cannot prevent another joint owner from using the joint property, for example by locking a gate of the farm to jointly owned premises without giving the other joint owner a key. He cannot allow strangers to share in the use of the property without the consent of all the other joint owners. Thus where A and B jointly

purchase a farm, B cannot allow C to graze cattle on the farm thereby restricting A's use of the farm. Similarly, if A and B let a sectional title unit which is jointly owned by them in equal shares, each is entitled to half the rental. However, B cannot compel A to share the full rental with a third party who is not a joint owner of the unit.

- (c) All joint owners must share in the profits derived from the property. However, if the joint owners have divided the use of the property so that each has a defined portion for his own exclusive use, the profits made from such use need not be shared. If one joint owner makes a profit from an unreasonable use of the property, this must be shared with the joint owners.”
(The underlining is mine)

What comes out of this passage in the main is that a jointly owned property which has not been divided cannot be shared with strangers without the consent of the joint owner. In respect of sectional title as obtains in the present case, where that is rented out, the joint owners are entitled to equal shares of the rentals. That is exactly what the applicant is seeking in this matter. I should add that the same principles were discussed exhaustively by SMITH J in *Masubey v Masubey* 1993 (2) ZLR 36 (H) at 38 E where he said:

“In Silberberg & Schoeman *The Law of Property* 2 ed, the learned authors deal with the position of joint owners in Chapter XIII (pp 332-7). With regards to the rights and duties of co-owners they make the following statements. All co-owners are entitled to a share in the whole of the property. No co-owner has a *jus abutendi* in respect of it. A co-owner may not prevent any other co-owner from using the joint property reasonably and in proportion to his undivided share. A co-owner cannot introduce ‘an innovation or change in the nature of the occupation of the land’ without the consent of his co-owners. Similarly he cannot permit strangers to share in the use of the property without the consent of all the other co-owners.”

I make the point therefore that when renting out the flat or any part of it the first respondent required the consent of the applicant. Having rented it out, because it is undivided, the applicant became entitled to an equal share of the rentals. Of course the flip-side of that is that the applicant also shares the liabilities relating to maintenance and rates. In that regard the first respondent, who has taken it upon herself to rent out the flat, has an obligation to render and account to the applicant. The latter is entitled to an equal share of the profits arising from renting out the flat.

In the result, it is ordered that:

1. The first respondent shall render an account of all rentals received and expenses incurred on the property called Share Number 114 of Stand 1213 Bulawayo Township commonly known as Flat 14, Cleedon House, Bulawayo, jointly held by the parties under Deed of Transfer Number 2001/01.
2. The account referred to in paragraph 1 above shall be rendered within 30 days of the granting of this order and shall be for the period January 2009 to date.
3. The first respondent shall bear the costs.

Shenje and Company, applicant's legal practitioners
Dube, Mguni & Dube, 1st respondent's legal practitioners