

KENNY KARIMAKWENDA  
versus  
RUMBIDZAI BUSHU  
and  
DAVISON MUTAKAYA  
and  
HARARE IMPORT AND EXPORT (PVT) LTD  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
MAKARAU J  
HARARE 27 July 2004

Mr *NF. Nyangani*, for the applicant  
Mr *P. Kawonde*, for the 1<sup>st</sup> respondent.

MAKARAU J: After hearing this application, I confirmed the provisional order with an amendment, and indicated that my reasons would follow. These they are:

The facts giving rise to this application are largely common cause. The applicant invested the sum of \$25 450 000-00 with the 3<sup>rd</sup> respondent, a company in which the 2<sup>nd</sup> respondent and his wife hold directorships. The 3<sup>rd</sup> respondent failed to honour the terms of the investment agreement and summons were issued against it and against the 2<sup>nd</sup> respondent and his wife, for a total claim in excess of \$900 000 000-00. The second and third respondents then started dissipating their assets. The 2<sup>nd</sup> respondent transferred a piece of immovable property jointly owned by him and his wife to the 1<sup>st</sup> respondent. That property forms the centerpiece of the application before me.

On 11 May 2004, this court issued a provisional order calling upon the 1<sup>st</sup> respondent to show cause why she should not be restrained from disposing and further alienating the property called stand 4773 Salisbury Township of Salisbury Township Lands pending determination of an application setting aside the transfer in her favour. It is pertinent to note at this stage that the provisional order did not place the applicant on terms to file the application seeking to set aside the transfer in favour of the applicant, an omission that I rectify in the order I made in this application.

The proceedings before me are for the confirmation of the provisional order issued on 11 May aforesaid. The first respondent opposed the confirmation of the order

on the broad basis that the applicant has not established the requirements for the issuance of a temporary interdict. In particular, Mr *Kawonde* for the first respondent submitted that the applicant had not established a clear right or a right open to doubt to the property in issue. With respect, this is where he erred.

One must at this stage recall the traditional requirements for an interlocutory interdict. They were originally set out in *Setlogelo v Setlogelo* 1914 AD 221 and have been repeated in numerous subsequent cases. What the applicant needs to establish is:

- (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 an 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 an interlocutory interdict.

It is trite that what the applicant is seeking is what is correctly referred to as an anti-dissipatory interdict. It is an interlocutory interdict in the sense that it is pending some other litigation to determine the rights of the parties to the property in dispute. It is on this premise that it becomes a temporary interdict. So much is common cause.

The purpose of an anti-dissipatory interdict is to stop a respondent from dissipating his property to frustrate the satisfaction of a judgement that the applicant hopes to obtain against the respondent.

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 onus resting on an applicant who has issued summons against the respondents and where such summons have not been excepted to for failing to disclose a cause of action.

It does present itself clearly to me that the purpose of the applicant seeking the interdict at this stage is to preserve the status quo pending determination of whether the first respondent obtained good title in the property or whether such title can be set aside on the grounds alleged by the applicant or on some other ground as the court sees fit. In the event that the property is transferred to a third party by the first respondent, that will

not only further complicate matters but will effectively put the property beyond the reach of the applicant should he succeed in obtaining judgment against the second respondent.

On the basis of the foregoing, I am satisfied that the applicant has met the requirements for the confirmation of the provisional order. He has a right to attach the property of the second respondent should he succeed in obtaining judgement against the second respondent in the action already commenced. The dissipation or transfer of second respondent's property to the first respondent in circumstances calculated to defeat applicant's just claims has infringed or threatened applicant's right to obtain satisfaction of his anticipated judgment against that property. Due to the fact that the applicant has a clear right to preserve the property of the second respondent his debtor, he need not establish that he will suffer irreparable harm should such property be transferred to a third party. (See *Charuma Blasting & Earthmoving Services (Private) Limited v Njainjai & Others* 2000 (1) ZLR 85 (SC)) However, in this case, it is apparent that the applicant will suffer irreparable harm if the property is further transferred, as he will not have a cause of action against that third party. There is in my view no other remedy open to the applicant other than restraining the dissipation of the second respondent's property. Finally, the balance of convenience favours the granting rather than the denial of the application in that the first respondent has not shown in which way she will be prejudiced if the application is not granted.

The applicant however has to challenge the transfer of the property by filing a court application substantiating the allegations of collusion and fraud upon which he has obtained the provisional order. He has to file that application within 10 days of this order.

It is on the above basis that I confirmed the provisional order on the turn, subject to the condition that the applicant has to file an application seeking to set aside the transfer in favour of the first respondent within 10 days of this order.

*I.E.G. Musimbe and Associates*, legal practitioners for the applicant.

*Kawonde and Company*, legal practitioners for the 1<sup>st</sup> respondent.