

JUDITH ISHEMUNYORO (nee MANDIDEWA)
versus
ANTONY ISHEMUNYORO
and
TYNSERVE DISTRIBUTORS (PVT) LTD
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 24 October 2016 and 7 June 2017

OPPOSED MATTER

T Biti, for the applicant
Adv T Chinwawadzimba, for the second respondent

MUNANGATI-MANONGWA J: The applicant and the first respondent are husband and wife being married in terms of the Marriage Act [*Chapter 5:11*] and the marriage still subsists. What has brought the parties before the court is not a matrimonial dispute but consequences arising from a commercial transaction concluded between the first respondent and the second respondent Tynserve Distributors (Pvt) Ltd. The latter has attached half share of a jointly owned property.

The facts of the matter are as follows.

The applicant and the first respondent started life together in 1991 after customary rites had been performed. It was only in 2008 that the parties solemnized their marriage in terms of the Marriages Act [*Chapter 5:11*]. Of the three children born of the marriage one (1) was a minor at the time of hearing of this matter. At the time of marriage, the applicant was employed by the Ministry of Public Construction and National Housing and was allocated Stand 424 Sinoia Township (hereinafter called “The property”) on rental terms. Subsequently in 1994, the property was offered to the applicant to buy, she accepted the offer. She paid fully the purchase price

which was directly deducted from her salary as a government employee. It is not in dispute that on 11 June 2012 the property was transferred into the applicant and her husband's names under Deed of Grant 2350/2012.

The applicant's husband has been running a grocery business under Manyene Trading (Pvt) Ltd since 2000.

The second respondent supplied goods to the business on credit and the first respondent stood as surety and co-principal debtor for the due payment of monies due to the second respondent. Upon the business defaulting payment, the second respondent successfully sued the first respondent in the magistrates court for payment of the sum of \$138 000-00. The applicant purports that she was unaware of these developments.

The second respondent in pursuit of execution has attached 50% of the property to recover what is owed to it. It is this act which has led the applicant to approach this court.

The applicant seeks the following order:

1. The attachment by the second respondent of rights in the property being Stand 402 Sinoia Township situate in the district of Lomagundi measuring 2 025 square metres, arising out of a judgment of the magistrates court in case number HC 23332/14 dated 7 November 2014, be and is hereby set aside;
2. In immovable matrimonial, which is the matrimonial home, creditors cannot attach the same as a result of debt accrued by either of the parties.
3. The Registrar of Deeds be and is hereby authorised to transfer the 50% ownership of the property held by the first respondent to the applicant and the Sheriff of Zimbabwe be and is hereby authorised to execute all such documents and do all such things to effect this transfer.
4. The first and second respondents pay costs of suit.

The first respondent, applicant's husband has not opposed the application. The second respondent vehemently opposes the relief sought.

Applicant's Submissions

Mr *Biti* for the applicant submitted that the first respondent (hereinafter referred to as "applicant's husband" as co-owner is not entitled to introduce structural changes in occupation, expose the property or encumber the property which is jointly owned. He argued that the

applicant's husband, the first respondent and his company pledged the property in question as security without the applicant's consent. That being so that pledge is null and void as the applicant a joint tenant to the property was not a party and never consented to that. Relying on "*ius abutendi*," he submitted that no co-owner has a right to destroy the property.

Relying on *Erasmus v Afrikander Proprietary Mines Limited*.¹ Mr *Biti* submitted that a co-owner has a right to reasonably use that property but if the use puts a premium or creates a nuisance on the rights of a co-owner then that right does not exist. He further referred to the decision of *Masubey v Masubeyz*² where the court held that the actions of a husband (now late) in granting his mother a usufruct on part of the property jointly owned without the consent of his wife infringed upon the rights of his wife. In essence, Mr *Biti* submitted that the attachment of the first respondents' half share was null and void for it ran contrary to the common law principle on joint ownership.

The applicant asserted in her application that her rights as co-owner are so critical as to determine who she could co-own the property with. She further advocates for the expansion of common law to recognize that jointly owned matrimonial property should not be attached or exposed without the co-owner's consent. This, Mr *Biti* argued, could be achieved through judicial activism duly supported by the Constitution which in s 176 gives power to this court among the other superior courts to develop the common law or customary law taking into account the interests of justice and the provisions of the Constitution.

Following on the applicant's assertion that she contributed the entire price, Mr *Biti* urged the court to consider that the applicant has a far greater share in the property it having been acquired through her employment and therefore entitled to transfer of the whole property. This submission he premised on the fact that whilst jointly owned, the property is held in shares proportionate to respective contributions. Adopting this perspective would result in the declaration of the applicant as the sole owner of the property.

Further, applicant's application has a constitutional dimension to it. She seeks to rely on s 56 (1) which guarantees equality and equal protection of the law and s 56 (2) on equal treatment including the right to equal opportunities in political, economic cultural and social sphere.

¹ 1976 (1) SA 950

² 1993 (2) ZLR 36 (HC)

Mr *Biti* submitted that allowing the husband to unilaterally mortgage the jointly owned matrimonial property is an infringement of the above stated rights. Section 80 (1) is brought in and same provides that every woman has full and equal dignity of the person with men including equal opportunities in political, economic and social activities. Thus allowing the attachment and sale of the property without the applicant's consent will amount to discriminating against the applicant, and will maintain the "inherent" disadvantages which women in Zimbabwe experience. Reference was made to the committee on Economic, Social and Cultural Rights wherein its General Comment No 16 (2005) placed emphasis on equal enjoyment of the rights for men and women in practice.

The vulnerability of women was discussed at length with reference to different International Conventions or Committees, the UN Committee on Economic Social and Cultural Rights General Comment No. 7 (1997) on the right to adequate housing for this vulnerable group.

Mr *Biti* called upon the court to live to its obligation under s 44 of the Constitution to respect, protect promote and fulfil rights and freedoms set out in the Constitution. In summary Mr *Biti* submitted that the attachment was unlawful as the husband did not have *ius abutendi*. If the applicant were to be deprived of her home this would be an infringement of her rights to dignity, equality, equal protection and benefit of the law and her right to property.

Mr *Biti* sought to persuade the court to adopt the English position as espoused by Lord Denning in *William and Glyn's Bank Limited v Boland* which makes it a duty of creditors to do due diligence when dealing in matrimonial properties, which principle is utilized in Malawi and Zambia.

Second Respondent's Case

For ease of reference second respondent shall be referred to as "Tynserve." Ms Chinwawadzimba for Tynserve submitted that on the common law aspect the case of *Erasmus v Afrikander Mines Ltd* cited supra sets out the standard. The applicant has to establish that the manner in which title has been used is unreasonable. This is not the case in *casu*. The law of property and s 72 of the Constitution provide that everyone has a right to property. That being so the respondent has a right to deal with his share as benefits him as an owner. In that regard there is no need to set the attachment aside. She further submitted that the attachment is

proper as it flows from an order of court which in terms of s 164 (3) of the Constitution is binding on all persons. She checked the relevance of all the sections of the Constitution which Mr *Biti* referred to being s 19, 25, 26, 56, 78, and 81 as having no bearing to the matter at hand. She stated that there is no evidence of which right is being infringed. It was further submitted on behalf of the respondent that the relief sought in the draft order that creditors cannot attach immovable property which is the matrimonial home is not supported by any authority. Further, there is no basis for the court to order transfer of the 50% ownership of the property held by first respondent to the applicant.

In response Mr *Biti* indicated that the founding affidavit does not have to state the constitutional aspect characterizing the application. The second respondent should have sought a declaration that first respondent owns 50% before proceeding. Further, this case is different from the *Linda Mudawadzuri v Kingdom Bank Africa Ltd*³ as there was distinct ownership as the shares were indicated. According to Mr *Biti* the attachment of the 50% amounted to unilateral allocation of shares.

Analysis

It is common cause that the property in issue is jointly registered, therefore it is co-owned. Unlike in the *Linda Mudawadzuri* case (cited *supra*) the Deed of Grant which is filed of record does not specifically state that either party owns an undivided half share. The preamble to the deed which refers to the state as the transferor or simply states “I do hereby grant unto Antony Ishemunyoro (born 10 January 1964) and Judith Mandidewa (born 28 February 1970)”. Their heirs, executors, administrators or assigns hereinafter referred to as the owner, or a piece of land measuring 2085 square meters called stand 424 Sinoia Township.”

In the absence of the specificity regarding the shares, the legal position where property is jointly registered was enunciated by MCNALLY JA as follows in *Lafontant v Kennedy*⁴

“What, then is the Zimbabwean law relating to joint ownership of immovable property? It seems on that joint ownership is the same as co-ownership, which in turn coincides with what the Deeds Registry Act [*Chapter 20:05*] calls a land held by two persons in undivided share.” See ss 24, 25 and 26 of that Act.

³ HH 95/15

⁴ (2000 (2) ZLR 280 SC

Where two persons own immovable property in undivided shares (as is the case here) there must, I think be a rebuttable presumption that they own it in equal shares. That presumption will be strengthened when (as here) the parties are married to each other at the time ownership was acquired.”

He further cites Jones Conveyancing in South Africa⁵ which states

“where transferees acquire in equal shares it need not be stated in the deed that they acquire “in equal shares” as this fact is presumed on the absence of any statement to the contrary.”

In essence the starting point is that parties are *prima facie* owners in equal shares. The court held in the same case that “the court cannot move from that position on mere grounds of equity. There must be a more solid foundation in law than that. Examples of facts amounting to evidence which may lead to successful rebuttal of the presumption are stated as instances where the co-owner is a nominee or agent of the other owner, where there is fraud, mistake, or a donation which can be voided by the donor.

I am not satisfied that the applicant presented to court any evidence which would persuade the court to declare her the sole owner of the property. Apart from absence of any evidence to prove her extent of contribution (except mere say so) and further establishment of a solid foundation or a basis why the first defendant’s share should be awarded to her. Without any recognised ground, mere contribution not being enough as mere grounds of equity do not suffice. The degree of rebuttal of the presumption on equal shares is very high as enunciated above.

Following the finding that the applicant has failed to establish grounds why she should be entitled to the whole property, it follows therefore that, the first respondent remains the owner of 50% share in the jointly owned property. That being so, to what extent can he deal with his property? The answer can be extricated from Sielberg and Schoeman’s The Law of Property where the rights of a co-owner are enunciated as follows.

“Every co-owner has the right freely and without reference to co-owners to alienate his or her share, or even part of his or her share subject of course to the provision of the subdivision of Agricultural Land Act. It is this right which is probably the most important characteristic which distinguishes a co-owner *per se* from all other forms of co-ownership such as partnerships and

⁵ 4 ed p 118

association. It is clear that the exercise of this right may lead to friction on that it enables one co-owner to force the others into a legal relationship with a party or parties they do not desire.”⁶

Thus, a co-owner has a right to deal with his rights. As rightly put by the author referred to above, an undesirable situation may arise where the other co-owner may then own property with a stranger. In essence therefore the first respondent is at law authorised to alienate his rights, encumber the same without reference to the other co-owner. It therefore follows that the second respondent would be within its rights to attach the 50% share of the first respondent to recover a debt incurred in a purely commercial transaction.

It cannot be disputed that the exercise of a co-owner’s rights bring outright hardship to another co-owner in a matrimonial set up. This is particularly so when the property in issue is a matrimonial home. A house being indivisible, the property being a family home as in this case it becomes in my view virtually impractical that the property be owned by two unrelated parties.

It is this undesirable and impracticable situation that in my view Mr Biti sought to demonstrate and seek solution to by referring to dynamic constitutionalism. No doubt legislative intervention is required to protect a family home. This may constitute in law reform providing legal mechanisms for the prevention of encumbering a matrimonial home in the absence of meeting certain criteria. As TSANGA J stated in *Madzara v Stanbic Bank Zimbabwe Limited and others*⁷, “the absence of mechanisms for the protection of a matrimonial home is indicative of a lacuna in the law which needs to be addressed legislatively in terms of spelling out the exact parameters of the protection of the matrimonial home”.

Attainment of such a milestone can never be achieved through judicial activism. This is a pertinent issue which touches on the concept of real rights as constituted by ownership and the will to deal in property and the limiting of such rights where matrimonial property is juxtaposed with the dictates of commerce. Entities like banks and other lenders rely on security which is guaranteed by ownership rights. It is upon the trust and security that whatever is lent out can be recovered that holds the confidence of banks and lenders. Given that scenario the clandestine interference by the courts in upturning the law may create an imbalance if not supported by the necessary legislative intervention. The situation obtaining in Malawi and Zambia cannot be brought about by the courts. In my view no constitutional provision in terms of equality of rights

⁶ 5th edition at p 135

⁷ HH 546-15 at p 16

during marriage, or equal treatment including equal opportunities in economic cultural and social spheres was infringed. Neither was the right to acquire property. The applicant worked and acquired property of which she out of her free will and volition decided to register jointly with the husband. No cogent reason was advanced to explain why she decided to include in title her husband who did not according to her evidence contribute to the acquisition. It can only be concluded that she donated the half-share to her husband and it was only after she was faced with the disposal of the husband's half share that she panicked and raised this application.

In conclusion, it is time that the legislature listens to the outcry that has resulted from the disposal of family homes by either spouse encumbering or selling a matrimonial home without the knowledge of the other leaving the family destitute. The Constitution recognizes the right to family and its protection to shelter and indeed protection of children. These rights will remain on paper unless effective measures and timeous intervention is made regarding protection of matrimonial homes. The dictates of commerce need be considered against the backdrop that family is what ultimately constitutes a nation upon which commerce is subsequently built. Although this application cannot succeed, it counts towards the statistics of reflecting the extent of the problems associated with the legislative gap *viz* protection of the matrimonial home.

Accordingly for the foregoing reasons, the following order is made.

The application is dismissed with costs.

Tendai Biti Law, applicant's legal practitioners

Dhema B Attorneys, 2nd respondent's legal practitioners