THE LIQUIDATOR OF CENTURY DISCOUNT HOUSE
versus
RICHARD CHINYANI
and
BRIAN BOSTOCK
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare 10 January and 9 March 2005

Opposed Application

Mr Matinenga, for the applicant
Mr Mamvura, for the 1st respondent
Mr Mugandiwa, for 2nd respondent

MAKARAU J: This matter came before me as an urgent application. With the consent of the parties and at the request of the parties that I issue a final order in the matter, I gave directions for further affidavits and heads of argument to be filed by the parties and thereafter heard the matter.

The applicant has the statutory duty of paying out to the best of his ability, the creditors of the Century Discount House, a financial institution that was placed under liquidation by an order of this court of 11 February 2004. The first and second respondents were directors of the institution.

As part of his duties, the applicant resolved to sue in this court, some twelve officers of the failed institution claiming an order in terms of s318 of the Companies Act [*Chapter 24:03*] that such persons be personally held liable without limitation, for all the debts of the institution. He also prayed for judgment against each of the defendants jointly and severally in the sum of $44 653 039 698,25 together with interest thereon at the prescribed rate from the date of provisional liquidation to date of payment in full. This suit commenced in this court on 30 March 2004.

Information came to the attention of the applicant that the respondents were in the process of disposing of their immovable properties. He then filed this application seeking an order restraining the respondents from disposing of these properties pending determination of the main suit between the parties.

Both respondents opposed the application.

First respondent opposed the application on the basis that he sold the property to settle his indebtedness to a local commercial bank after his farming operations failed to realize enough to pay back to the bank. At the time this application was filed, he had paid over the amount of the loan to the bank and the purchaser had taken occupation of the property and was about to take transfer.

Second respondent opposed the application on the basis that he had informed the applicant that since his income from the failed discount house was going to dry up, he was going to dispose of his assets in order to sustain himself. He had since sold the properties to third parties.

The applicant in this matter is seeking an anti-dissipation interdict in *securiatem debiti.* The elements of this interdict were, in my view, adequately discussed by CHATIKOBO J in *Bozimo Trade & Development Co P/L v First Merchant Bank of Zimbabwe & Others* 2000 (1) ZLR 1 (H). In that case, the learned judge held that the requirements for an anti-dissipation interdict are the same as the traditional requirements for an interlocutory interdict. These he went on to recap as:

a) a *prima facie* right, even if it is open to doubt;
b) an infringement of such right by the respondent or a well grounded apprehension of such infringement;
c) a well grounded apprehension of irreparable harm to the applicant, if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally;
d) the absence of any other satisfactory remedy; and
e) that the balance of convenience favours the granting of the interdict.

In settling for the above requirements, the learned judge rejected the submission by the respondents in that case that applicants seeking the prohibitory interdict have to prove that the respondents have no bona fide defence to the claim or that the respondents have assets within the jurisdiction. I am persuaded by the soundness of the reasoning by the learned judge in discussing the essential elements of the prohibitory interdict and in rejecting the additional requirements suggested by the defendants in the matter before him. I will be guided by his remarks as representing the correct position at law.

The issue that falls for determination between the applicant and the first respondent in the matter before appears to me to be quite narrow. I did not understand *Mr Mamvura* to argue that the applicant had not established the elements listed in (a) to (d) above. If I understood him correctly, then in my view, his stance was properly adopted. It is my view that proving a prima facie right for the purposes of this interdict is one of the lightest onuses that an applicant bears before this court. In the matter of *Kenny Karimakwenda v Rumbidzai Bushu and Others*, HH 156/04, dealing with the same issue, I expressed myself in the following terms:

> "The right that the applicant therefore needs to establish in an anti-dissipatory interdict is that he will be entitled to obtain satisfaction of his judgment against the property that the respondent is dissipating. This in my view is one of the lightest *onuses* resting on an applicant who has issued summons against the respondents and where such summons have not been excepted to ……."

I remain of the same conviction.

As observed by CHATIKOBO J in the *Bozimo* case at page 10A-B, the requirement in (d) above that the applicant has no other remedy is one that needs not be proved independently once a dissipation of the assets of assets is proved. I would venture to hold similarly for the requirement in (c) above. Once dissipation is proved or accepted, the apprehension of the applicant that he will suffer irreparable harm becomes well grounded.

As between the applicant and the first respondent, the disposal of the asset is accepted. Thus, the requirements listed by CHATIKOBO J in the *Bozimo* matter in paragraphs (a) to (d) have been established. The only requirement that remains for consideration between the parties is the one in (e), dealing with the balance of convenience.

Mr *Mamvura* argued that the balance of convenience is not in favour of the granting of the interdict against the transfer of the property at this stage in the proceedings as the residual value of the immovable property after settling the amount due under the mortgage bond makes the granting of the interdict worthless.

It has not been disputed that the first respondent was indebted to a local commercial bank and in respect of which he mortgaged the immovable property in issue in 2003. In September 2004, when he allegedly failed to service the loan, he decided to dispose of the property and pay off the loan, which he has duly done. Transfer of the property is now imminent against cancellation of the mortgage bond.

The argument by *Mr Mamvura* found favour with me. By selling the immovable property to pay off the mortgage bond, the first respondent was not only mitigating his losses but was reducing himself to his net worth as the applicant would have found him in the event that it obtained judgment against him. The mortgage would have enjoyed preference in the sale of the property on execution in any event. Thus, the disposal of the asset does not in any way prejudice the interests of the applicant. In the circumstances of this matter and as argued by *Mr Mamvura*, the residual value of the property after payment to the mortgagee is too insignificant compared to the amount of the suit to warrant the granting of the interdict.

On the basis of the foregoing, the application as against the first respondent will be dismissed with costs.

I now turn to consider the issue between the applicant and the second respondent. His opposition to the granting of the interdict is premised on the fact that he is retired and cannot live off his earnings as a part time employee. He therefore disposed three of his immovable properties to sustain himself. It is worth noting that all properties were disposed off after the suit against him and the other directors had been filed. I cannot read into the reasons given by the respondent any ground upon which the interdict sought by the applicant can be refused, having regard to the requirements of the interdict as detailed above. The second respondent has not been able in my view to place before the court any facts or arguments that tend to negate any of the requirements of the interdict

In dismissing the second respondent's opposition I am aware that he also sought to oppose the granting of the interdict on the ground that the purchasers of his property were no cited in the application before me and that this was fatal misjoinder. I am unable to agree.

It is my view that the issue in dispute is purely as between the applicant and the respondents. The rights of the purchasers cannot clog the right of a creditor to look to the property of his debtor to satisfy a judgment obtained against the debtor. It does not appear to me to be part of our law that a debtor can put his property beyond execution by simply introducing another party who can claim that they purchased the property prior to execution. Execution of the judgment of the court, while not conferring a real right on the creditor in the property to be executed takes preference over any personal rights conferred by any contract between the judgment debtor and third parties. This is to be contrasted with a situation where there is a double sale and the claims of the competing purchasers are each weighed to find where equity lies as between the competing purchasers. In that situation, this court has held that the third part be always cited in the proceedings relating to the property in dispute and failure to do so amounts to fatal misjoinder.

It is my further view that the good faith and innocence of the third parties where an anti-dissipation interdict in *securiatem debiti* is sought cannot be used as a shield against the granting of the interdict which is essentially a tool that the court uses to protect the integrity of its proceedings so that judgements granted by it are not unduly frustrated.

For the reasons above, the following order is made:

1. The application against the first respondent is dismissed with costs.

2. The second respondent is hereby interdicted from transferring or disposing in any other manner,

   (a) certain piece of land called Stand 377 Strathaven Township of Strathaven A situate in the District of Salisbury, measuring 1588 square metres and held under Deed of Transfer number 7220/74 and
   (b) certain piece of land called Stand 5818 Salisbury Township, situate in the District of Salisbury, measuring 1588 square metres and held under Deed of Transfer number 4996/80 pending finalisation of the suits in cases HC 3769/04 and HC 5151/04.

3. The third respondent is interdicted from registering any transfer or alienation in any other form of the properties described in 1 and 2 above pending finalisation of the suits in cases HC 3769/04 and HC 5151/04.

4. The second respondents shall pay the applicant's costs of the application.

Costa and Madzonga, applicant's legal practitioners
Scanlen & Holderenss, first respondent's legal practitioners
Wintertons, second defendant's legal practitioners