ANDREW ZIGORA
versus
SAMANTHA NHENDE
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 28 February and 6 April, 2022

**Urgent Chamber Application**

*Mr E Homera*, for the applicant.
*Mr N M Phiri with Ms L Charangwa*, for the 1st respondent.
No appearance for the 2nd Respondent.

DEME J: The Applicant approached this Court on an urgent basis seeking the relief expressed in the following way:

> "TERMS OF FINAL ORDER SOUGHT
> 1. Pending the finalization of the Applicant's claim under case number HC 5227/21 the 1st Respondent is hereby interdicted from dealing in any manner with the immovable property that may cause encumbrances and or dispose by selling it to any third party.
> 2. The 1st Respondent be and is hereby ordered and directed not to alienate or remove any such improvement made on the immovable property until the matter under case number HC 5227/21 is finalised.
> 3. The 1st Respondent shall pay costs of suit on an attorney-client scale (only if it opposes this application).
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> INTERIM RELIEF GRANTED
> The 2nd Respondent pending the finalization of the Applicants claim under case number HC 5227-21 be and is hereby ordered and directed to place a caveat on the immovable property mainly stand number 2 Glynde Avenue Mabelreign Harare held under deed of transfer number 2120/2017 registered in the name of Samantha Nhende the 1st Respondent herein."

The Applicant and the 1st Respondent were previously married to each other under unregistered customary union. After the dissolution of the unregistered customary union, the Applicant, on 21 October 2021, issued summons under case number HC 5227/21 against the 1st Respondent claiming an order for the apportionment of assets acquired during the subsistence of the customary union. The 1st Respondent filed notice of appearance to defend on 11 October 2021 before filing her plea on 3 November 2021.

Among the assets to be distributed, according to the Plaintiff's Declaration filed by the Applicant under case number HC 5227/21, is the immovable property known as number 2 Glynde Avenue, Mabelreign, Harare, (hereinafter called "the property"). The Applicant affirmed that he is labouring under reasonable apprehension that the 1st Respondent may transfer the property to third parties without his knowledge. The property in question is registered in the name of the 1st Respondent.

According to the Applicant, the transfer of the property to third parties will cause prejudice to him as he, the Applicant, is claiming that the same property be equitably divided between the 1st Respondent and himself under case number HC 5227/21. The Applicant further claimed that he has a valid claim in the property as he contributed towards the acquisition of the property during the subsistence of the customary union. The Applicant further asserted that, during the subsistence of the customary union, he agreed with the 1st respondent that the property be registered in the name of the 1st Respondent. The Applicant also averred that the parties' decision to have the 1st Respondent's name registered on the property was in the interest of convenience as the 1st Respondent was getting the loan from her bank.

The Applicant averred that the1st Respondent must be interdicted from disposing of the property. According to the Applicant, the 1st Respondent made attempts to remove some of the improvements from the property. This, according to the Applicant, will decrease the value of the property. The Applicant also maintained that the improvements are permanent fixtures of the property which cannot be removed without damaging the property. The Applicant attached a copy of the letter where the 1st Respondent, through her Legal Practitioners, advised the Applicant that he can remove the improvements from the property.

The Applicant also alleged that the 1st Respondent did engage some independent agents to facilitate the sale of the property. This, according to the Applicant, happened during the weekend preceding the filing of the present application. It is the Applicant's case that he will suffer irreversible financial prejudice if the relief sought is not granted. He further affirmed that the claim for the division of the property under case number HC 5227/21 is not a frivolous claim.

The application is being opposed by the Respondent. In opposition to the application, she raised three points *in limine*. She disputed the Applicant's claim on the basis that it does

not disclose cause of action. She further averred that the Applicant is seeking to apply general law concept of tacit universal partnership to the unregistered customary union which is a customary law concept. She also maintained that the Applicant failed to lay the foundation for the choice of law as provided for in terms of s 3 of the Customary Law and Local Courts Act [*Chapter 7:05*]. The 1st Respondent also affirmed that the application has no cause of action as the Applicant has failed to prove that the 1st Respondent is intending to sell the property.

Replying to the first point *in limine*, the Applicant's counsel, Mr *Homera* submitted that the matter before the court is not for the determination of whether or not tacit universal partnership existed between the Applicant and the 1st Respondent. According to Mr *Homera*, tacit universal partnership will be determined at the appropriate time under case number HC 5227/21. He further submitted that what is before the court is the prayer for the protection of Applicant's personal rights in the property.

The 1st Respondent also submitted through heads of argument that the present applicant fails to meet the urgency test. She further stated that the present application is tantamount to self-created urgency. Mr *Phiri* submitted, on behalf of the Applicant, that the Applicant created urgency by baselessly claiming that the 1st Respondent is marketing the property through the letter written by his legal practitioners addressed to the 1st Respondent's legal practitioners dated 23 February 2022. Further, Mr *Phiri* also submitted that the letter does not identify the agents and prospective buyers which visited the property in dispute which, according to Mr *Phiri* suggested that the Applicant's claims were unsubstantiated. Mr *Phiri* also submitted that the unregistered customary union between the Applicant and the 1st Respondent dissolved in October 2020 and since then the 1st Respondent did not attempt to sell the property.

In response to this point *in limine* for lack of urgency, Mr *Homera* submitted that the Applicant has established that he is labouring under reasonable apprehension that the property may be disposed of. Mr *Homera* further submitted that the 1st Respondent's legal practitioners failed to give the Applicant assurance that the property was not going to be sold through their letter dated 24 February 2022 which responded to the letter by Applicant's legal practitioners. This lack of assurance, according to Mr *Homera*, forced the Applicant to file the present application.

The 1st Respondent also raised another point *in limine* to the effect that the relief sought by the Applicant is incompetent on the basis that the interim relief and terms of final order are identical. Mr *Homera,* in response to the competency of the relief, highlighted that the interim and final relief sought by the Applicant are different. He further submitted that the court is at liberty to vary the relief sought if it considers it necessary to do so.

With respect to merits, the 1st Respondent denied that the tacit universal partnership between the Applicant and the 1st Respondent ever existed. The 1st Respondent also asserted that she does not harbour any intention to sell the property. She also claimed that the Applicant never made any contribution towards the acquisition of the property save for improvements which the Applicant effected to the property. She further alleged that she is ready to compensate the Applicant for improvements that the Applicant made. The 1st Respondent affirmed that she solely acquired the property through the mortgage from the bank without the contribution of the 1st Respondent. She also averred that she is entitled to the real rights over the property which should never be disturbed by the Applicant who has failed to lay any claim over the property in question. The 1st Respondent also argued that the present application fails to meet the requirements of interdict. She also averred that the balance of convenience test favours the dismissal of the present application.

With respect to whether or not the relief sought is competent, it is clear from our jurisprudence that the court has discretion to amend the order. In the case of *Jonga* v *Chabata*[1], the court held that:

> "The wording of an order is within the discretion of the court."

Thus, based on this jurisprudence, it is clear that the point *in limine* concerned has no merit. I therefore dismiss this point *in limine*.

The 1st Respondent raised a further point *in limine* where Mr *Phiri* submitted that the present application lacks urgency. Urgency has been extensively defined in our jurisdiction. In the case of *Kuvarega* v *Registrar General and Another*[2], the court held that:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arise, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of

[1] HH 276/17.

[2] 1998 (1) ZLR 188 (H).

> urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

The Applicant has demonstrated that he is labouring under reasonable apprehension that the property in question may be disposed of by the 1st Respondent which will defeat his claim under case number HC 5227/21 where he is seeking the relief that the property be equitably apportioned between the Applicant and the 1st Respondent. The Applicant asserted that he made some improvements to the property. The 1st Respondent is not disputing that the Applicant made some improvements to the property. In para. 12 of her opposing affidavit, she averred that she is ready to compensate the Applicant for the improvements made. The Applicant further claimed that some agents were visiting the property which heightened his suspicion that the property was now being put up for sale.

Mr *Homera* further highlighted that, on 23 February 2022, they wrote to the 1st Respondent's legal practitioners seeking a guarantee that the property would not be disposed of before the finalisation of the claim under case number HC 5227/21. The appropriate part of the letter dated 23 February 2022, addressed to the 1st Respondent's legal practitioners, is as follows:

> "We are advised by our client that this past, weekend, yours has been sourcing agents and prospective buyers to the property under dispute, we find this to be improper in light of the pending matter in court which involves the property.
> We shall in the circumstances be approaching the High Court on an urgent basis to stop such an act and place a *caveat* on the property."

However, according to Mr *Homera*, the 1st Respondent's legal practitioners did not give a satisfactory response to the plea made by the Applicant which forced the Applicant to file the present application. In reply to the Applicant's legal practitioners, the 1st Respondent's legal practitioners, through the letter dated 24 February 2022, highlighted that they have no knowledge that the 1st Respondent is intending to dispose of the property. They did not shed any further light. The relevant portion of the letter is as follows:

> "As regards the allegation of our client sourcing prospective buyers to the property in question, we have no knowledge of same."

In light of the submissions of the Applicant's counsel, I am of the view that the present application meets the test of urgency. The fears of the Applicant are well founded. The 1st Respondent gave an evasive answer which failed to assure the Applicant that the property in question was not advertised for sale. The Applicant did not delay in approaching

the court after the need to act arose. The Applicant asserted that he detected, during the weekend preceding the filing of this application, that the agents were visiting the property. The Applicant's legal practitioners warned the 1st Respondent's legal practitioners that they were to file the urgent chamber application if they fail to get the guarantee that the 1st Respondent was not marketing the property. Thus, after detecting the agents, the Applicant took less than seven days to file the present application. I, therefore dismiss the point *in limine* for lack of urgency raised by the 1st Respondent.

The 1st Respondent also raised another point *in limine* to the effect that the Applicant's matter does not disclose the cause of action as he seeks to import the general law concept and apply it to the unregistered customary union which is a customary law aspect. Mr. Phiri, on behalf of the 1st Respondent insisted that the Applicant did not plead to the choice of law enunciated in s 3 of the Customary Law and Local Courts Act, [*Chapter 7:05*]. Section 3(1) of the Customary Law and Local Courts Act, which is apposite for the present application provides as follows:

> "(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires—
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> (a) Customary law shall apply in any civil case where—
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> (i) The parties have expressly agreed that it should apply; or
>
> (ii) Regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
>
> (iii) Regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
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> (b) The general law of Zimbabwe shall apply in all other cases."

In my view, the choice of law is not before me. What is before me is whether or not the Applicant is entitled to the relief sought with regard being to the circumstances that have been advanced by the Applicant. The fact of whether or not general law can be employed to the unregistered customary union will be debated at the appropriate time when the dispute under case number HC 5227/21 is being heard by this court. Dealing with this issue at this time will pre-empt the dispute under case number HC 5227/21. In the circumstances, I dismiss this point *in limine*.

I will now focus on the merits of the case. For the Applicant to be entitled to the provisional order, he must demonstrate, among other things, a *prima facie* case. This is established in terms of r 60(9) of the High Court Rules, 2021 which is as follows:

> "(9) Where in 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."

*Prima facie* case was extensively defined in the case of *Setlogelo* v *Setlogelo*[3]. This, as opposed to a clear right, may be open to doubt, according to the case of *Setlogelo* v *Setlogelo* (supra).

The Applicant, through his legal practitioner, submitted that he made some improvements to the property. As highlighted before, parties are not disputing that improvements were effected to the property. It is the value of the improvements which the parties are disputing. Parties are also not agreeing on whether or not some of the improvements are permanent fixtures or otherwise. On the basis of an admission made by the 1st Respondent, I am of the view that the Applicant has established a *prima facie* case. The remaining areas of disagreements will be resolved at the proper moment when the court is determining the matter under case number HC 5227/21.

Mr *Phiri* submitted that the present application does not meet the test of the application for interdict. He further submitted that the balance of convenience test favours the dismissal of the present application. Mr *Homera*, on behalf of the Applicant, argued that the present application satisfies the requirements of interdict.

The following are the key requirements of the interim interdict:

- Establishment of a prima facie case though open to doubt.
- The Applicant must be labouring under reasonable apprehension that actual injury may be suffered or has been suffered.
- The Applicant must establish the fact that there is no other remedy other than by way of the urgent chamber application.
- The Applicant must prove that the balance of convenience favours the granting of the application filed.

This was postulated in the case of *Setlogelo* v *Setlogelo* (*supra). See also Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt Ltd and Another*[4]. *In casu,* the Applicant is labouring under reasonable apprehension that the property in dispute may be

[3] 1914 AD 221.

[4] 1980 ZLR 378.

disposed of before the finalisation of the matter under case number HC 5227/21. What exacerbates his fears is the unsatisfactory response given by the 1st Respondent's legal practitioners who simply denied having knowledge that the property has been or is being marketed. Balance of convenience favours the Applicant, in my view. If he is not protected, he will suffer irreparable prejudice. In my opinion, I do not see any other remedy being available for the Applicant which can be employed to protect his rights other than the present application especially in light of the fact that the 1st Respondent's legal practitioners have failed to offer him a warranty that the property is not being disposed of.

In the circumstances, the Applicant is entitled to the relief sought.

With respect to nature of the relief, there is no need of having terms of final order since there is no need for the return day. The provisional order has its final sunset clause being the finalisation of the matter under case number HC 5227/21. Once the dispute for the division of the property has been finalised, the *caveat* will be no longer necessary.

The Applicant had prayed for costs if the 1st Respondent has opposed this application. There is no justification for threatening the 1st Respondent with costs if she opposes the application. This approach violates the 1st Respondent's fundamental right to a fair hearing established in terms of s 69 of the Constitution which is one of the non-derogable rights provided for in s 86(3) of the Constitution. It is just and equitable that each party must bear his or her own costs.

Accordingly, it is ordered as follows:

(a) Pending the finalization of the Applicant's claim under case number HC 5227/21 the 1st Respondent is hereby interdicted from dealing in any manner with the immovable property known as number 2 Glynde Avenue, Mabelreign, Harare held under Deed of Transfer number 2120/2017 registered in the name of the 1st Respondent that may cause encumbrances or dispose by selling it to any third party.

(b) The 1st Respondent be and is hereby ordered and directed not to alienate or remove any such improvement made on the property specified in paragraph (a) until the matter under case number HC 5227/21 is finalised.

(c) The 2nd Respondent, pending the finalization of the Applicants claim under case number HC 5227/21, be and is hereby ordered and directed to place a caveat on the property specified in paragraph (a).

(d) There shall be no order as to costs.

*Dube-Tichaona, Tsvangirai*, Applicant's Legal Practitioners.
*Muvingi and Mugadza,* 1st Respondent's Legal Practitioners.