

HH 29-2003
HC 5699/00
ROSEDEANE GARDENS OWNERS' ASSOCIATION
versus
LUXMORE NDENDA

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 2 May, 2001 and 26 February, 2003

OPPOSED APPLICATION

F Girach for the applicant
G C Chikumbirike for the respondent

HUNGWE J: The applicant is an owners association of cluster houses development in Ashdown Park, Harare. As members are owners of an undivided share in the land coupled with an exclusive right of occupation of a numbered block of part of the structure. There is in place a Constitution that sets out the objects of the association, its powers and its administrative structures. The membership section of this Constitution is clause 9 which sets out the conditions of membership. These are that -

- 1. One has to be a registered owner of an undivided share in the land.**
- 2. Prior to such registration of title to an undivided share in the land, a member has to complete a prescribed form of application and has paid certain levies as may be determined by the committee. Once those formalities are complied with, membership is automatically conferred to that person.**

The respondent bought a section of the building complex on the piece of land to which the members of the applicant are co-owners of undivided shares in the land. Upon making his purchase, applicant wrote a letter welcoming respondent to

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Rosedean Gardens, the name of the complex. In that letter the respondent is referred to as a member of the applicants. He is also updated as to the activities and decisions of the Owners Association. He is given minutes of the meetings held up to that date and informed of the date of the next meeting.

He attended the meeting held two months after the date of that letter. The minutes of that meeting reflect that his decision to put up a prefabricated wall around his unit i.e. number 10 was debated and in the end it was resolved that he should not do so as this would compromise security.

It is common cause that the members of this block share common areas around the block. That area is small. Most of the amenities are shared.

Respondent argued that as he had not completed the requisite form for application of membership, he therefore did not exercise his right to become a member. He therefore is not a member. As such he is not bound by the Constitution of the applicants. He does not dispute that he is carrying out the activities which the meetings resolved should not be carried out namely keeping pets and putting up the prefabricated wall around his unit.

Applicant seeks an order directing the respondent to pull down the wall around his unit and to remove the pets he presently keeps.

Respondent's membership had not been put in issue until this application was filed. He did not raise it in those meetings he attended. He paid all the levies and did as demanded by the applicant.

In short he has conducted himself as a member. The absence of a formal application, to my mind, does not prevent an interpretation of his conduct as being consistent with membership. It is the only conclusion one can come to. It accords with commons sense.

I am satisfied that in spite of his non-application of membership formally, by conduct, all the parties acted as if he was such. He is therefore bound by the Constitution of the applicant.

As such he has no answer to the order sought.

In the result there will be an order in terms of the draft with costs.

***Zamchiya Costa* applicant's legal practitioners**

***Chikumbirike and Associates* , respondent's legal practitioners**