

BEATRICE MAKANYARA WAMAMBO
(Nee Tasara)
versus
TAPIWA WAMAMBO
and
TRUSTEES FOR THE TIME BEING OF WAMABOZZ TRUST
and
REGISTRAR OF DEEDS HARARE
and
REGISTRAR OF DEEDS BULAWAYO
and
KWEKWE CITY COUNCIL
and
MASVINGO CITY COUNCIL
and
GWERU CITY COUNCIL
and
COMPETENT PLUMBERS PRIVATE LIMITED
and
GREEN CARPET TOURS AND SAFARI PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 26 May & 15 June 2023

Urgent chamber application

C Damiso, for the applicant
TC Masawi with MM Damba, for the 1st 2nd 8th & 9th respondents
No appearance for the 3rd to 7th respondents

TSANGA J: The applicant filed an *ex parte* urgent chamber application for an anti-dissipation interdict, seeking interim relief against the respondents as follows:

1. That pending the return date, the Respondents, their assignees and representatives be and are hereby temporarily interdicted from disposing through a sale or any other way or attempting to dispose or in any way encumbering or attempting to encumber, transfer rights in the immovable property listed below, pending the outcome of proceedings under case number HC 2517 and HC 3368/23;

- a) Stand Number Lot 9 of 7A Chicago, Kwekwe.
- b) Stand Number 7595 Section 4, Mbizo Kwekwe.
- c) Stand Number 6650, Newton Kwekwe.
- d) Stand Number 6123 Ngwee Street South View, Gweru.
- e) Stand Number 7061 Chigwagwagwa Street, Target Kopje, Masvingo.
- f) Stand Number 3305 Masvingo Mandere Close, Rujeko.
- g) Stand Number 5811, Knowe, Norton.
- h) Flat Number 47 Calder Gardens, 2nd St /Cnr Josiah Tongogara, Harare.
- i) Stand Number 97 Stanks Drive, Leeds, LS14 5NS England, United Kingdom
- j) Stand Number 871 Riverside Masvingo.
- k) Stand Number 1330 Mica Drive, Mica Point, Kariba
- l) Stand Number 20 Mahatshula, Bulawayo
- m) Stand Number 3304 Nyamhunga Township, Kariba
- n) Flat Number 303 Wynchford Court 218 Herbert Chitepo Harare
- o) Stand Number 399 Southcliff, Hwange

The final order hinged on barring disposal of the above properties pending the outcome of HC 2517/22 and HC 3368/23. Suffice to say that HC2517 is a pending divorce action whilst HC 3368/23 is an action seeking cancellation of a Trust formed by the first respondent who is the applicant's husband. He is said to have transferred certain properties to defeat any claims applicant may have.

A similar application seeking an interdict was brought in July 2022 under HC 3727/22 before MUNANGATI J. It listed properties a) to i) and sought an interim relief pending the outcome of HC 2517/22, being the divorce matter between the applicant and the first respondent. That application for interim relief was dismissed on the basis that the requirements for an interim interdict were not met by the factual circumstances averred. Particularly, some of the listed property, such as Stand Number Lot 9 of 7A Chicago, Kwekwe was said to be registered in a company to which the first respondent is a director. The company had not been cited but in any event the Judge had highlighted that the applicant could claim against her husband's shares in the company as a personal right. Regarding the remaining properties, her finding was that no clear evidence had been given as to how the respondent intended to dispose of those properties. In the absence of harm, she found that it would not be tenable to grant an

interdict that would inconvenience the first respondent. Because there was no evidence that the rights of the applicant were being trampled on, the Judge refused to make a blanket order. Furthermore, her conclusion was that the applicant could in any event seek compensatory damages since she was satisfied from the properties listed, that the first respondent could afford to do so should that become necessary. The application was accordingly dismissed with costs.

The present application for an anti-dissipation interdict has included the Trustees of the Wamambozz Trust as well as two companies as respondents. It has been catalysed by the intended sale of Flat 47 Calder Gardens, Harare, which is registered in the name of the first respondent. The sale is pending the resolution of the divorce matter under HC 2517/22. Applicant avers that she has also filed an application for cancellation of the Deed of donation to the Trust of some of the properties enumerated herein on the basis that the true purpose of the Trust is to remove the properties from the pool of assets owned by the spouses so that they will not be available for distribution on an equitable basis.

A court is urged to exercise utmost care before granting an anti-dissipation interdict, it being an invasive remedy that can be prejudicial and oppressive to third parties. See *Max James Rosenfels & Anor v Twalumba Properties (Private) Limited & Anor* 2018 (1) ZLR 185 (H) at p 186 G-H. Therefore in view of the judgment under HC 3727/22, which had already dismissed applicant's quest for an interdict pending the divorce action in 2022, I declined to hear the matter *ex parte* and directed that it be set down with instructions that all parties be served in order to determine if it was not *res judicata*.

At the hearing, Ms Damiso emphasised the applicant's *prima facie* right to equitable distribution of the matrimonial property which was being interfered with by the creation of a Trust to defeat that purpose. She also highlighted the fear that the first respondent will dissipate the property before the divorce is finalised. She pointed to the clear intention to sell as evidenced by a letter dated 16 May 2023 to tenants stating that that he intended to sell Calder Gardens. The irreparable harm was said to arise from the fact that if not interdicted from selling the property applicant contributed to, she would lose out completely. The applicant highlighted that the first respondent may be testing waters and if he is successful in selling the one property which he intends to sell, he may sell the others. She further argued that there is no other satisfactory remedy and that the balance of convenience favours that the first respondent be interdicted until both the matters of divorce and the cancellation of the Trust are finalised.

She also emphasised that the matter is distinctly different from that filed under HC 3727/22 by virtue of the added respondents such as the Trustees and the two companies whom she said are in reality the main protagonists since the 3rd to the 6th respondents have only been cited nominally. She also pointed out that the cancellation of the title deeds is sought against the companies mentioned, which issue she emphasised, had not been canvassed under HC 3727/22. The two applications were therefore said to be materially distinct as to render *res judicata* inapplicable.

Mr Masawi, who appeared for the 1st, 2nd and 8th and 9th respondents, argued that matter is decidedly *res judicata* and that the applicant cannot seek to come through the back door when she did not appeal the judgment granted by MUNANGATI J under HC 3227/22. The applicant was said to be essentially still seeking an interdict pending the hearing of the divorce matter. Moreover, the same properties had been listed albeit more were also added in respect of the same pending divorce. In particular, Calder Gardens, the property to be sold was included in the dismissed application. Applicant was therefore said to be seeking a review of the judgement by MUNANGATI J, which was given a year ago. As for the cancellation of the Trust, he highlighted that the applicant has in fact transferred four of her own properties into a Trust. Applicant, however, explained that as per her declaration in the matter seeking to cancel the Trust, by contrast the one which she formed was with the first respondent's full knowledge with the expectation that he would also put his properties into that same Trust.

Mr Masawi argued that there is no urgency herein as the court had in fact already decided that the applicant has an alternative remedy in the form of damages should any property be sold. He emphasised that her energies should instead be channelled towards finalising the divorce matter since there is no reckless disposal of property in this case.

Analysis

In a plea of *res judicata*, the requisites are that the two actions must have been between the same parties, concerning the same subject matter and founded on the same cause of action. It is also a requirement that all three requisites be satisfied. See *Gwaze v National Railways of Zimbabwe* 2002 (1) ZLR 679 (S).

There is absolutely no doubt that save for the actual naming of the companies to whom reference was in fact made when HC 3727/22 was heard, the parties are essentially the same. The main protagonists are in fact the applicant and her husband, the first respondent. The

complaint is the same, namely the fear of him disposing of the assets pending the hearing of the divorce matter. In other words, there is no doubt that the applicant is demanding the very same thing that she was demanding under HC 3727 /22 which is that the first respondent should not dispose of any of the properties pending the hearing of the divorce matter.

Under HC 3727/22 the Judge was clear that even in the event of sale of any of the properties, the applicant can still seek compensatory damages given the means of the first respondent. There was no appeal against that judgment. As held in *Tobacco Sales Producers (Pvt) Ltd v Eternity Star Invstms* 2006 (2) ZLR 293 (H), it is not permissible for a party to undermine a court order by bringing in a fresh action. Also in *Muzanhenhamo & Anor v Katanga* 1991 ZLR 1991 (1) ZLR 182 (SC), it was held that a wife cannot prevent her husband from disposing of assets unless he is doing so to defeat her just rights. That one property in question that she says is for sale is in his name. His lawyer says it is being disposed of out of need. It has not be shown that this specific the sale is to defeat her rights. Also as stated, the judgement in HC 3727/22 which included that same property, has already spelt out that she has other remedies.

Filing of a multiple actions on matters already decided by court simply adds more expense for the applicant and takes away resources from addressing the real gist of the matter. This is indeed a case where instead of filing a multiplicity of claims, the focus should be on having the divorce matter heard and finalised as soon as is practicable. The decision under HC 3727/22 was over a year ago. There is absolutely no doubt that the matter under HC 3727/22 involved an interdict pending the hearing of the main divorce matter. This application again seeks an interdict pending the hearing of the same divorce matter. The addition to the mix in this application, of the matter pertaining to the reversal of the Trust and the properties donated to it, is not separate from the main divorce matter in the sense that the two should be heard together.

I conclude that the quest for an interdict herein is indeed *res judicata* for the reasons canvassed, and that this application is improperly before the courts. Accordingly:

The urgent chamber application is struck off the roll with costs.

Rubaya Chinuwo Law Chambers, applicant's legal practitioners
Masawi and Partners, 1st respondent' legal practitioners