HONORATO NILO FERNANDES
versus
VERENO JOSEPH FERNANDES
and
REGISTRAR OF DEEDS, HARARE N.O.
and
SHERIFF OF THE HIGH COURT
and
HUDGAME INVESTMENTS [PRIVATE] LIMITED

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 June 2016 and 21 December 2016

Civil Trial – Special case

B. Madanhe, for the plaintiff
F. Nyamayaro, for the first defendant
G. Mhlanga, for the fourth defendant
No appearance for the second and third defendants

MAFUSIRE J: Upon queries raised by myself, the parties readily opted to proceed with this matter as a special case in terms of Order 29 of the Rules of this Court.

The plaintiff ["***Honorato***"] and the first defendant ["***Vereno***"] were brothers. They were, since 1996, the joint and equal owners, on a single title deed, of undivided shares in a certain commercial property at Kamfinsa Shopping Centre in Harare. The property was on 3 505m^2 of land. Some shops and offices were built on it. These were being leased out to various tenants, the brothers sharing the expenses and the rentals in equal shares.

In 2006 the brothers entered into a written agreement which they titled "Memorandum of an Agreement of Dissolution of the *de facto* Partnership". In the preamble, the status *quo* was recognised as a *de facto* partnership being one arising out of their arrangement to lease out the property and sharing the expenses and the income as aforesaid. Next, it was recorded that owing to constant disputes between them, the brothers had resolved to dissolve the partnership as they could no longer work together amicably. The assets would be distributed, in particular, the right of occupation and enjoyment of the fruits of their joint ownership of

the property. The preamble also mentioned the intention, at some future date, to subdivide the property, which was said to be impossible at that time. In the meantime all what they would do was to assign to each the rights in, and to certain defined premises within the property, and to agree the manner in which common rights and obligations would be dealt with.

To give effect to their intention, the property, or the developments on them, was/were split in two and assigned to each. The essence of the main part of the agreement was to dissolve the partnership and to bestow to each the exclusive right to the beneficial use and profits of those portions of the premises assigned to them. The operative part of the agreement permitted each to lease out their respective portions; to alienate or transfer such rights, and generally to deal with their respective allotments to their best advantage. However, to each was reserved the right of first refusal in respect of the other's portion in the event of an alienation or a transfer. They would be jointly responsible for the common areas. Rates and water accounts would be shared in proportion to the respective areas occupied.

Simultaneously with the above agreement was another one titled "Cession and Assignment". The essence of this second agreement was to record the cession and assignment to each other, of certain defined letteable portions of the premises. It was also indicated that they would register by Sectional Title in terms of the Deeds Registries Act the divisions so created.

A year later, Vereno sold, or purported to sell, to the fourth respondent ["***Hudgame***"] two of the shops assigned to him. In the preamble, Vereno was described as the owner of those shops. It was also recorded that he was in the process of acquiring Sectional Title for them. The agreement had the usual terms and conditions, such as those dealing with the purchase price; the mode of payment; transfer; risk and profit; capital gains tax, and the like. To protect its interests, Hudgame caused an xn caveat to be registered on the whole property.

In 2015, i.e. nine years after the two agreements aforesaid, Honorato brought this action against Vereno, the Registrar of Deeds, the Sheriff and Hudgame. Apart from costs, his claim was for the following orders:

i. to terminate the bothers' joint ownership of the property;

ii. to compel Vereno, or, if he would not comply, the Sheriff, to sign all the documents and to do everything necessary for the application for a sub-division permit in respect of the property;

iii. to declare the brothers jointly liable, in equal portions, for the costs of effecting the sub-division;

iv. to declare the two agreements aforesaid [dissolution of the *de facto* partnership and the cession and assignment], and Vereno's agreement of sale with Hudgame, illegal and therefore null and void for being contrary to law;

v. to compel the Registrar of Deeds to uplift the xn caveat;

Honorato's cause of action was that he now wanted the property subdivided so that he could have exclusive ownership and control of a portion because he and Vereno had not ben agreeing on the methods of managing the property. He alleged that Vereno had attempted to alienate a portion of the land without Honorato's knowledge; that Vereno was not contributing to the payment of the utility bills and rates; that Vereno was not cooperating in having the property subdivided; that the property was capable of being subdivided, and that the two agreements [of dissolution of the *de facto* partnership and of cession and assignment] were illegal because they were prohibited by law since, in the words of the plaintiff's declaration, they were "*... clustered with the effect of transferring the ownership of a piece of land without [first] obtaining a permit [for] a subdivision …*" Vereno's sale agreement with Hudgame was said to be illegal because it had not been done with Honorato's consent as joint owner, yet it had the effect of transferring ownership of a portion of the land without a subdivision permit.

Vereno defended the action on the basis that a subdivision was impossible owing to the manner of the developments on the property. He said any subdivision would not be possible without damaging the existing buildings, and he did not wish the property subdivided anyway. He denied that he was not contributing to the common expenses or that he was not cooperating in the management of the building. He said since the agreements in question, each of them had been confined to their respective portions for administrative purposes and that there had been no problems at all. There was nothing illegal in those agreements as none of them had the effect of transferring ownership. Of his agreement with Hudgame, he denied that it was illegal because the sale had been conditional and not absolute.

Hudgame also contested the claim. Firstly, it claimed that it had become prescribed because the cause of action had arisen in 2007 when the sale agreement had been entered into. On the merits, it said the brothers' two agreements were competent and legal as they dealt with the administrative aspects of the developments on the property. Its information was that the brothers had abandoned the subdivision route in favour of that of Sectional Title following advice from surveyors.

On its agreement with Vereno, Hudgame said this followed the brothers' own agreements which, *inter alia*, permitted them to deal with their respective portions as they pleased. It argued that the law permits a co-owner to alienate a part or the whole of his own share in a joint ownership of a property.

Hudgame also said that by those agreements, Honorato had consented to Vereno's sale to it. Finally, Hudgame said that if its agreement with Vereno was cancelled, Honorato would be unjustly enriched because it had built a multi-million dollar shop complex on the section sold to it.

The Statement of Agreed Facts took the factual position no further except to record one area of disagreement. This was that Honorato had approached land surveyors who had advised that a subdivision of the property was possible. Reference was made to a letter from the City of Harare, the local authority, some two months after Vereno's plea, which said that given the property's zoning, a subdivision was at its discretion as the local planning authority. The letter went on to advise the requirements for a subdivision. These included some prescribed form which had to be signed by the owner or owners of the property. Part of Honorato's argument was that Vereno was refusing to sign this form.

I have considered the following issues as decisive of the matter.

[a] **Prescription**

In terms of the Prescription Act, [*Chapter 8:11*], a debt, other than those specified, becomes prescribed after the lapse of three years. Hudgame said its agreement with Vereno was in May 2007. Its argument was that soon after taking occupation it had demolished the pre-existing building and had put up a massive structure which was running as a supermarket. He said Honorato saw it happening but raised no finger. Thus, the argument concluded, Honorato's cause of action arose then and expired three years later.

Honorato has completely ignored Hudgame's plea of prescription. He has ignored everything else said by Hudgame about it. But the point seems so valid. His claim to nullify

Vereno's sale to Hudgame, coming eight years later, is prescribed. It falls within the definition of the term "*debt*" as defined in s 2 of the Act. Therein "***debt***", without limiting the meaning, includes anything which may be sued for, or claimed by reason of an obligation arising from statute, contract, delict or otherwise.

Therefore, Honorato's claim to nullify Vereno's agreement of sale with Hudgame should be dismissed.

Prescription was not raised in respect of Honorato's two agreements with Vereno.

[b] **Legality of Vereno's agreement of sale with Hudgame**

Honorato sought to impeach both his two agreements with Vereno as well as Vereno's with Hudgame that I have just considered above. But for the fact that the legality or otherwise of this third agreement was said to affect Honorato's rights over the property in regards to his relationship with Vereno as joint owners, I would not have considered it again under this heading because I was done with it under prescription. Vereno did not raise prescription as a defence.

Under illegality, Honorato's point was that the sale agreement was illegal for want of compliance with s 39 of the Regional, Town and Country Act, [*Chapter 29:12*]. This section requires that a permit be procured for certain developments or procedures on a property. It reads:

> "**39 No subdivision or consolidation without permit**
>
> [1] Subject to subsection [2], no person shall –
>
> [a] subdivide any property; or
>
> [b] enter into any agreement –
>
> [i] for the change of ownership of any portion of a property; or
>
> [ii] for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
>
> [iii] conferring on any person a right to occupy any portion of a property for a period of ten years or more or for the his lifetime; or
>
> [iv] for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more; or
>
> [c] consolidate two or more properties into one property;

except in accordance with a permit granted in terms of section *forty*:

Provided that an undivided share in any property, whether or not it is coupled with an exclusive right of occupation, shall not be regarded for the purposes of this subsection as a portion of that property." [my emphasis]

Honorato completely ignored the above proviso. An undivided share in any property is not regarded as a portion of the property for the purposes of s 39 of the Act. No subdivision permit is required before one sells an undivided share in a property. The brothers owned undivided shares in the property. Therefore, the Act did not apply.

But even if the above proviso was not there, or did not say what it says, the Regional, Town and Planning Act would still not apply. Honorato relied on the case of *X-Trend – A – Home* v *Hoselaw Investments*[1]. In that case the Supreme Court interpreted s 39 to mean that what is prohibited is the agreement itself that may lead to a change of ownership of any portion of a property, irrespective of the time of signing that agreement.

However, Honorato has misconstrued the true nature of Vereno's sale agreement with Hudgame. It is not what the parties said, or thought, what they were doing that matters. It is what they actually did. It is necessary to dissect, stage by stage, the incidence of the brothers' co-ownership of the property to show where Honorato's argument falters.

The brothers were joint co-owners of the property in equal undivided shares. That meant that for every inch of that property each of them owned 50%. They each had the right to a share in its entirety. That is the starting point.

The second point is that as co-owners, none of them had the right to, for instance, destroy it. None of them could prevent the other from using it reasonably in proportion to their undivided shares: see Silberberg & Schoeman's *The Law of Property*, 5th ed. at p 133 – 134 [hereafter referred to as "***Silberberg***"]. All profits from the property would be shared equally, even if they be the result of an initiative by one of them. Conversely, each was liable to share in the expenses or losses incurred in the running or upkeep of the property. If one paid more than the other, he was entitled to recover the extra.

The third point is that every co-owner of a jointly owned property has the right to freely and, without reference to the other co-owner or owners, alienate his or her share, or even part of it. In a footnote on p 135, Silberberg comments:

[1] 2000 [2] ZLR 348 [S]

> "Thus a co-owner who owns one-half undivided share may introduce another co-owner by giving him or her one-quarter undivided share retaining one-quarter himself, or he or she may transfer his or her entire half-share to somebody else. Every co-owner may also encumber his or her share, e.g. by passing a mortgage bond over it, provided always that in doing so he or she does not infringe on the rights of the other co-owners."

It seems to me that it is this aspect of co-ownership that Honorato, and even Vereno himself, and Hudgame also[2], got entangled in.

When Vereno sold to Hudgame, he was not selling a subdivision of the property. He was not selling a section or sections of the premises. Equally, Hudgame was not buying a subdivision or sections of the premises. No transfer of a subdivision or sectional title of the premises would transfer from Vereno to Hudgame by reason of that agreement. The Regional, Town and Country Planning Act was plainly irrelevant.

The true nature of what Vereno did, by that agreement of sale, was to alienate so much of his 50% undivided share in the property as was represented by the two shops in question. This he could do. If Hudgame took transfer, it would be of that undivided share as alienated to it. To the extent of that share sold to it, Hudgame would become a co-owner in the property, not an exclusive owner of a subdivision. In other words, to the extent of its share, Hudgame would become a joint co-owner with the two brothers.

It may be that a joint co-owner of a property in undivided shares, like Honorato was – even assuming that he was unaware of Hudgame's existence – might one day wake up to find himself co-owner with a stranger. This may be undesirable. But the law does not prohibit it. Of this Silberberg says, at p 135:

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

It seems to me it is this ability of co-owners to alienate their interest that, among other things, judicial attachment of a co-owner's interest in a property that he or she jointly owns with another or others is possible.

To get round the problem of a co-owner having a stranger or strangers fostered on him or her by his or her other co-owner or owners, the law permits them to get the property partitioned at any time. This is the fourth point in my stage by stage analysis of the incidence of co-ownership.

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[2] Because they raised irrelevant and misconceived arguments

Silberberg says every co-owner may insist on the partition of the property at any time. Honorato said he was insisting that the property should be partitioned. He went on to cite numerous cases in support of that right. But that argument jumped the gun.

Whether a court will grant a demand for a partition or not is, in my view, entirely in its discretion, depending on all the circumstances of the case. A partition may be uneconomical. It may be detrimental to the interests of the co-owners themselves, or some of them, or the owners of adjoining properties. It may be prohibited by reason of the zoning of the property in terms of local town or country planning laws.

The learned author says it remains to be seen whether a court will in fact refuse a co-owner's demand for partition. In my view, where the case for a partition has properly been pleaded and properly made out, and the circumstances are such that it is desirable that it be done, the court should grant the request. However, *in casu*, before dealing with whether or not Honorato has made out a proper case for partitioning, I must stress that, as shown above, a joint co-owner of a property in undivided shares is not precluded from alienating his share, even without the consent of the other co-owner or owners. This was one of the grounds of Honorato's purported impeachment of Vereno's agreement of sale with Hudgame. It must fail.

[c] **Legality of the agreement of dissolution of *de facto* partnership and of cession and assignment**

Honorato purported to impugn his agreements with Vereno to dissolve their *de facto* partnership and to cede and assign to each other defined portions of the premises on the property on the same grounds as those he sought to do so against Vereno's sale agreement with Hudgame, namely that they were proscribed by s 39 of the Regional, Town and Country Act. He said the effect of the two agreements was to subdivide and alienate to each other portions of the property without a subdivision permit. This was a misconception. In fact, the argument had a tinge of bad faith.

Joint co-owners of a property can agree on the manner they may want to administer the property. This is the fifth point in my stage by stage analysis. Joint owners can agree on the manner they may occupy, use or enjoy the property. They can agree to re-arrange or regulate their rights and duties in respect of their joint ownership. They may agree to bring strangers onto the property: compare *Pretorius* v *Nefdt and Glas*[3] where because one co-

[3] 1908 TS 854

owner granted a third party permission to use a private road on a jointly owned farm, the other co-owner was granted an interdict because the arrangement was done without his consent.

The two agreements above only regulated the administrative aspects relating to the use and enjoyment of the property. They did not alienate to the brothers the portions of the premises allocated to them. There was no question of the brothers owning those portions individually and exclusively. It was only in the outlook period that a subdivision or Sectional Title could be considered.

Therefore, Honorato's attempt to impugn the two agreements should fail.

[d] **Whether Honorato has made out a case for the subdivision of the property**

Honorato's claim for a subdivision of the property was badly pleaded. It was cluttered with numerous other irrelevant causes. Fortunately for him, just enough detail was sprinkled in the declaration to found the claim and sustain it. He averred that Vereno had been very uncooperative in the management of common areas. He said he was not contributing his share of the utility bills and the rates with the result that these had accumulated. On his part, Vereno was unwilling to have the property subdivided. Honorato says he was left with no option but to approach the court to order a subdivision.

As I have shown above, the court can order a partition in a proper case. Even in spite of an agreement of perpetual joint ownership – which was not the case in this matter – a party can still demand a partition. Every case depends on its set of facts.

It was because of the problems encountered in managing the property mutually or jointly that had led the parties to enter into the two agreements aforesaid. Evidence on record suggests that despite the property being only 3 505m^2 in extent, and despite the developments or improvements on it, a subdivision was still possible. Vereno has not suggested any reason why, in the face of his brother wanting out, he should insist on him staying put. It is true that Honorato has confused issues by devoting acres of space unnecessarily attacking the three agreements in question, instead of confining himself to explaining why the court should order a subdivision.

However, a holistic consideration of the circumstances of this case leaves me in doubt that joint ownership of the property has become burdensome to Honorato. It was not explained how the brothers became joint owners in the first place. However, from the current deed of transfer, it seems initially there were three co-owners, each owning a third share. It

was when the one third share of the third co-owner devolved to the two in equal shares that they became joint owners.

However, be that as it may, it seems to me a proper case to allow the parties to part ways for as long as this can be done in accordance with local town planning requirements and without in any way prejudicing Hudgame's rights and interests in the property.

Honorato claimed costs of suit against Vereno and Hudgame if they should oppose the claim. They did. But obviously Honorato meant to say, if the two opposed the claim unsuccessfully. That has not been the case. Honorato himself has just been barely successful. I consider it a proper case to order that each party should bear its own costs, especially given that the arguments by all the parties were manifestly misplaced.

In the circumstances I make the following orders:

1 Subject to the requirements of the local planning authority, and to paragraph 2 below, the land situate in the District of Salisbury, known as the Remaining Extent of Lot 306 of Greendale, held jointly in the names of the plaintiff and the first defendant under Deed of Transfer No 8152/96, may be subdivided appropriately and equitably between them.

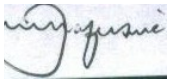
2 Notwithstanding paragraph 1 above, any subdivision as aforesaid shall not prejudice the rights or interests of the fourth defendant in the property which it acquired by reason of, or in connection with, or in pursuance of, or incidental to, the Memorandum of Agreement of Sale between it and the first defendant on 24 May 2007.

3 The parties are ordered and directed to cooperate fully by signing all the relevant documents and doing everything necessary practicable whenever required, failing which the fourth defendant, or his lawfully authorized representative, shall be empowered and authorized to stand in the stead of the defaulting party and to do whatever may be required of such party in order to give effect to the subdivision aforesaid.

4 The costs of the subdivision, or those incidental thereto, shall be borne by the plaintiff and the first defendant in the proportion of the subdivisions allocated to them, or in equal shares, whatever the case shall be.

4 Each party shall bear its owns costs.

21 December 2016



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