ISAAC CHIDUKU
and
JECONIAH CHIDUKU
and
NOREEN CHIDUKU
versus
AMOS CHIDUKU
and
DROWACK INVESTMENTS (PVT) LTD
And
CAPEVALLEY PROPERTIES (PVT) LTD
and
NORTON TOWN COUNCIL
and
ENVIRONMENTAL MANAGEMENT AGENCY

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 28 December 2022

Urgent Chamber Application

Mr *Chipupuri*, for the applicant
Mr *Zimudzi*, for the first respondent
Mr *Muchadehama*, for the 4th respondent

FOROMA J: This is an application in which the applicant seeks a provisional order on the following terms – the interim relief as sought reads:

> "That pending the determination of this matter the applicants are granted the following relief:
>
> (a) The first respondent is barred from holding out as a holder of a 50% undivided share in a certain piece of land in Hartley called Swallow field of Johannesburg measuring 127.6238 hectares held under deed of transfer number DT 5157/99 pending the return date and finalisation of this matter.
> (b) The first respondent is barred from unilaterally dealing in a certain piece of land in Hartley called Swallowfield of Johannesburg measuring 127.6238 hectares held

under deed of transfer number DT 5157/99 pending the return date and finalization of this matter.

(c) The first respondent is barred from dealing in sub-divided stands allocated to applicants and those reserved for the family pending the return date and finalization of this matter.

(d) The first respondent is barred from unilaterally authorizing the transfer of any sub-divided stands pending the return date and finalization of this matter.

The terms of the final order sought read as follows:

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

(1) The first respondent be and is hereby interdicted from holding out, as a holder of a 50% undivided share in a certain piece of land in Hartley called Swallowfield of Johannesburg measuring 127.6238 hectares held under deed of transfer DT5157/99 pending the determination and final outcome of the Arbitration proceedings commenced by the applicants against the first respondent at the Commercial Arbitration Centre.

(2) The first respondent be and is hereby interdicted from unilaterally dealing in a certain piece of land in Hartley called Swallowfield of Johannesburg measuring 127.6238 hectares held under deed of transfer DT5157/99 pending the determination and final outcome of the Arbitration proceedings commended by the applicants against the first respondent at the Commercial Arbitration Centre.

(3) The first respondent be and is hereby interdicted from dealing in subdivided stands allocated to applicants and those reserved for the family pending the determination and final outcome of the Arbitration proceedings commended by the applicants against the first respondent at the Commercial Arbitration Centre.

(4) The first respondent be and is hereby interdicted from unilaterally authorizing the transfer of any subdivided stands pending the determination and final outcome of the Arbitration proceedings commenced by the applicants against the first respondent at the Commercial Arbitration Centre.

(5) That costs of this application shall be borne by the first respondent on a legal practitioner and client scale."

At the commencement of the hearing of this matter I invited the parties to address the issue of urgency before we could proceed to deal with any other points *in limine* which the parties were inclined to raise or the merits. After listening to the counsels both for applicants and the first respondent, I ruled that the matter was urgent. This was because elements required to establish urgency are clearly spelt out by the applicants in their founding papers as having arisen in December 2022 and these consisted of among others a purported withdrawal from an agreement reached between the first respondent and the applicants (as siblings) which agreement recorded that the parties agreed to share the asset left by their deceased father, namely the piece of land in Hartley called Swallowfield of Johannesburg

measuring 127.6238 hectares equally which resulted in the parties holding 20% of the total shareholding each. The urgency arose from the fact that the first respondent by resiling from the agreement now claims in his own right ownership of 50% of the total shareholding of the piece of land jointly registered in first applicant and first respondent which the first applicant and other applicants contend was jointly held by the siblings. In his alleged resiling from the agreement the first respondent started asserting he would no longer be bound by the agreement aforesaid and that henceforth he would be proceeding on the basis that at law and as a joint title holder of title with first applicant he would be proceeding to deal with his 50% undivided share without consulting any of the siblings. During argument by Mr *Zimudzi* conceded that the first respondent was party to the agreement in which the deceased Tapfumaneyi Mushore Chiduku's children as siblings agreed that they would share 20% each of the total hectarage of the piece of land aforesaid. Clearly therefore the need to act arose as soon as the first respondent indicated that he no longer regarded his or her siblings as shareholders in the farm left in the estate of their late father a position which clearly prejudiced his siblings. This among other reasons which include the renunciation of powers of attorney to deal with the siblings' shares which had been given in the context of the memorandum of agreement clearly constitutes an urgent situation requiring the parties adversely affected thereby to seek resolution as provided in the agreement (i.e. arbitration) and to seek urgent relief to prevent anticipated irreparable consequential loss arising from a breach of the aforesaid agreement pending the outcome of arbitration.

Having ruled that the matter was urgent, the parties proceeded to address me on the remaining points *in limine* raised by the first respondent and in this regard Mr *Zimudzi* addressed three additional points *in limine* namely:

1. That the court had no jurisdiction to deal with this matter as the terms of the agreement between the parties stipulated that any dispute arising from the agreement had to be referred to arbitration by a single arbitrator to be appointed by the Commercial Arbitration Centre.
2. That the interim relief was similar to the final relief sought and that would have conferred upon the applicants a final relief in an application for a provisional order on proof of a *prima facie* case which would be legally untenable. The law is

clear that where party approaches a court for a provisional order he would have to seek initially an interim relief pending confirmation of that relief on the return date.

3. Mr *Zimudzi* further argued that there were material disputes of fact disclosed on the papers which made it difficult for the court to determine the matter on the basis of the papers filed in the urgent application.

Mr *Muchadeham*a also raised a single point *in limine* which he termed the misjoinder of the respondent (Norton Town Council). He argued that the documents filed by the applicant do not show any substantive interest that the fourth respondent has in the outcome of these proceedings thus there is no basis for it to be cited in this matter. All that had happened is that the fourth respondent had been put out of pocket by being dragged into these proceedings between siblings where it has no interest.

Mr *Chipupuri* on behalf of the applicants opposed each of those points *in limine* as indicated. He submitted that the court indeed had jurisdiction in terms of s 9 on the Arbitration Act. He confirmed that the applicants had indeed referred the substantive dispute for resolution by an arbitrator as envisaged in the agreement with first respondent and that this matter was infact pending. He further argued that the applicants did not intend to ask the High Court to substitute the arbitrator and determine the substantive dispute. In regard to whether or not the court had jurisdiction, I find that the intention to refer the matter to arbitration is a proper exercise of rights arising from what was agreed between the siblings. The relief sought by the applicants does not evince an intention on the applicant's part to have the High Court substitute the arbitrator in the resolution of the substantive dispute between the parties. I accordingly find that the objection as to jurisdiction is without a basis.

The objection that the interim relief and final relief are substantially similar is based on the procedural prohibition that a party seeking interim relief through a provisional order should not obtain a final order without adequately proving entitlement to it as such applicant is only required to prove a *prima facie* case for it to obtain interim relief whereas a final order is granted on proof on a balance of probabilities. Mr *Chipupuri*'s response was that the two reliefs i.e. interim relief sought and final relief sought were dissimilar and that they must be

understood in the context that the interim relief is sought pending the return date and the final relief is sought pending Arbitration.

I am satisfied that the interim relief sought in the provisional order as quoted herein above is not of the same import as the final relief sought as it is a temporary interdict. It must be appreciated that the first respondent has a right to anticipate the return date by giving 48 hours' notice and it is clear at law that the interim relief survives only until the return date. In other words the interim relief has no life beyond the return date of the provisional order unless confirmed. It is clear from the final relief sought that in the event that the final relief as sought is granted it will be permanently protective of applicant's rights pending determination of the arbitration proceedings pending. The position taken by the applicants is that on the return date they shall be asking the court to grant an interdict (permanent this time) barring any interference with their rights pending resolution of the dispute through the pending Arbitration. For these reasons I find that there is nothing offensive and objectionable about the manner in which of interim relief sought and the final order to be granted have been couched.

As regards the issue that there are material disputes of fact, a proper appreciation of the facts pleaded in the papers filed i.e. affidavits shows that the disputes between the parties are the consequences of the purported breach of the aforesaid agreement by the first respondent. Such breach of agreement will result in the applicants suffering irreparable loss. The first respondent has conceded that he was party to the agreement of the 1st of September 2021 (pages 26 to 31 of the founding affidavit) which records *inter alia* that the transfer of Swallowfield Farm into first respondent and the first applicant's names was not in their individual capacities but for the two jointly to hold in trust for the benefit of all the beneficiaries of the Estate of their late father.

The first respondent's attempt to resile from the said agreement is not accepted by the rest of the siblings and it is also not in dispute that clause 8 of the agreement between the parties (applicants and the first respondent) provides for resolution of disputes arising from the said agreement by arbitration. These foregoing facts which are common cause are what is essential for the court to determine the urgent chamber application. There is therefore no material dispute of fact and infact none was indicated specifically. With regard to the

misjoinder the fourth respondent objected to its being cited as a party to these proceedings contending that it has no substantive and direct interest in the result of the dispute between applicants and the first respondent (as siblings) nor has any been demonstrated to exist. The argument by applicants that the Norton Town Council needed to be cited in these proceedings to secure its compliance with any judgment by the court as urged by applicants is lame as no suggestion or evidence has been adduced in the papers to demonstrate that the fourth respondent could play a partisan role in the matter. Infact the applicant conceded that no substantive relief is sought against Norton Town Council. They have said as much in para 9 of the founding affidavit. I accordingly find that the objection of misjoinder by the fourth respondent is well taken. Fourth respondent in the circumstances need not participate further in these proceedings and I order that its name should be expunged from the record of these proceedings with costs.

After disposing of the points *in limine* the applicants and first respondent's counsel addressed the merits. It is clear pp 53 to 55 of the provisional order that the applicants seek arises from a factual conspectus which is largely common cause. I briefly outline it. The first applicant and his four siblings (including first respondent) all of whom are children of the late Tapfumaneyi Mushore Chiduku entered into an agreement on how to share the farm called Swallowfield Farm of Johannesburg Norton held under deed of transfer 5157/99 left by their late father. The agreement is part of the papers filed by the applicants. It is apparent from the said agreement that although first applicant and first respondent were registered as the owners of the farm left by the deceased (who had died intestate) they did so in trust and on behalf of the siblings who each became a 20% shareholder in the said farm which had to be shared equally amongst the siblings. None of the five (5) siblings disputes having been party to the said memorandum of agreement which as indicated resulted in each of them owning 20% of the shares in the farm left by their late father.

For reasons not very clear, the first respondent sought to resile from the agreement insisting that the farm, the subject of agreement was owned by him and the first applicant in undivided equal shares to the total exclusion of the other three siblings by virtue of the property being registered in the names of the two in the title deed. First respondent's attempt to breach the agreement aforesaid was resisted by the other four siblings. Meanwhile first

respondent was adamant that he henceforth was reverting to his original position where he held 50% share of the value of the farm which he jointly owned with first applicant. There were other ancillary arrangements which had been made upon the signing of the memorandum of agreement from which the first respondent also sought to resile namely powers of attorney in favour of the other siblings to deal with their shares as had been acknowledged in the memorandum of agreement. This first respondent obviously did in order to ensure that his claim to the undivided 50% would remain available. The first respondent's reasons for his decision to breach the aforesaid agreement were not accepted by the other four siblings who took the matter for resolution by arbitration as provided in the said agreement. When the first respondent sought to resile from the memorandum of agreement the interest of each sibling i.e. 20% share each in the farm became threatened. The threat to the 20% share each became real as the first respondent sought to deal with the farm as a 50% owner thereof for all intents and purposes provoking applicants to urgently file this suit. Mr *Zimudzi* argued that the first respondent is the holder of 50% of rights in the farm as evidenced by the title deed which he jointly holds with the first applicant. Therefore, on the basis that the farm is owned according to the terms of the title deed held by two of the siblings the rest of the siblings had nothing to lay claim to so he further argued. Thus, he argued that the rest of the siblings cannot be said to have established a *prima facie* right for purposes of the claim for a provisional order sought.

Mr *Chipupuri* did not agree. His position on behalf of the applicants remained that the memorandum of agreement is the source of the rights that the applicants seek to protect and that in terms of the memorandum of agreement each of the four holds 20% shares in the farm with the first respondent also holding 20% as his own making a total of 100% shareholding. It is clear that if the position urged upon the court by the first respondent is upheld then the memorandum of agreement cannot avail the other four siblings. Considering that it is common cause that the agreement was freely and voluntarily entered into by each and all of the five siblings, it is this court's view that the applicants have established a *prima facie* case against the first respondent and that a dispute has arisen between the parties to the aforesaid agreement which has to be resolved by arbitration. According to the papers filed the first respondent did not consult any of the siblings on his proposed action (to resile from

the agreement). Whatever his cause of dissatisfaction with his siblings, the justification for his purported breach of agreement must be put to the test of the pending arbitration as contemplated in the agreement between them as siblings.

In the circumstances, it is only proper to protect the asset in terms of which each of the applicants (in terms of the memorandum of agreement) claims a share of 20% of the farm pending determination of the issue whether or not the first respondent can prove his claim to 50% of the farm which has to be done at the pending Arbitration. It is common cause that the arbitration proceedings have been commenced and they are just awaiting processing and finalization. In the circumstances it is proper and in the interest of all concerned including the first respondent that the asset in dispute being *res litigiosa* be preserved pending finalization of the arbitral proceedings which in essence is the relief applicants seek in the interim relief sought. That will prevent any prejudice to all concerned. The four applicants have *prima facie* demonstrated their entitlement to 80% of the farm in terms of the memorandum of agreement. It would be harsh, improper and clearly oppressive for parties who *prima facie* hold 80% to be held to ransom by one who holds only 20% of the farm. While I do not purport to make a ruling on how the arbitration proceedings will unwind and pan out, the facts before me in particular the memorandum of agreement which the first respondent has admitted he was party to clearly demonstrate that it will be unjust to expose the other four siblings to potential irreparable loss by allowing first respondent to deal with the said asset on the basis that he is a 50% shareholder as opposed to 20% that each of his siblings have accepted as their respective share. As for the balance of convenience it is apparent that it favours the applicants who stand to lose through no proven fault of theirs in the event that the court does not interdict the first respondent from dealing with this property (the asset) as if he is a 50% shareholder should they ultimately win at arbitration. The applicants have therefore successfully established the requirements for an interim interdict and is it clear that the potential for irreparable loss has been established which justifies the grant of the provisional order sought.

Mr *Chipupuri* submitted that costs of today be awarded in favour of the applicants against the respondents. Mr *Zimudzi* opposed this contending that because the provisional order is based on a *prima facie* case there is no guarantee that on the return day the

provisional order will be confirmed and the normal practice of the courts is that costs at the time of consideration of the provisional order be reserved for determination on the return date when the matter will be fully ventilated.

I accordingly grant applicants the provisional order and reserve costs for determination by the court which will deal with the confirmation or discharge of the provisional order.

Thompson Stevenson & Associates, applicants' legal practitioners
Zimudzi & Associates, first, second and third respondent's legal practitioners