SIMELINKOSI ZIMANO
versus
ZIMRE PROPERTY INVESTMENTS LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 11, 12 May 2020 & 3 June 2020

Opposed urgent chamber application

T M Chagonda, for the applicant
B Diza, for the respondent

CHINAMORA J: **Introduction**: The dispute before me concerns the sale of a piece of land, namely, Stand 27288 Ruwa Township, in Goromonzi, measuring 800 square metres "the property". On 26 January 2018, the respondent sold the property to the applicant for a purchase price of US$26,800-00 in terms of a written instalment sale agreement. A deposit of US$16,000-00 was paid upon signing the agreement, with the balance of US$10,800-00 payable in 18 monthly instalments of US$600-00 each. In clause 3, the agreement stipulated that:

> "All payments due in terms of this agreement shall be paid to Zimre Property Investments Limited, through their bankers: CABS PLATINUM BRANCH, Account No. 1003604110, or at any other address that may be nominated in writing by the seller".

The applicant contended that she duly paid the purchase price in terms of the agreement of sale. However, on 22 April 2020, the applicant discovered that her account had been credited by a payment from the respondent in the sum of ZW$8,900-00. Enquiries revealed that the purchase price had been returned to her on the basis that the payment should have been made in cash in United States currency. The amount was tendered to the respondent by the applicant's legal practitioners.

As the parties failed to agree, on 1 August 2019, the applicant filed an application in this court under HC 6387/19 for a declaratory order, which was granted by DUBE J on 30 January 2020, in the following terms:

"IT IS ORDERED THAT:

1. The payment of the purchase price by the applicant into the respondent's Cabs Platinum Account be and is hereby declared valid and in compliance with the terms of the agreement of sale between the parties.
2. The applicant be and is hereby declared to have performed her obligation to pay the purchase price.
3. The respondent shall pay the applicant's legal costs".

The urgent chamber application

Although not appealed and remaining extant, the order granted by DUBE J did not end the dispute between the parties. On 5 May 2020, the applicant filed an urgent chamber application, in which the provisional order is couched as follows:

"INTERIM RELIEF SOUGHT

Pending confirmation or discharge of this provisional order, the applicant is granted the following interim relief:

1. That the respondent be and is hereby interdicted from effecting transfer of Stand 27288 Ruwa Township situated in the district of Goromonzi measuring 800 square meres to any other person pending the return date.

TERMS OF FINAL ORDER SOUGHT

That you show cause why a final order should not be made in the following terms:

1. The respondent's cancellation of the agreement of sale executed on 26 January 2018 be and is hereby declared unlawful and therefore null and void.
2. The respondent shall take all necessary steps to effect transfer of the property, namely, Stand 27288 Ruwa Township situated in the district of Goromonzi measuring 800 square metres to the applicant within 30 days of the date of this order.
3. In the event that the respondent fails to effect transfer in terms of clause 2 above within a reasonable practicable time, the Sheriff or his lawful deputy be and is hereby authorized to sign all documents and take all steps to effect transfer of the property to the applicant.
4. The respondent shall pay costs of suit on a legal practitioner and client scale".

The applicant avers that, on 3 February 2020, she asked the respondent to effect transfer to her and tendered payment of all costs required for transfer. She asserted that by letter dated 25 March 2020, the respondent purported to cancel the agreement of sale, and had returned the purchase price less cancellation costs on 24 March 2020. The applicant averred that, acting on the advice of her legal practitioners, the applicant returned the payment as there was no basis for the refund. While the respondent had suggested that the dispute could be settled if the applicant made an additional payment, the applicant's response to the proposal appears in her lawyers' letter dated 26 February 2020. The relevant parts of that letter read:

"Messrs Mhishi Nkomo
Legal Practice
HARARE

Dear Sirs

RE: SIMELINKOSI ZIMANO vs ZIMRE PROPERTY INVESTMENTS LTD HC 6387/19

We refer to the above matter and to your letter dated 13 February 2020.

The court order dated 30 January 2020, per Dube J, declares our client to have performed her obligation to pay the purchase price. It is contemptuous for your client to insist that ours pay an additional amount, over and above the purchase price, before yours can effect transfer. Clause 4 of the agreement of sale between the parties provides, in unambiguous terms, to the effect that your client shall tender transfer of the property upon payment of the purchase price.

We are totally appalled by the attitude which your client, a very respectable corporate citizen, has taken. Your client must understand and appreciate that our client in an ordinary struggling citizen who has exhausted all her savings so that she can build a shelter above her head. The suggestion by your client for an additional payment in flagrant disregard of the law and the court order smacks of clear corporate indiscipline.

In the circumstances and sadly, an application to compel transfer is inevitable. Should your client insist with its demands, we shall have be left with no option than to make that application and seek costs on a punitive scale.

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Yours faithfully

ARTHERSTONE & COOK"

The reply to the above letter was given by the respondent by way of a letter from her legal practitioners dated 25 March 2020, whose contents I reproduce below:

"Atherstone & Cook
Praetor House
119 J Chinamano Ave
Harare

Dear Sir,

RE: S. ZIMANO vs ZIMRE PROPERTY INVESTMENTS LIMITED – HC 6387/19

The above matter refers.

We have been advised that our client has taken the decision to cancel the agreement and has since returned the full purchase price, less cancellation costs, to your client. Kindly find attached hereto the proof of payment.

Further to the above, our client has since dealt with the property as it deemed fit.

Yours faithfully

MHISHI NKOMO LEGAL PRACTICE"

In his supporting affidavit, Mr Sympathy Muzondiwa of Atherstone & Cook law firm, deposed that he was the legal practitioner dealing with the applicant's matter. He stated that he was on leave from 26 March to 31 March 2020, and that on 28 April 2020, the applicant advised him that she had received an email from the respondent to which was attached only saw the letter of 25 March 2020. The legal practitioners further said that he could not travel back to Harare from Mvuma due to the nationwide Covid-19 lockdown. Their offices were closed as the legal sector was then not exempted as an essential service until the relaxation of the lockdown to level 2. Mr Muzondiwa averred in his affidavit he only returned to the office on 4 May 2020 and saw the respondent's letter dated 25 May 2020. The lawyer submitted that the application I am seized with was then drafted and filed on 5 May 2020.

The respondent opposed the application. It raised two points *in limine*, namely, that the matter was not urgent, that the application is patently defective as the interim relief was not predicated on pending litigation. I will come back to this. In relation to the merits, the respondent argued that the applicant was not entitled to the relief sought as the purchase price had been refunded. Additionally, the respondent submitted that it had alienated the property to a third party who was not part of the proceedings before the court. Neither the details of the third party, nor the agreement of sale are given by the respondent. It invited the applicant to "*pursue any other remedies it deems available to it, but the property is no longer available"*. In relation to DUBE J's order, the respondent averred as follows:

> "It is disputed that the court order by Dube J defined any rights. It merely made a finding that payment had been done. If it defined any rights the applicant would not be back in court. She would be simply enforcing those rights. There was nothing to be gained from appealing the order".

Finally, the respondent contended that the applicant could not suffer irreparable harm because the full purchase price had been reimbursed. At the hearing, I asked the parties to file heads of argument and postponed the matter to 12 May 2020. To protect the integrity of the proceedings before me, I granted an interim order in the following terms:

> "Pending the final determination of this urgent chamber application, the respondent be and is hereby interdicted from doing any act or signing any papers to transfer the property known as Stand 27288 Ruwa Township, in the district of Goromonzi, measuring 800 square metres".

I move to examine the points *in limine*.

Points *in limine*

As observed earlier, two preliminary points were raised the respondent, *viz*:- that the matter is not urgency; and that the application is fatally defective as the interim relief is not predicated on pending litigation. I will now examine the first objection.

Urgency issue

The respondent argued that the need to act when the agreement of sale was cancelled on 26 March 2020, yet the urgent chamber application was filed on 5 March 2020. As no action was not taken for some 40 days, it was submitted that the matter was not treated as urgent, and so was not urgent. In this respect, the respondent argued that the explanation for the failure to act timeously should not be believed as the letter of cancellation was delivered before the lockdown was imposed. As such, the High Court was still open to deal with urgent matters.

I have before me an affidavit by Mr Muzondiwa in which he explained that he was handling the applicant's brief, and that he did not see the letter of 25 March 2020 until 4 March 2020. He is an officer of this court and I have no reason to disbelieve him in the absence of anything that adversely impinges on his professional or ethical integrity. The averments that Mr Muzondiwa travelled to Mvuma on 25 March 2020 and that he was on leave from 26 to 31 March 2020 were not seriously challenged. I also judicial notice of the fact that the first phase of the Covid-19 lockdown did not include the legal sector as an essential service. If Mr Muzondiwa did not see the letter of 25 March 2020, he could not have related to the urgency of the plight facing his client (the applicant). The fact that Practice Directive No. 1 of 2020 allowed the High Court to deal with urgent matters is irrelevant if the lawyer concerned was not aware of the letter which triggered the issue of urgency. Accordingly, I find that the need to act arose on 4 May 2020, being the date Mr Muzondiwa first saw the letter cancelling his client's agreement of sale. The present application was filed the following day, on 5 May 2020, confirming that the matter was dealt with swiftly. I am therefore prepared to treat this application as urgent. Thus, the point *in limine* based on lack of urgency has no merit and is dismissed.

Whether application is defective

I was urged to dismiss the application on the ground that, as it was not predicated on a matter seeking to resolve the dispute between the parties, it was fatally defective. The question I have to ask is: does the absence of pending litigation *ipso facto* render the application defective? The answer was sufficiently provided in *Chiswa v Maxess Marketing (Pvt) Ltd & Ors* HH 116-20, where KWENDA J, quite instructively, said:

> "This court has the power to amend a draft provisional order where it does not properly capture the appropriate remedy merited and articulated in the founding affidavit. (See r240 0f the High Court Rules, 1971).
> … …
> I have already alluded to rule 240 of the High Court of Zimbabwe rules, 1971 which empowers the court to grant any order it deems fit in any application, including a provisional order, whether or not other relief has been asked for. My understanding is that the final wording of any court order (whether final or provisional) is the prerogative of the court as long as the order resolves the dispute(s) before the court. The draft provisional order submitted by the applicant with the application remains a proposal. Indeed, there are instances when the draft order (provisional or final) may be so wrong that the court cannot correct it without stepping into the shoes of a litigant (applicant)".

Mr Blessing *Diza*, for the respondent sought to argue that r240 does not apply to chamber applications since the rule refers to the court and not judge. However, such an argument is invalidated by r246 (2) which allows a judge, if satisfied that the papers establish a *prima facie* case, to grant a provisional order in terms of the draft order or as varied. Counsel for the respondent conceded the point. He submitted, on the authority of *Nzara & Ors v Kashumba N.O. & Ors* SC 18-18, that the court cannot vary an order, and relied on the following dicta of UCHENA JA:

> "This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour. The rules of court require that such an order be specified in the prayer and the draft order. These requirements of procedural law seek to ensure that the court is merely determining issues before it by the parties and not going on a frolic of its own".

I have read the judgment of my brother UCHENA JA, and it is obvious that his remarks were taken out of context. The learned judge of appeal correctly captured the issue before him as: *whether or not a court can grant an order not sought by the parties?* Of course, the answer is in the negative. Granting an order the parties did not ask for is different from saying that a court can amend a draft order where it does not properly capture the appropriate remedy merited and

articulated in the founding affidavit. Even KWENDA J in *Chiswa v Maxess Marketing (Pvt) Ltd & Ors supra* was aware that it is not in every instance that orders can be corrected or amended without stepping into the shoes of a litigant. It is clear that the case which confronted UCHENA J had nothing to do with the situation contemplated by either r240 or r246 (2). That this is so comes out clearly from the Namibian case cited with approval in *Nzara & Ors v Kashumba N.O. & Ors supra*. In this respect, in *Kauesa v Minister of Home Affairs & Ors* 1996 (4) 955 (NmS) at 973H to 974C, DUMBUTSHENA AJA observed:

> **"**It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and invite them to submit arguments either for or against the judge's point. It is undesirable for a court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.

The above case was simply stating what is elementary. Of course, a judge should decide a case on the basis of evidence which has not been put before him. I therefore find that the link that counsel for the respondent sought to make between the decision in *Nzara & Ors v Kashumba N.O. & Ors supra* and the argument that r240 as read with r246 (2) of the High Court Rules,1971, does not allow a judge or court to vary an order is a tenuous one. Quite apparent is that *Nzara & Ors v Kashumba N.O. & Ors supra* does not support the proposition proffered by the respondent. Nothing precludes a judge or court from amending a draft order if such a variation is necessary to succinctly reflect the relief established by a litigant's papers. In fact, a contrary interpretation cannot be supported in light of *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Pty) Ltd & Anor* S 43-13, where GARWE JA confirmed that r240 permits a court, after hearing argument, to vary an order sought. Indeed, my brother judge of appeal underlined that the power in r240 enables a court to grant an order which is consistent with the facts, so that final relief is not granted by way of a provisional order. Accordingly, the point *in limine* has no merit, and is dismissed. I proceed to examine the merits of the application.

On the merits

The requirements for an interim interdict are trite. (See *Setlogelo v Setlogelo* 1914 AD 221). For a litigant to succeed, he/she/it must establish the following:

(a) a *prima facie* right, even if it is open to some doubt;

(b) a well-grounded apprehension of irreparable harm if the relief is not granted;

(c) the balance of convenience;

(d) the prospects of success in the main matter; and

(e) no other satisfactory remedy.

These requirements are considered conjunctively and not disjunctively I will address them in turn.

(a) *Prima facie* right

On the merits, the applicant submitted that she had managed to establish a *prima facie* right. In *casu*, the order granted by DUBE J was not appealed and remains extant. It is no answer for the respondent to say that there was no point to be served by appealing. The consequence of not challenging the order is that it confirms that the applicant paid the full purchase price in terms of the agreement of sale. In the words of Mr *Innocent Chagonda*, the order granted by DUBE J declared the validity of the contract between the parties and, in the absence of an appeal, both parties are obliged to observe the court order. I agree with counsel's submission. The respondent's somewhat cynical (if not cavalier) attitude is that it was pointless to appeal. Once that stance was adopted, it is obvious that this court had made a pronouncement that the contract between the parties was *perfecta*. The inevitable consequence of this legal position is that the applicant is entitled to demand reciprocal performance of the respondent's obligations. The general rule was stated by PATEL J (as he then was), in *River Ranch Ltd v Delta Corporation Ltd* HH 1-10, as follows:

> "Where the sale of immovable property is involved, the purchaser's obligation to pay the purchase price is ordinarily reciprocated by the seller's obligations to give occupation and effect transfer. See *Pasha v Southern Metropolitan Local Council of the Greater Johannesburg Metropolitan Council* 2000 (2) SA 455 (WLD) at 466. The parties' obligations are reciprocal because they arise from what is essentially a bilateral or synallagmatic contract. See Christie: *The Law of Contract in South Africa* (3rd ed.) at 467-468".

Consistent with the above *dicta* and the reality that the order issued by this court in HC 6387/19 is extant, I find that the applicant has established a *prima facie* right to bring the present application.

(b) Apprehension of irreparable harm

The applicant submitted that she has a well-grounded apprehension of irreparable harm occurring if the order sought is not granted. In its opposing affidavit, the respondent has repeatedly asserted that it has alienated the property to a third party. Assuming such an alienation has taken place, it is clear that the property has not yet been transferred to such third party. The interim relief seeks to interdict the respondent from effecting transfer to any third party. If the property is transferred to a third party who acquires real (as opposed to personal) rights in it, the applicant stands to suffer irreparable harm. The legal implications of transfer of title were lucidly spelt out in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) at 105H to 106A, and require no further elaboration.

In response, the respondent argued that it had refunded the purchase price which was held in a trust account on the applicant's behalf. To demonstrate the irreparable his client would suffer, Mr *Diza* submitted that, it granted, the interim relief would affect the rights of a third party who was not before the court. There are a number of things that are glaringly curious. Firstly, the respondent did not take me into its confidence and disclosed the said third party. Secondly, no document in the form of an agreement of sale between the respondent and a third party purchaser was placed before the court. Thirdly, no supporting affidavit by the third party was filed with the opposing papers. Finally, and crucially, no application was made for the joinder of the said third party to the proceedings. The provisions of r87 (2) (b) of the High Court Rules are pertinent. In this respect, I note that the respondent filed its notice of opposition on 11 May 2020. There is no reason why the agreement of sale, if it existed, was not filed with the opposing affidavit. Such a document could also have been produced at the hearing. The net effect of these omissions is that I am unable to consider in the abstract the interests of a nameless third party. I decline the invitation to do so.

(c) Balance of convenience

It was submitted on applicant's behalf that the balance of convenience favours her. It was submitted that the respondent has a shown a blatant disregard for an extant court order. The applicant submitted that the interdict would secure the protection of the rights that flow from the order granted by DUBE J. Mr Chagonda contended that the applicant had complied with its obligations in terms of the agreement of sale and ought to receive transfer. He further argued that, despite paying the bulk of the purchase price in United States currency, the purported refund was made in Zimbabwean currency. Thus, the applicant urged me to find that the balance of convenience favoured preventing a transfer to a third party that would effectively aid breaching an order of this court. On the other hand, the respondent submitted that the convenience of the court favours the dismissal of the application. I am not persuaded by this argument, more so, coming from a party that has elected not to appeal a court order adverse to its interests, and decided to ignore it. It worth remembering that in *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity & Ors* 2004 (1) ZLR 538 (S), CHIDYAUSIKU CJ was on point when he remarked:

> "This is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards."

I endorse the late Chief Justice's eminently sensible statement of the law. In my view, the balance of is tilted in favour of the applicant, who has done nothing but to abide by the law in meeting her contractual obligations and in respecting an order of this court.

(d) Prospects of success

Given the existence of an extant order of this court, the chances of the applicant's case to interdict transfer of the property to a third party are good. The case she has made in the papers before me is that she fulfilled her obligations in terms of the agreement of sale. That position was confirmed by a declaratory order granted by this court. That order was not appealed. On the other side of the coin, the respondent's argument was that the payment of the balance, although made in terms of the law, did not make economic sense. Mr *Diza* stated that the instructions from his client are that it would rather repudiate the agreement than agree to effect transfer to the applicant. Mr *Chagonda* submitted that the effect of Mr *Diza's* submission was that his client

(Zimre) was not acting in accordance with its lawyer's advice. He submitted that an officer of the court should not act in a manner that endorsed his client's contempt of court, and that if he accepts the binding nature of that court order a legal practitioner should not act in a way that undermined the court order. I associate myself with Mr Chagonda's submissions. Let me add that a legal practitioner who continues to act for a client whose instructions contradict an order of this court effectively makes himself an accessory to an act of contempt of court. I am at pains to appreciate the prudence of such foolhardiness. In these proceedings, I will not make any findings on Mr *Diza*'s professional integrity. Suffice to comment, however, that I find it undesirable and beyond conscience for a legal practitioner who finds himself in the invidious position of acting for a client who is steering perilously close to unethical conduct to continue with the brief.

(e) No other satisfactory remedy

The respondent's contention is that, to the extent that it has reimbursed, the purchase price a remedy already exists. It is worth turning to *Magarita v Munyuki & Ors* HMA 44-18 where MAFUSIRE made some useful remarks on what constitutes satisfactory remedy:

> "However, the remedy that is envisaged by the law is not just any other remedy. It has to be one that is effective. What an effective remedy is can never be defined with any degree of precision. It has to be considered on a case by case basis. At any rate, and as already been pointed out, these individual requirements for an in interdict are all taken together to help the court dispense real and substantial justice in the *Cohen v Cohen* [1979 (3) SA 420 (R)] sense".

In this case, the dispute to be resolved boils down to who of the competing parties should, in the final analysis, retain the property. My view is that, with the galloping inflation, monetary compensation does not present as an effective remedy to a purchaser who has paid the purchase price and is entitled to take transfer. The appropriateness of damages as a satisfactory remedy was considered by MAFUSIRE J in *Northern Farming (Pvt) Ltd v Vegra Merchants (Pvt) Ltd* HH 328-13, where *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 372-373 the following passage appears:

> "It is often said that an interdict will not be granted if there is another satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer? … There is no suggestion that it could be replaced by a claim for an interdict. <u>The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it – to render it more effective</u>". **[My own emphasis]**

I endorse the above observations. It simply beggars belief that a party that willingly breaches a court order should be heard to say that a refund of the purchase price is an adequate remedy. Elementary principles of fairness dictate that the respondent's conduct of seeking to proceed with transfer of the property to the unnamed third party ought to be interdicted. At any rate, our courts invariably uphold the doctrine of sanctity of contracts. In this context, *Book v Davidson* 1988 (1) ZLR at 369F, held that the public interest required agreements freely entered into to be honoured. The granting of interim relief would also protect the integrity of DUBE J's order and safeguard the efficacy of its consequences.

Conclusion

I am satisfied that the applicant has established the requirements for interim relief. Having dismissed the points *in limine*, I am now left to decide on the appropriate interim order that I should grant. Taking a cue from *Chiswa v Maxess Marketing (Pvt) Ltd & Ors supra,* I accept that as long as the relief I propose to grant is supported by averments and supporting documents in the founding papers I can vary the draft order in terms of r240 as read with r246 (2) of the High Court Rules to give effect to the appropriate relief. In *Ecocash Zimbabwe Ltd v Reserve Bank of Zimbabwe Ltd* HH 333/20, I observed that the interim relief cannot be considered in isolation of the final order. Bearing this in mind, it is clear from the applicant's papers that she wishes to prevent the respondent from transferring the property to any party other than herself pending the return date. Thus, on the return date, the applicant will seek a final order interdicting the respondent from doing any act which results in the transfer of the property to a third until such a third party is joined to any proceedings to decide the competing interests in respect of Stand 27288 Ruwa Township, in the district of Goromonzi, measuring 800 square metres.

Disposition

In the result, I make the following order:

TERMS OF INTERIM ORDER

IT IS ORDERED THAT:

1. Pending the return day of this application and any order given by the Court on that date:

   1.1 The respondent be and is hereby interdicted from effecting transfer of Stand 27288 Ruwa Township situated in the district of Goromonzi measuring 800 square meres to any other person.

2. The costs shall be in the cause.

Atherstone & Cook, applicant's legal practitioners
Mhishi Nkomo Legal Practice, respondent's legal practitioners