ANYHOME (PRIVATE) LIMITED
versus
CLEMENCE MATSIKA
and
REGISTRAR OF DEEDS N.O.
and
SHONHIWA CHIZINGA
and
TSITSI CHIZINGA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 25 February, 3, 10 & 14 March 2022

Urgent Chamber Application-Interdict

D. Sanhanga, for the applicant
M. Mtlongwa, for the 1st respondent
A. Chambati, for the 3rd and 4th respondents

MUSITHU J:

BACKGROUND

The applicant, an entity duly incorporated in terms of the laws of Zimbabwe seeks an order interdicting the sale and transfer of tile in an immovable property registered in the name of the first respondent. The first respondent is a former employee of the applicant. During his employ with the applicant, the first respondent is alleged to have caused the loss of the applicant's merchandise resulting in some financial loss to the applicant. It is in respect of that claim that the applicant asserts some rights over the first respondent's immovable property for which it requires that a caveat be constituted over the immovable property through a court application that is pending before this court. To that end, the applicant filed this urgent chamber application seeking the following relief:

> "**INTERIM RELIEF**
> Pending the finalisation of the application filed under case number HC 2836/21it is hereby ordered that:

1st Respondent shall not sell, alienate, pledge or dispose of in any manner a certain property registered in the name of 1st Respondent known as ***an undivided 0.0298% share being share number 1225 in certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares, held under Deed of Transfer number 1682/2017.***
2nd Respondent shall not cause the transfer of title of a certain property registered in the name of 1st Respondent known as ***an undivided 0.0298% share being share number 1225 in certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares, held under Deed of Transfer number 1682/2017*** to any person without leave of this court granted by way of a court order.

TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The 1st Respondent be and is hereby interdicted from selling or disposing of a certain property registered in the name of 1st Respondent ***known as an undivided 0.0298% share being share number 1225 in certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares, held under Deed of Transfer number 1682*** be and is hereby declared specially executable.
2. The XN Caveat placed on a certain property registered in the name of 1st Respondent known ***as an undivided 0.0298% share being share number 1225 in certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares, held under Deed of Transfer number 1682/2017*** be and is hereby confirmed.
3. The 1st Respondent to pay costs of suit."

The parties first appeared before me on 25 February 2022, and I postponed the matter to 3 March 2022 at the request of the first respondent's counsel. He had received instructions late and needed time to study the application and file opposing papers. On resumption of the hearing on 3 March 2022, it emerged from the first respondent's opposing affidavit that the property at the centre of the dispute had since been sold to the third and fourth respondents. Ms *Sanhanga* for the applicant applied for the joinder of third and fourth respondents. The two were joined with the consent of Mr *Mtlongwa* for the first respondent.

The joinder of the third and fourth respondents inevitably entailed the postponement of the matter to allow for service of the urgent chamber application on the two, as well as give them time to oppose the application if they were so inclined to. The matter was postponed to 10 March 2022 by consent. At the hearing on 10 March 2022, the third and fourth respondents had filed opposing papers. The applicant had also filed an answering affidavit to the first respondent's opposing affidavit. It was tendered from the bar.

The brief factual background is as follows. The applicant claims that the first respondent was its manager until his resignation on 29 April 2021. Between January 2020 and March 2021, the first respondent unlawfully caused the loss of the applicant's goods whose value was US$41 790.75. Criminal proceedings were instituted against the first respondent resulting in his conviction under **CRB 1611-12/21**. Part of his sentence required him to pay restitution to the applicant. Other criminal matters involving the two parties remain outstanding.

The applicant claims that it made a formal demand to the first defendant. The claim was partly for loss of merchandise as well as damages for running a parallel business by the defendant in violation of his contract of employment with the plaintiff. To protect its interests, the applicant's legal practitioners wrote to the second respondent on 23 May 2021. The letter reads in part as follows:

> "…….
> Our client wishes to recover the value of its stolen property as a result of the unlawful and criminal acts of the mentioned. We are advised that Clemence Matsika has only one asset of value, that is, ***Undivided 0.0298% Share Being Share Number 1225 In Certain Piece of Land Situate in the District of Salisbury Called Lot J of Borrowdale Estate Measuring 724, 0475 Hectares.*** This is the only asset that our client may execute against and recover its dues.
>
> We have instructions to make an application with the High Court for the registration of a caveat against the property owned by Mr. Clemence Matsika, and we have commenced the process. Once we file with court, we shall serve you.
>
> In the meantime, we wish to safeguard our client's interest, in case the property may be transferred before getting an order for placement of a caveat.
> ……."

The application to place the caveat on the first respondent's property was filed on 7 June 2021 under HC2836/21. The first respondent opposed that application, and part of his reason for opposing was that he had no intention of selling that property. That application is pending before this court.

Applicant's Case

The applicant claims that on 17 February 2022, it became aware that sometime in December 2021, the first respondent sold the property to an unknown third party. The applicant became aware of this position after its counsel received a call from the second respondent alerting it of the sale. The applicant's counsel was further advised that the transfer of the property to the purchasers could only be forestalled through an urgent chamber application that had to be filed

within 48 hours of the notification. The applicant filed this urgent chamber application on 22 February 2022.

The applicant averred that the matter was urgent as it had immediately acted upon being informed of the intended transfer. It further averred that it was entitled to the relief it sought pending the determination of the application to register the caveat under HC 2836/21.

First Respondent's Case

In his opposing affidavit, the first respondent raised the following *in limine*, lack of urgency and non-joinder. The objection on non-joinder was abandoned following the joinder of the third and fourth respondents.

As regards the question of urgency, the first respondent contented that the need to act arose on 7 June 2021 when the application to register the caveat was filed. The first respondent opposed that application and it was at that stage that the applicant ought to have realized that the first respondent could deal with the property as he wished. There was nothing stopping him from selling the property if he so wished. Only a court order could stop him from conducting himself in that manner. The matter was not urgent. This was clearly a case of self-created urgency.

Concerning the merits, the first respondent averred that the application was doomed. The application had been overtaken by events. The property had since been sold and the purchase price paid in full. At the time of the sale, no claim had been made against him. The pending application did not suspend the disposal of the property. Surely the applicant did not expect the first respondent to wait for a non-existent claim from 7 June 2021. The first respondent denied that the property was *res litigiosa*. The first respondent further denied owing the applicant US$41 790.75. That amount remained unsubstantiated. It was not liquidated. He also denied that the property had been sold to defeat the applicant's claim. No such claim existed at the time of the sale. In any event, the law did not permit the lodging of a caveat over another person's property without good cause. The interest on which the claim was predicated had to exist at the time the caveat was lodged. It must not relate to some future interest.

The first respondent prayed for the dismissal of the application with costs.

Third and Fourth Respondents' Case

The third and fourth respondents raised two preliminary points, lack of urgency and the fact that the application had been overtaken by events. The court was urged to jettison the

application for lack of urgency. They also contended that the need to act arose on 7 June 2021, when the application to register the caveat was filed. The applicant acted unreasonably by failing to treat the matter as urgent. The urgency arose from the filing of the court application for registration of the caveat, and not the impending registration of the transfer of the property. That is why the applicant sought interim relief pending the determination of the application filed under HC 2836/21. The cause of action was that application. The applicant had failed to explain the delay in lodging the application between 7 June 2021 and 22 February 2022. This was not the kind of urgency envisaged by the rules of court.

The third and fourth respondents also averred that the application had been overtaken by events. The applicant sought to interdict the first respondent from selling, alienating, pledging or disposing of the property in any manner. The applicant delayed to act and the property had been sold to the third and fourth respondents. The court could not be called upon to interdict that which had already happened. The application was improperly before the court and ought to be struck off the roll of urgent matters.

As regards the merits, third and fourth respondents, averred that they did not have rights awaiting determination by the court. They had acquired personal rights in the property and all they wanted was the transfer of title in the property into their names. They had already paid the full purchase price, stamp duty, capital gains tax and conveyancing fees. The applicant on the other hand was just relying on unsubstantiated claims. It had no greater personal rights to the property than them. The two respondents claimed that they had heavily invested in the property. In any event, only a court order or a warrant of execution could place a caveat over the property. There was no court order or a warrant of execution registering a caveat on the property.

Applicant's Reply

The applicant insisted that upon service of the application under HC2836/21, the first respondent was made aware that his rights to dispose of the property were disputed. It would be tantamount to an abuse of the due process of the law to proceed to sell and transfer the property to third parties under the circumstances. Further, in his opposing affidavit, the first respondent had sworn under oath that he had no intention of selling a property where he was residing with his family. The applicant further contended that it had acted when the need to do so arose. The mere act of filing the application to register the caveat showed that it was intent on protecting its

interests. The applicant had also communicated with the second respondent as far back as 23 May 2021. Further, as far back as 7 May 2021, the applicant had made a formal demand to the first respondent for payment of the amount due.

The parties had engaged through their respective legal practitioners and the first respondent had acknowledged the debt in part. The parties agreed on a payment arrangement which was to lead to the signing of an acknowledgment of debt and a deed of settlement. While on one hand the parties were negotiating, the first respondent was at the same time in the process of selling his property.

The applicant denied that the debt became due through the institution of a claim in court. It was the failure to pay that instigated an approach to the court. The debt became due when formal demand was made on 7 May 2021. The need to act arose on 17 February 2022 when the applicant discovered that the first respondent was now in the process of transferring title in the property to the third and fourth respondents. The application was therefore urgent.

The applicant denied that the application had been overtaken by events. The purpose of registering a caveat was to prevent transfer of the property. That process had not happened and that's what the applicant sought to prevent. At the time the first respondent sold the property, he was aware of the application to place a caveat on that same property. 10 days prior to the sale, the first respondent had sworn under oath that he was not going to sell the property. The sale was a ruse to defeat the applicant's claim. In his opposing affidavit to the application under HC2836/21, the first respondent claimed that his property was valued at US$45 000.00, but 10 days later he sold it to the third and fourth respondents for US$21 000.00. This was clearly a sham sale. The first respondent ought to have waited for the completion of the proceedings under HC2861/21 before selling the property.

The applicant further asserted that it had since instituted a summons action for the debt that had since been established. The claim was known to the first respondent as far back as May 2021. He had entered into consultations which ultimately would lead to an acceptable payment plan. The fact that the first respondent had since been convicted by a criminal court showed that he was culpable, and the applicant intended to use the evidence of the conviction in its civil claim.

SUBMISSIONS AND THE ANALYSIS

Urgency

In arguing their respective positions on the question of urgency, the parties' counsels largely relied on their papers. Mr *Mtlongwa* argued that the existence of circumstances that were prejudicial to the applicant's cause was not the only consideration in determining the question of urgency. He relied on the authority of *Gwarada v Johnson & Others*[1]. Mr *Chambati* for the third and fourth respondents argued on the strength of *Kuvarega v Registrar General & Anor*[2] the applicant had itself to blame as it waited until the day of reckoning to spring into action. The applicant waited until the property was sold, when it ought to have acted earlier. In her reply, Ms *Sanhanga* submitted that urgent applications where those where if the court failed to act, the applicant would as well dismissively tell the court not to bother itself to act subsequently as the harm occasioned by the failure to deal with the matter on urgent basis would be irremediable.

The question of urgency must considered in the context of the circumstances surrounding the dispute. There are of course circumstances that are peculiar to each case, and for that reason, each case must be considered on its own merits. The remarks by MAKARAU JP (as she then was) in *Document Support Centre (Pvt) Ltd* v *Mapuvire*[3] are apposite in that regard. She said:

> "……In my view, urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant".

I associate myself with the views of the learned judge. The court cannot ignore the consequences attendant upon a failure to deal with a matter on an urgent basis. Of course, adverse consequences to the applicant's cause will not save an applicant where it is clear that the applicant indeed sat on its laurels and was only jolted into action by the impending harm. That cannot be said of the applicant in this case. The applicant filed an application to register a caveat on the property immediately after asserting its claim against the first respondent, as well as expressing an interest in that property. That interest was based on the claims it asserted against the first respondent. The submission on behalf of the respondents that the applicant ought to have approached the court at that stage for the relief sought in *casu,* lacks merit. The same goes for the

---

[1] HH 91/09
[2] 1998 (1) ZLR 188 (H)
[3] 2006 (1) ZLR 232 (H) 243G; 244A-C

argument that the filing of a notice of opposition to the application for registration of the caveat should have alerted the applicant to the fact that the first respondent could exercise its rights in the property at any given time. It is common cause that the act that leads to the transfer of title by the second respondent is the sale of the property. At the time that the application under HC 2836/21 was filed, the property had not been sold as yet. In paragraph 14 of his opposing affidavit to that application, the first respondent boldly stated that:

> "There is absolutely no need for the registration of a caveat in my property. Applicant has nothing to protect. It also has nothing to fear.
> 14.1……
> 14.2. I am not disposing of the property and I have no intention of doing so.
> 14.2. The stand is where I stay with my family. I cannot sell it to run away from Applicant's claim. A claim which has not so far been properly made"[4]

I agree with the applicant's submission that based on that undertaking, it had no reason to believe at that stage that the first respondent would proceed to act otherwise. The first respondent misled the applicant, and under oath for that matter. At that stage, the applicant had no reason to approach this court on an urgent basis in the face of that undertaking. The need to act clearly arose when the applicant's counsel received communication from the second respondent on 17 February 2022 advising of the sale of the property and its impending transfer to third and fourth respondents. In view of the foregoing, it is the court's finding that the matter is urgent.

That the relief sought was overtaken by events

The second preliminary point raised on behalf of the third and fourth respondents was that the relief sought was incompetent as it had been overtaken by events. Mr *Chambati* submitted that once paragraph 1 of the interim relief sought was found to be incompetent, then paragraph 2 also fell away. According to counsel, paragraph 2 of the interim relief sought ignored that there had been a transition involving the immovable property. The third and fourth respondents' interests in the property also needed to be protected. In reply, Ms *Sanhanga* argued that paragraph 1 of the interim relief sought had not been overtaken by events. It was still effective as there was nothing stopping the first respondent from selling the property to other third parties. She further submitted that paragraph 2 of the interim relief sought should be considered as stand-alone.

[4] Page 22 of the 1st respondent's notice of opposition.

The starting point in resolving this issue is r 60 (9) of the High Court Rules, 2021. It states as follows:

> "Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he or she shall grant a provisional order either in terms of the draft filed or as varied"

Once a judge is satisfied that a *prima facie* case has been established, then he must in my view grant the interim relief as sought or as varied. The rules of court do not even provide for a hearing of the parties on the papers filed. In my view, the judge is at large to determine the application on the papers without even hearing the parties, and in so doing he may make modifications to the interim relief sought. Errors in the construction of the draft order, and in turn the interim relief sought are remediable[5]. It is for this reason that I believe r 60(9) endures.[6] The objection is without merit and is accordingly dismissed.

Merits

The requirements for the granting of an interdict were set out in *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors.*[7] MALABA JA (as he then was). He said:

> "It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) said an applicant for such temporary relief must show:
> "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
> (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
> (c) that the balance of convenience favours the granting of interim relief; and
> (d) that the applicant has no other satisfactory remedy."

The court is alive to the fact that the property has been sold to the third and fourth respondents. It is the transfer of the property to third parties for which a caveat is being sought under HC2836/21. I agree with Ms *Sanhanga* that the sale of the property to the third and fourth

---

[5] See *Qingsham Investments (Private) Limited v Zimbabwe Revenue Authority* HH 207/17 at page 2
[6] See also *Phillip Chiyangwa v Interfin Bank Limited (In Liquidation) & Another* HH 982/15 at page 2 of the judgment
[7] *2004 (1) ZLR 511 (S)* at 517 C-E

respondents does not stop the sale of the same property to other parties for as long as title is yet to be transferred to third and fourth respondent. Such multiple sales are not uncommon in this jurisdiction. Upon a consideration of the requirements that need to be satisfied for an interim interdict to be granted, this court is satisfied that the applicant is entitled to the relief sought. There is an application for the registration of a caveat which is pending before this court. The property that the first respondent sold and whose title he seeks to transfer to third and fourth respondents is the same property that is the subject of the pending application for the registration of the caveat.

There is clearly a dispute between the applicant and the first respondent involving some amounts of money that the applicant claims from the first respondent. There is communication on record, some of which is on a without prejudice basis, involving the two parties concerning the first respondent's liability to the applicant. While this court is alive to the legal significance of the without prejudice communication, the court cannot turn a blind eye to the existence of the claim the applicant has against the first respondent as is manifest from the papers, the without prejudice communication notwithstanding. In the court's view, the applicant has managed to establish a *prima facie* case against the first respondent which entitles it to the relief it seeks herein.

The applicant seeks relief that pending the finalisation of the application filed under HC 2836/21, the interim relief sought herein be granted. This court cannot determine whether the sale and transfer of title to third and fourth respondents should be interdicted pending the hearing of the application under HC2836/21 at this stage of the proceedings. That, in my view, is for the court to consider on the return date after hearing arguments on the parties' substantive rights. For now, I can only grant the following interim relief pending the return date.

DISPOSITION

Resultantly it is ordered that:

Pending determination of this matter on the return date, the Applicant is granted the following interim relief:

1. 1st Respondent shall not sell, alienate, pledge or dispose of in any manner a certain property registered in the name of 1st Respondent known as ***an undivided 0.0298% share being share number 1225 in certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724, 0475 hectares, held under Deed of Transfer number 1682/2017.***

2. 2nd Respondent shall not cause the transfer of title of a certain property registered in the name of 1st Respondent known as ***an undivided 0.0298% share being share number 1225 in certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate measuring 724, 0475 hectares, held under Deed of Transfer number 1682/2017*** to any person without leave of this court granted by way of a court order.
3. This provisional order shall be served on the respondents by the Sheriff of the High Court or by the applicant's legal practitioners.

Rungwandi, Mari Rujuwa, applicant's legal practitioners
Mangezi, Nleya & Partners, 1st respondent's legal practitioners
Chambati, Mataka & Makonese Attorneys at Law, 3rd & 4th respondents' legal practitioners