

REPORTABLE: (87)

SAMANTHA NHENDE
v
(1) ANDREW ZIGORA (2) REGISTRAR OF DEEDS N.O

SUPREME COURT OF ZIMBABWE
BHUNU JA, MATHONSI JA & CHATUKUTA JA
HARARE: 4 JULY 2022 & 3 OCTOBER 2022

N. M. Phiri, for the appellant

E. E. Homera, for the first respondent.

No appearance, for the second respondent.

MATHONSI JA : On 6 April 2022, after hearing a contested ^{Judgment} urgent ^{No. SC 102 /22} application for an interdict made by the first respondent, the High Court (No. SC 106/22) granted a final order in the following terms:

“Accordingly, it is ordered as follows:

- (a) Pending the finalisation of the applicant’s claim under case number HC5227/21 the first 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 first respondent that may cause encumbrances or dispose by selling it to any third party.
- (b) The first respondent be and is hereby ordered and directed not to alienate or remove any such improvement made on the property specified in para (a) until the matter under case number HC5227/21 is finalised.
- (c) The second respondent, pending the finalisation of the applicant’s claim under case number HC5227/21, be and is hereby ordered and directed to place a caveat on the property specified in para (a)
- (d) There shall be no order as to costs.”

This appeal is against the whole judgment of the court *a quo*.

THE FACTS

The appellant, a female adult, and the first respondent, a male adult, entered into an unregistered customary union in August 2015 and were delighted to commence living together as husband and wife about October 2015.

During the subsistence of their customary union, they acquired both movable and immovable property including house number 2 Glynde Avenue, Mabelreign Harare which is solely registered in the name of the appellant. The mortgage finance sourced to acquire the house was secured in the appellant's name and in her account. The first respondent however alleges, with significant assertiveness, that he also directly contributed to the acquisition of the property and the repayment of the loan. He further asserts that he added improvements to the house which enhanced its value.

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The customary union broke down in February 2021. As a result, the first respondent sued a summons against the appellant in the court *a quo* under case number HC 5227/21 seeking an order for the division of the parties' property acquired during the subsistence of the customary union.

In his declaration, the first respondent pleaded in part thus:

- “3. The plaintiff and the defendant entered into an unregistered customary union on or around the first of August 2015, with the traditional rites having been done they began to reside together as husband and wife from November 2015. In terms of the tacit universal partnership:
 - (a) Each party worked independently and contributed individually to the acquisition of the property, both movable and immovable for the joint ownership of the union.
 - (b) -----
 - (c) -----
4. Pursuant to the establishment of a tacit universal partnership by the parties, the parties acquired both movable and immovable property as shall appear in Annexure A attached.
- 5 -----

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7 -----

8 Pursuant to the universal tacit partnership the plaintiff went on to further contribute by way of making improvements to the property being complete renovation of the kitchen, painting the interior and exterior of the main house, gate, garage and external rooms, re-wiring of the whole house electrical system, plumbing of the kitchen, bathroom, servant's quarters, storage/ laundry room, installation of solar geyser, water tank and pump, installation of the security system and planting of lawn around the yard, installation of a back- up power solution on the main gate, which renovations cost a total of USD 16 000.00... thereby increasing the market value of the said property as well as making it habitable for the parties.” (The underlining is for my emphasis)

The appellant entered appearance to defend the claim and filed a plea. As the matter was pending before the court *a quo* the parties engaged each other through correspondence as they bickered over the distribution of the immovable property, among other issues. It was during the course of their engagement that the appellant admitted part of the averments made by the first respondent.

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By letter dated 10 December 2021 to the first respondent's legal practitioners, the appellant's legal practitioner stated:-

“RE: ANDREW ZIGORA v SAMANTHA NHENDE CASE NO. HC 5227/21

Reference is made to the above and to your letter dated 26th November 2021, which we received on 30th of November 2021, the contents of which have been noted

----- Further, our client disputes yours' claim for improvements amounting to US\$16 000.00. We are advised that your client only contributed to the painting of the house and some kitchen renovations of which our client is prepared to offer US\$2 500. Our client further advises that she believes that the other improvements including solar system, alarm system, electric gate motor, and water tank are fixtures and fittings which can be removed and the plaintiff can collect same-----

(The underlining is for emphasis).

According to the first respondent, in February 2022, he got to know that the appellant intended to sell the immovable property forming the subject of the pending

summons action. His concerns were registered in a letter addressed to the appellant's legal practitioners which drew the attention of the appellant and her legal practitioner to the fact that he had become aware that she was sourcing agents and prospective buyers. The letter entreated the appellant to assure the first respondent that the property was safe.

In response, the appellant did not give any such assurances. In fact the letter written in response thereto was vague and unhelpful.

PROCEEDINGS BEFORE THE COURT A QUO

In the wake of those developments, the first respondent moved swiftly, filing an urgent chamber application on 24 February 2022. In his founding affidavit, the first respondent attested to a reasonable apprehension that the appellant would dispose of the house, given that it is registered in her name only, in order to defeat his claim for division of the universal partnership property. He implored the court *a quo* to grant an order restraining the appellant from "the whims and decisions" of the appellant.

To the application, the first respondent attached a draft provisional order the grant of which was motivated. It reads in relevant part:

"TERMS OF FINAL ORDER SOUGHT

1. Pending the finalisation of the applicant's claim under case number HC 5227/21 the first 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 first respondent be and is hereby ordered and directed not to alienate or remove any such improvements made on the immovable property until the matter under case number HC 5227/21 is finalised.
3. First respondent shall pay costs of suit on an attorney-client scale only if it (*sic*) opposes this application.

INTERIM RELIEF GRANTED

The second respondent pending the finalisation of the applicant's 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 first respondent herein."

The application was strenuously opposed by the appellant who raised quite a substantial number of points in *limine*. The appellant protested that the matter was not urgent, that the first respondent had not established a *causa* having failed to plead the choice of law and finally that the relief sought was incompetent. On the merits, the appellant argued that the first respondent had not presented any evidence to show that she intended to dispose of the house. She rounded off by submitting that she, as the registered owner of the house, had exclusive rights over it unlike the first respondent who could not possibly claim any share to it.

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The court *a quo* found that the application passed Civil Appeal No. SC 196/22 regarding the objection that the application did not disclose a cause of action as it sought to import general law into a dispute governed by customary law, the court *a quo* found that the issue was not before it. In the court *a quo*'s view that was an issue to be resolved when determining the claim for division of property in HC 5227/21. The court *a quo* refused to be drawn to "pre-empt the dispute" in the main action.

The objection relating to the competency of the relief sought was also dismissed on the basis that the court had the discretion to grant an order that was competent and established by the case before it.

On the merits of the application, the court *a quo* found that indeed the first respondent was labouring under a reasonable apprehension that the appellant may dispose of the house before the finalisation of the main claim. It took the view that those fears were bolstered by the unsatisfactory response to his enquiries given by the appellant.

As already stated, the court *a quo* granted final relief in favour of the first respondent. In doing so, it reasoned:

“With respect to the 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.”

It is significant to note that the relief that the court *a quo* granted is what was set out both in the terms of the final order sought and the interim relief of the draft provisional order. Judgment
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PROCEEDINGS BEFORE THIS COURT

The appellant was discontented by the judgment of the court *a quo*. She noted an appeal to this Court on the following grounds:

- “1. The court *a quo* grossly erred at law in and misdirected itself in fact in granting an interdict (*sic*) as regards appellant’s immovable property in circumstances where there was no evidence or at all that the appellant intended to alienate the property.
2. The court *a quo* erred at law in granting an interdict where the requirements of such relief had not been met, particularly where a clear right had not been established.
3. The court *a quo* grossly misdirected itself and erred in failing to consider that the issue of the choice of law was crucial in the determination of whether or not there was a cause of action against the appellant.
4. The court *a quo* grossly misdirected itself in fact in ordering appellant not to remove improvements on the property where no evidence or indications of the said improvements were made or proved by the respondent.
5. The court *a quo* misdirected itself in fact and subsequently erred at law in granting a final order in an urgent chamber application where an interim relief had been sought

thereby denying the appellant the opportunity to make representations on the return date.”

At the hearing of the appeal both counsel were in agreement that the grounds of appeal raise only three issues for determination in this appeal. These are:

1. Whether the requirements of an interim interdict were satisfied.
2. Whether the court *a quo* erred in refusing to determine the choice of law question; and
3. Whether the court *a quo* was correct in granting a final order.

SUBMISSIONS ON APPEAL

Mr. *Phiri*, who appeared for the appellant, adopted a three- pronged approach in motivating the appeal. Firstly, on the choice of law, he submitted that the first respondent ought to have pleaded the application of general law for him to sustain a valid cause of action. For that reason, so it was argued, the court *a quo* fell into error by proceeding to determine the application despite the first respondent’s failure to plead a choice of law.

On the evidence placed before the court *a quo*, Mr. *Phiri* submitted that it did not sustain the relief that was sought. In counsel’s view, the first respondent did not substantiate his suspicion that the appellant intended to dispose of the house. In that regard, the requirements for the grant of a final interdict were not satisfied and as such the application should have been dismissed.

Finally, Mr. *Phiri* strongly submitted that the court *a quo* misdirected itself in *mero motu* granting a final relief where the application had been one for interim relief and a case was not made for the grant of a final one. Mr. *Phiri* insisted that, by so doing, the court

a quo also deprived the appellant the opportunity to contest the terms of the final order sought on the return date. Counsel urged the court to intervene bearing in mind the irrational manner in which the court *a quo* exercised its discretion to grant final relief.

Mr *Homera* for the first respondent defended the judgment of the court *a quo*. In his view, the fact that there was a pending matter between the parties, in which the first respondent lay a claim to the house, which claim would be prejudiced if the status *quo ante* was not preserved, meant that a good case was made for the grant of an interdict. The choice of law argument was not before the court *a quo* and could not detract from the need to grant an interdict.

Mr *Homera* took the view that the moment the appellant failed to give the first respondent assurance that the house would not be disposed of, a basis for the issuance of an interdict arose because there was a reasonable apprehension of Civil Appeal No. SC 196/22. Judgment No. SC 102 /22

Regarding the appellant's complaint against the grant of a final order, Mr *Homera* submitted that there is room for the court *a quo* to grant it in the exercise of its discretion. This is so because such final relief is granted in spoliation proceedings. As such nothing could stop the court *a quo* from granting it in the present case.

Whether the requirements of an interdict were satisfied

The starting point is to make the observation that all that the first respondent sought in his application was the interim relief of the placement of a caveat on the title deed to the house in dispute. I am aware that in paras 19 and 20 of his founding affidavit the first

respondent made remarks in support of a final order for an interdict to be granted against the appellant.

However a close reading of those remarks clearly shows that he was motivating what was sought as the terms of the final order which the court would have only related to on the return date of the provisional order had it been granted. This is in line with the civil practice and procedure for urgent applications.

Earlier in this judgment I reproduced the draft provisional order which the first respondent sought. It bears testimony that the court *a quo* was requested to grant the interim relief of the placement of a caveat, nothing more. It is a relief which may be termed an interim interdict *pendente lite*. Briefly its requirements are that:

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- (i) The right which is the subject matter of the main action is clear or *prima facie* established though open to some doubt; Civil Appeal No. SC 196/22
- (ii) If the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he or she ultimately succeeds in establishing the right,
- (iii) The balance of convenience favours the granting of interim relief; and
- (iv) The applicant has no other satisfactory remedy.

See *Airfield Investments (Private) Limited v Minister of Lands & Ors 2004* (1) ZLR 511(S) at 517 B-E.

From the above requirements, there must be evidence establishing a *prima facie* right even though it may be open to some doubt. The evidence before the court *a quo* showed that the first respondent had made a claim for the sharing of property including the house in

dispute. I have cited verbatim the pleadings he placed before the court. It shows that he specifically pleaded the existence of a tacit universal partnership and his contribution to it.

Prima facie therefore, the first respondent established a right, which may be subject to some doubt. Should that right be proved in the main case, there is a well- grounded apprehension of irreparable harm to him if it is not protected. For that reason, the balance of convenience favoured the grant of interim relief. It was not suggested that there was any other remedy available to the first respondent other than that which was sought.

From the foregoing, I conclude that the requirements for the grant of the relief that was sought, with minor amendments, were satisfied. It is however not the relief that the court *a quo* granted. I shall return to that issue shortly.

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Whether the court a quo should have resolved the choice of law issue Civil Appeal No. SC 196/22

Counsel for the appellant dedicated a lot of time and energy arguing on choice of law. In the process, he clouded his view of that which the court *a quo* was required to determine. The application of Customary Law is regulated by s 3(1) of the Customary Law and Local Courts Act [*Chapter 7:05*]. It provides:

“3 Application of Customary Law

- (1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires-
 - (a) customary law shall apply in any civil case where-
 - (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;
 - (b) the general law of Zimbabwe shall apply in all other cases.”

Where any one of the factors set out in subsection (1) (a) of s 3 is present, customary law applies. It is however settled that where customary law is incapable of providing an avenue for the resolution of a dispute, rights or obligations, general law will apply. See *Chiwenga v Mubaiwa* SC 86/20 at p 2.

I discuss this aspect for purposes of completeness only because the court *a quo* declined to be drawn to determine it. The question whether the court *a quo* failed to relate to that issue or that the first respondent did not establish a cause of action by not pleading it was of no moment at all for two reasons.

Firstly, the first respondent pleaded a general law concept of a tacit universal partnership which I have said was enough to establish a *prima facie* right deserving protection by the court. Secondly, what was before the court *a quo* was an application for an interdict *pendente lite*, that was the *causa*.

The court *a quo* cannot be faulted for refusing to be drawn to the aspect of choice of law because an interdict *pendente lite* is incapable of resolution through customary law. The appellant is at liberty to pursue that argument in the main action, if he is so inclined. There is therefore no merit in the third ground of appeal.

Whether the court a quo erred by granting a final order

The High Court Rules, 2021 set out a procedure for the filing and determination of urgent applications. They also provide a form for a provisional order which litigants

approaching the court under that procedure are required to adhere to as well as to attach to the urgent chamber application.

In terms of r 69 (9):

“(9) Where in an application for a provision 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.” (The underlining is for my emphasis)

There is a reason why the Rule is couched that way. Firstly, in an urgent application, the applicant is usually granted interim relief on the basis of a *prima facie* case as the applicant would not have proved his or her case. The procedure allows a litigant which can show a *prima facie* right to be accorded interim relief that usually protects the status *quo ante* until the return date of the provisional order. See *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188.

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After the grant of interim relief in the form of a provisional order, the matter does not end there. The procedure is that the respondent is allowed to file a full dossier of opposition to the confirmation of the provisional order, which confirmation takes the form of granting the terms of the final order sought in the prescribed form of the provisional order. After the provisional order is granted, the full procedure of a court application, including the filing of a notice of opposition, answering affidavit and heads of argument, kicks in. It is a procedure which allows the applicant to fully prove his or her case and the respondent to disprove it without the pressure of urgency.

On the return date of the provisional order, a fully-fledged opposed application is set down and heard on the opposed roll. Following that hearing the court may either confirm

or discharge the provisional order. It confirms it by granting the terms of the final order sought.

Having said that, I must reiterate what this Court stated in *Nzara & Ors v Kashumba N.O & Ors* 2018 (1) ZLR 194 (S) at 200G of the cyclostyled judgement, that the court cannot grant an order that has not been sought by a party. The point is also made in *Chiwenga, supra*, that the purpose of provisional relief is to preserve the status *quo* pending the return day. At p 13 of the cyclostyled judgment the court stated:

“The purpose of a final order is different from that of a provisional order in that a final order is conclusive and definitive of the dispute. It finally settles the issues and has no return date. Once a final order is given the court issuing the order becomes *functus officio* and it cannot revisit the same issues at a later date.”

I have had to give a detailed account of the procedure for provisional relief because there appears to be a signal failure or lack of appreciation at the moment at the High Court that when approached on an urgent basis, except where spoliatory relief is sought in which case the court grants final relief, the court is required to issue interim or provisional relief in the form of a provisional order.

Given that, by its very nature, an urgent application requires the applicant to establish a *prima facie* case for the grant of interim relief, the jurisdiction of the court to grant final relief is not triggered.

In this case the court *a quo* completely ignored the draft provisional order that was presented to it by the applicant and related to the matter as if it was an ordinary application, where its jurisdiction to grant final relief would have been triggered. It had not. Doing so was a misdirection which resulted in a gross irregularity.

What is even more unfortunate is that the first respondent had made a case for the interim relief that he sought. The fifth ground of appeal ought to succeed.

DISPOSITION

The first respondent made a case for the placement of a caveat on the title deed to the property in dispute as interim relief. The court *a quo* elected to grant the relief which it ought to have related to on the return date and not on an urgent basis. As a result the court granted relief which was not sought by the parties. This was a misdirection and ought to be interfered with.

Regarding the question of costs, although the costs usually follow the result I am of the firm view that there is no basis for the first respondent to be mulcted with an award of costs for the sins of the court *a quo* where he had not invited the error the court committed.

In the result, it be and is hereby ordered as follows:

1. The appeal succeeds in part with each party to bear its own costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

“1. The application is granted in terms of the draft provisional order as amended.

2 The interim relief granted is amended to read:

‘INTERIM RELIEF GRANTED

Pending the return date of this provisional order, the second respondent is directed to place a caveat on the immovable property known as stand number 2 Glynde Avenue, Mabelreign, Harare held under deed of transfer number 2120/2017 registered in favour of the 1st respondent.”

BHUNU JA : I agree

CHATUKUTA JA : I agree

Mvingi and Mugadza, appellant's legal practitioners

Dube- Tachiona and Tsvangirai, 1st respondent's legal practitioners

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