

ISAAC CHIDUKU
and
JECONIAH CHIDUKU
and
NOREEN CHIDUKU
versus
AMOS CHIDUKU
and
DROWBACK INVESTMENT (PVT) LTD
and
CAPEVALLEY (PROPERTIES) (PVT) LTD
and
NORTON TOWN COUNCIL
and
ENVIRONMENTAL MANAGEMENT AGENCY

HIGH OF ZIMBABWE
FOROMA J
HARARE, 2 & 7 February & 29 March 2023

Urgent Chamber Application

FOROMA J: The three applicants in this urgent chamber application applied for a provisional order the terms of the interim relief of which reads as follows- Interim Relief.

That pending the confirmation or discharge of this Provisional Order the applicants are granted the following relief:

- 1) That first to third respondents is (sic) directed to stop advertising for sale of any stands on a certain piece of land in Hartely called Swallowfield of Johannesburg measuring 127,6238 hectares held under deed of transfer number DT 5157/99.
- 2) The first to third respondents be directed to refrain from collecting sale proceeds of stands.

The terms of the final order sought read as follows:

- 1) Pending the determination of the appeal under SC 14/23 between the parties the first to third respondent shall not take any steps neither shall they act in any such manner as is consistent with the order granted under HC 8561/22 dated 28 October 2022 and shall not act in such a way unless entitled to so act in terms of a court order.
- 2) The costs of this application shall be borne by the first to third respondents on a higher scale.

In essence the relief sought by the applicants in this application is that the execution of the judgment appealed against which was suspended by the noting of an appeal be itself suspended pending the determination of the appeal. Put differently the applicants seek to enforce the ... of the judgment appealed against pending the determination of the appeal in order to preserve the *res litigiosa*. The application is opposed by the three respondents.

The background to the issue in dispute is very straight forward. On 28 December 2022 I granted the applicants a provisional order against the first respondent in case No HC 8561/22. The terms of the interim relief of the said provisional order reads as follows:

That pending the determination of this matter, the applicants are granted the following relief.

1(a). the first respondent is barred from holding out as a holder of a 50% undivided share in a certain piece of land in Hartely called Swallowfield of Johannesburg measuring 127,6238 hectares under deed of transfer number DT 5157/99 pending the return date and finalization of this matter.

(b) the first respondent is barred from unilaterally dealing in a certain piece of land in Hartely called Swallowfield of Johannesburg measuring 127,6238 hectares held under deed of transfer number DT 5157/99 pending the return date and finalization of this matter.

(c) The first respondent is barred from dealing in subdivided stands allocated to applicants and those reserved for the family pending the return date and finalization of this matter.

(d) The first respondent is barred from unilaterally authorizing the transfer of any subdivided stands pending the return date and finalization of this matter.

The terms of the final order sought of the provisional order are also relevant for a clearer background of the matter. These can be summarized as an order interdicting first respondent from relating to and or dealing with the piece of land called Swallowfield of Johannesburg unilaterally and in whatever form or manner prejudicial to applicants' interest therein pending determination

and final outcome of pending arbitration proceedings commenced by applicants against the first respondent at the Commercial Arbitration Centre. The effect of the provisional order was to protect and preserve the corpus of the *res litigiosa* namely certain piece of land in the District of Hartely being Swallowfield of Johannesburg measuring 127,6238 hectares held under deed of transfer No 5157/99 in the joint names of first applicant and first respondent pending resolution of a dispute that had arisen between the applicants and first respondent as siblings which dispute was subject of pending arbitration proceeding respondent in HC 8561/22.

It is significant to note that the property Swallowfield of Johannesburg (herein after called the “undivided asset” was the parties deceased fathers farm. It was agreed in terms of an agreement between the first respondent herein (who was also first respondent in HC 8561/22) and the applicants as beneficiaries of their late father that the undivided asset would be shared equally between the 50% then such that each one would hold 20% share of the same

First respondent *in casu* did not dispute the terms of the agreement aforesaid but sought to resile from the said agreement for reasons considered unacceptable to the rest of the beneficiaries. This much was common cause at the hearing of HC 8561/22 and Mr *Zimudzi* endorsed this on behalf of first respondent. In seeking to resile from the agreement for the sharing of the undivided asset first respondent sought to assert that he was hence forth to reclaim his 50% share in the undivided asset in terms of the Deed of Transfer No 5157/22 and would not recognized any share of the other siblings except the 50% undivided share of first applicant. In HC 5157/99 I did not find first respondent’s position to be supportable particularly since in the agreement for sharing of the undivided asset there was *inter alia* the following agreed position— “whereas after the administration and distribution of other assets of the late Tapfumaneyi Mushore Chiduku the immovable property was transferred and was to be held in trust in the joint names of Amos Chiduku and Isaac Chiduku for the benefit of all beneficiaries” as read with Clause 1 – which provides as follows- 1 Sharing of SallowfieLd farm. “The title holders hereby relinquish their title and interest in Swallowfield Farm held under D T N o 5157/99 and avails same for sharing equally among all the five siblings that are parties herein as the last property from the estate of the late Tapfumaneyi Mushore Chiduku.” It was on the basis of the foregoing that the court granted the provisional order. On 11 January 2023 the three respondents noted an appeal against the grant of the provisional order. Immediately thereafter the asset constituting *res ligiosa* which had been

subdivided by agreement of all five siblings once again became exposed to disposal on account of a unilateral decision of first respondent. Although first respondent disputed that he had taken any action exposing the *res litigiosa* to disposal I do not believe him as none of the siblings would benefit anything in undermining the terms of the provisional order.

It is clear that as found in the judgment per HC 8561/22 that the relief sought and granted to the applicants was protective of each of the siblings including the first respondent. First respondent has not in this court's view notes an appeal with a view to genuinely test the correctness of the judgment appealed against. First respondent's intention is *mala fide* as he seeks to take an unfair advantage of the legal consequences of noting of an appeal namely that the execution of the judgment appealed against is suspended. The first respondent misunderstands the legal consequences of noting an appeal. The effect is not to set aside the judgment appealed against pending determination of the appeal so as to restore the *status quo ante* the judgment. The judgment appealed against effectively remains extant save that in the interest of the protection of appellant's rights in the event of the appeal succeeding the execution thereof is suspended. If it were not so then it would not be possible for the court to grant leave to execute a judgment appealed against pending determination of appeal.

In opposing the application by applicants Mr *Mubaiwa* on behalf of first respondent argued that the relief sought by applicants was incompetent in that it had not been granted in the judgment appealed against. For what it is worth and assuming any validity in the argument the applicants counsel Mr *Chipupuri* argued that in any event the court is entitled to amend the draft order in order to give effect to the correct relief as established on the papers.

Bearing in mind that what is suspended by the noting of an appeal against the judgment is the execution of the judgment appealed against it is clear that what the applicants require as substantive relief is not leave to execute the judgment but an order rendering the judgment appealed against operative pending the determination of the appeal. There is a fine but important difference between granting an order that the judgment is operative pending determination of an appeal and granting leave to execute the judgment pending determination of the appeal the latter which if granted entitles the respondent in the appeal to sue out a writ of execution. As urged upon us by the applicants the essential elements to be proved in order for the applicants to be entitled to an order that the judgment remains operative pending appeal is the balance of convenience and

what is just in the circumstances of the matter. *In casu* the applicants argued amply demonstrated that it is just that the judgment granting the provisional order remain operative pending determination of the appeal. Put differently that in the event that the opposed is determined in favour of the applicants against the respondents the applicants will be entitled pursue to the enforcement of the agreement between the siblings for the equal sharing of the Swallowfield farm by pursuing arbitration. This can only be possible if the provisional order granted remains operative as that would ensure preservation of the *res litigiosa*. On the other hand if the first respondent succeeds on appeal he will still be able to enforce his claim to 50% of the farm on amount of the preservation of the *res litigiosa*.

Mr *Mubaiwa*'s main argument is that the agreement which first respondent has resiled from was a deed of settlement which first respondent could lawfully withdraw from and that having with drawn therefrom the *status quo ante* would have to prevail pending any resolution of legal disputes between the parties. This argument begs the issue that the court was faced with in HC 8561/22 namely the preservation of the *res litigiosa* pending the finalization of the dispute between the siblings. Mr *Mubaiwa* seems not to be aware that Mr *Zimudzi* who appeared on behalf of the 1st respondent in HC 8561/22 conceded on behalf of the first respondent that first respondent had freely and voluntarily entered into the agreement for the equal sharing of the Swallowfield farm with the rest of the siblings. In that agreement first respondent accepted that the 50% undivided share he held in Swallowfield farm was held in trust for the benefit of all the beneficiaries of the estate of their late father and that in that agreement he and first applicant had relinquished their apparent rights title and interest in the said farm for purposes of having same shared equally by all the siblings. Surely in light of the agreement for the equal sharing of Swallowfield farm 1st respondent cannot be heard to claim any entitlement to 50% the farm on the basis of the title deed which rights and interest (he acknowledged as held by him and first applicant in trust) and which infact he expressly renounced in favour of equal sharing with his siblings. He surely cannot blow both hot and cold and any attempt to do so may not go down well with his siblings who by reason of the sharing have acquired real rights in the said Swallowfield farm by reason of their inheritance.

In the circumstances and bearing in mind the need to preserve the *res litigiosa* as aforesaid applicants have demonstrated that the balance of convenience favours them. In any event if as 1st respondent indicated under oath that he has not interfered with the judgment appealed against he

stands to suffer no prejudice from an order that the judgment appealed against remains operative pending the determination of the appeal. It is therefore ordered that there will be an order in terms of the provisional order as amended. The provisional order is amended in the Interim relief granted by deletion of the whole paragraph 1 and substitution of the following-

1. The provisional order granted by this court in HC 8561/22 shall remain effective pending the determination of the appeal per case No SC 14/23 and any appeal against this order shall not suspend this order.
2. The first to third respondents be and are hereby barred from collecting any sale proceeds of any stands directly or indirectly through any third parties pending the determination of the appeal in SC 141/23.

Thomson Steven & Associates, applicant's legal practitioners
Samkange & Hungwe Attorneys, first, second and third respondent's legal practitioners