MAX JAMES ROSENFELS
and
CADDYSHAK INVESTMENTS (PRIVATE) LIMITED
versus
TWALUMBA PROPERTIES (PRIVATE) LIMITED
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 25 OCTOBER 2017 AND 8 MARCH 2018

Opposed Matter

E Mubayiwa for the applicant
L Madhuku for the respondents

MOYO J: This is an application for an anti-dissipation interdict. The two parties have been embroiled in litigation. It appears to stem from an agreement of sale that was entered into by the parties. It appears there is a dispute as to the fulfillment or otherwise of the terms of the agreement of sale.

There has been litigation and counter litigation between the parties in relation to the terms of this agreement of sale. This litigation resulted in first respondent obtaining default judgment against the applicants claiming restitution of the deposit on the purchase price. The default judgment was in the sum of $230 000-00 plus legal costs and interest. Applicants herein tried to rescind that default judgment with no success. The applicants also tried to stay the execution of that judgment but failed.

In paragraph 18 of the founding affidavit the applicants formulate the basis for this application. It reads:

> "It is my humble averment that the judgment debt is an asset in the hands of the first respondent, a company which has no other assets in Zimbabwe, and whose directing mind and driving force is now deceased".

It is further averred on behalf of the applicants that they have issued summons against first respondent for various sums and that they are likely to succeed against first respondent, that they would as a result be entitled to a substantial sum of money as against the first respondent. It is further averred that that is the reason behind this application, that the respondents be interdicted from dissipating the proceeds of the judgment obtained by the respondents against the applicants, pending finalization of the litigation that the applicants have mounted as against the respondents.

The first respondent opposes the application, firstly on the basis that its frivolous and vexatious in that it is primarily an application for a stay of execution disguised as an anti-dissipation interdict. The first respondent chronicles the matters that the parties have been embroiled in before the High court as HC 10203/15, HC 1914/17, HC 1932/17, HC 3899/17 and HC 3993/17.

First respondent aver that this application is mounted as a result of a failure by the applicants to obtain a stay of execution in HC 1932/17 and a rescission in HC 1914/17.

First respondent also avers that an anti- dissipation interdict cannot be in respect of assets attached in execution.

The only issues for determination in this matter are have the applicants made a case for an anti-dissipation interdict as sought? Or are the applicants simply trying to hide behind the term anti-dissipation interdict whilst they are still pursuing their mission to foil the first respondent's enjoyment of the fruits of a judgment they obtained from this court?

An anti-dissipation interdict is defined by Herbstein and Van Winsen in the *Civil Practice of the High courts of South Africa* 5th edition vol 2 at page 1488 as:

> "a special type of interdict that may be granted where a respondent is believed to be deliberately arranging his affairs in such a way as to ensure that by the time the applicant is in a position to execute judgment he will be without assets or sufficient assets on which the applicant expects to execute."

The other term for such an interdict in terms of the English Law is the Mareva injunction. The purpose and scope of the Mareva injunction is summarized as follows in Halsbury's Laws of England:

> "The purpose of the Mareva injunction is not in anyway to improve the position of claimants in insolvency but simply to prevent injustice of a defendant placing assets

> which might otherwise have been available to satisfy a judgment out of reach of plaintiff. It does not operate as an attachment. It merely restrains the owner from dealing with assets in certain ways."

Per Herbstein and Van Winsen *(supra)* at page 1490. At page 1491, Herbsten and Herbstein and Van Winsen (*supra)* it is stated thus:

> "The purpose of the interdict is to prevent a person (the intended defendant) who can be shown to have assets and who is about to defeat the plaintiff's claim, or to render it hollow, by secreting or dissipating assets before judgment obtained or executed, and thereby successfully defeating the ends of justice from doing so."

It is further stated that it is not essential to establish an intention on the part of the respondent to frustrate the anticipated judgment if the conduct of the respondent is likely to have that effect.

In Herbstein and Van Winsen at page 1491 it is also stated that the requirements that must be satisfied to obtain an anti-dissipation interdict are the same as for any other type of interdict meaning that the applicant must establish

a) a *prima facie* right

b) a well-grounded apprehension of irreparable harm

c) the absence of any other remedy

d) and that the balance of convenience favours the applicant.

It is further stated at page 1492 of the same text that the onus rests on the applicant to establish the requirements for the granting of the interdict. It is also stated and that the granting of such an interdict by the court is discretionary.

It is further stated at page 1493, that since this is an invasive remedy that can cause severe prejudice to the respondent and possibly to third parties, due caution should be exercised by a court in granting such an order, and that all practical safeguards against abuse should be built in and a careful attempt should be made to visualize ways in which the order may prove needlessly oppressive on the intended defendant. It is further stated therein at page 1493 that the scope of the interdict granted will be restricted to such assets as will be sufficient to satisfy the applicant's claim, but must leave the respondent with sufficient living expenses, the running of his business (if any) and the defence of the principal action, without creating so large a loophole as to allow the respondent to continue the alleged scheme of removing assets.

I then turn to look at the factual background of this case. We have an application for an anti-dissipation interdict by the applicants, blocking the dissipation of their on assets that the first respondent is now entitled to in terms of a judgment of this court. Frantic efforts have been made to reverse that judgment and to stay its execution. Can it then be held that the applicants are indeed motivated by the desire to stop the first respondent from dissipating assets in fear of failure to execute their own judgment against the first respondent? I hold not. The background between the parties mires this application in controversy in that its real motivation and intents and nature cannot be genuinely and truthfully established considering the background between the parties. I say so for the anti-dissipation interdict seems to be another step in a chain of events that have already shown the applicants' unwillingness to honour the judgment of this Honourable Court.

It cannot therefore be held to be an application motivated by the principles as enunciated herein, extracted from Herbstein and Van Winsen. It is therefore difficult to make a finding in the circumstances that there is a fear that applicant may fail to execute its judgment against the respondents as clearly all applicant says is that, the main person who ran first respondent is since deceased and that first respondent has no other valuable assets in the country, there is no concerted effort to formulate the basis for such a thought or averment other than that it is a bold statement. The applicants bear the onus of proof of a prima facie right in the circumstances and a well-grounded apprehension of harm. Failure to lay the ground concisely as to why the applicant is of the view that respondents have no meaningful assets means that the requirement for a prima facie right has not been established. Again, the requirement for a well-grounded fear of harm cannot be said to have been established as certainly "well grounded" connotes a foundation with clearly stated facts that indeed the fear is a reasonable one. This is juxtaposed with the background of the case where the applicants seem to have made concerted efforts to avoid the execution but failed, and then decided to mount this application. It is an easy averment and a bold assertion to simply state that respondent has no assets of value and that its core driver is deceased. One would have expected the applicants to put the court in their confidence by substantiating the claim of lack of assets of value, how do they know about the affairs of the first respondent? How do they know that if Nkululeko Sibanda has died then first respondent is doomed? Obviously first respondent is a separate legal *persona* from this Nkululeko Sibanda.

All these averments were essential in my view especially considering the background of the matter. The applicant's counsel submitted that the respondents did not deny being out of assets and that its driving force was deceased, but respondent avers in paragraph 12 of the opposing affidavit where she responds to the issues raised by applicant in paragraphs 19-34, that any averments of fact in these paragraphs are denied.

In paragraphs 23-24 of the founding affidavit applicants aver that the respondents have no valuable assets and that its main driver is since deceased.

The principles in Herbstein and Van Winsen have already established that an interdict is a matter of discretion by the court and the background of this case will certainly not sway this court in applicant's favour as it appears the applicants are making frantic efforts to stay execution that it has failed to do via the normal routes. Again, in the case of *DS, R* v *DS, M and Others* 2012 ZAGPJHC 227 it was stated that an applicant must show a well-grounded apprehension of irreparable loss and that because of the draconian nature, invasiveness and conceivably inequitable consequences of anti-dissipation relief, the courts have been reluctant to grant it except in the clearest of cases. This particular case cannot be held to be one of the clearest cases, because firstly, the motivation for this application is not clear as facts show that there is a possibility that its an application for a stay of execution that is being brought on another forum. Secondly, that applicant does not provide a well-grounded fear, in fact applicant, just mentions that respondent has no assets, how that is so is not stated on the facts as well as how applicants laid their hands on such information. The averment seems to be an assumption rather than a fact. In the circumstances I am reluctant to exercise my discretion in applicant's favour.

The application is accordingly dismissed with costs.

Mutuso, Taruvinga and Mhiribidi, applicant's legal practitioners
Mundia and Mudhara, 1st respondent's legal practitioners