

HB 39-19
HC 2377/13
XREF HC 2145/13
XREF HC 2351/13

WILTSHIRE EXPLOSIVES (PVT) LTD
versus
MARY MASHANGA N.O
and
THE REGISTRAR OF DEEDS N.O
and
BULAWAYO CITY COUNCIL
and
LINOS PHIRI

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 27 FEBRUARY 2019 AND 21 MARCH 2019

Opposed matter

S Chamunorwa for applicant
1st respondent in person
J Sibanda for 4th respondent

MOYO J: This is an application for an ant-dissipation interdict.

Applicant has sued the first respondent for the sum of \$393 192-53 and ZAR 243 129-27 in HC 2145/13. The basis of the claim is not the subject matter of these proceedings but it appears the two parties were in a labour relationship with applicant being first respondent's employer and allegations are made of misappropriation of applicant's funds by first respondent during his course of employment. First respondent is since deceased and is now represented by his wife and executrix to his estate.

Applicant's case is founded on paragraph 9 of the applicant's founding affidavit wherein it is stated thus:

“This is an application for an ant-dissipation interdict which has been precipitated by the fact that when these allegations against the first respondent were brought to his attentions he mentioned that he intended to dispose of his immovable property known as house number 1964 Mahatshula Bulawayo.”

In paragraph 11, applicant goes on to state that:

“I verily believe that the intended sale of the property is not in good faith and intended solely to defeat the proceedings currently pending against first respondent, such that if applicant is successful it may not be able to recover the money owed to it.”

In paragraph 14 of the founding affidavit applicant avers that:

“It is my respectful submission that the balance of convenience favours the applicant than the respondent in that all that is sought herein is to preserve the *status quo* pending the resolution of the plaintiff’s claims.”

Applicant further, in paragraph 15.1 of the founding affidavit states

“that there is a reasonable apprehension that the first respondent may at any time proceed to dispose of his immovable property.”

In opposing the application first respondent states as follows:

In paragraph 6 of the first respondent’s opposing affidavit he says:

“I deny telling the deponent that I intended to sell my house as alleged.”

First respondent further avers in the same paragraph that he had to service a loan that he owed to the bank and now that he was out of employment the bank suggested that he sells his immovable property in order to service the loan.

Further, still on paragraph 6 (the 4th unmarked paragraph under paragraph 6, first respondent says that he has since sold the property to third parties and has no interest in the property anymore as it has already been sold. He goes on to say the interdict thus cannot be granted in the circumstances.

Fourth respondent avers that the interdict cannot be granted because he has already purchased the stand being the subject matter of the dispute from the applicant. Fourth respondent avers in paragraph 9.2 of the opposing affidavit that he purchased the stand being the subject matter of this dispute from the first respondent on 9 September 2013 after the property had been advertised in local papers. The fourth respondent goes on to state that as of 24 September 2013, when this court issued a provincial order, the property had already been sold.

Applicant in its answering affidavit paragraph 4.1 and 4.2 avers that the house was sold with haste to frustrate applicant’s claim and that the sale was therefore *mala fide*. The applicant

goes further to state that the sale flouts the Provisions of the Deeds Registries Act [Chapter 20:05] section 11 thereof.

The following factors are pertinent in the court record.

- 1) Applicant says the basis for an anti-dissipation interdict are on its pending claims against first respondent and that first respondent divulged an intention to dispose of the asset.
- 2) The asset was allegedly sold on 9 September 2013, with the provisional order being granted on 24 September 2013, two weeks after the sale.
- 3) The first respondent denied that the sale was *mala fide* and instead alleged that financial commitments to the bank, and his loss of employment led him to sell the property.

First respondent's explanation in this regard cannot be held by this court to be untrue or *mala fide* as that has not been proven in any way.

His bank statements do show that he acquired some loans during the relevant period. It is also common cause that he was dismissed from employment, so his explanation for the sale of the property cannot be held to be solely to defeat the judgment that applicant might get against him. Once a reasonable explanation has been given for the disposal, this court cannot hold that the disposal was *mala fide*.

In any event, if first respondent had malicious intentions why would he advise applicant of the intended sale? He would have simply kept it to himself only to shock applicant with a copy of a sale agreement. In this instance, however, it is applicant who avers that first respondent was open to it about his intentions to sell the property.

It thus cannot be held that there are any *mala fides* on first respondent's part. I hold the view that in the circumstances the only issue for determination by this court is whether applicant from the facts, has made a case for the confirmation of the anti-dissipation interdict? An anti-dissipation interdict is defined in Herbestein and van Winsen in *The Civil Practice of the High Courts of South Africa* 5th Edition Vol 2 at page 1488 as:

“a special type of interdict that may be granted when a respondent is believed to be deliberately arranging his affairs in such a way as to ensure that by the time the applicant is in a position to execute judgment he will be without assets or sufficient assets on which the applicant expects to execute.”

The other term for such an interdict in terms of the English law is the Mareva injunction. The purpose of the Mareva Injunction is summarized as follows in the Halsbury's Laws of England:

“The purpose of the Mareva Injunction is not in any way to improve the position of claimants in insolvency but simply to prevent injustice of a defendant placing assets which might otherwise be available to satisfy a judgment, out of reach of plaintiff. It does not operate as an attachment. It merely restrains the owner from dealing with assets in certain ways.”

The granting of an anti-dissipation interdict is discretionary on the part of the court. Refer to the case of *Knox D' Archy Ltd v Jamison* 1994 (3) SA 700.

Herbestein and Van Winsen “*The Civil Practice of High Courts of South Africa*” 5th Edition Vol 2, provides thus:

“But since this is an invasive remedy that can cause severe prejudice to the respondent and possibly third parties, due caution should be exercised by a court granting such an order, all practical safeguards against abuse should be built in and a careful attempt should be made to visualize ways in which the order may prove needlessly oppressive to the intended defendant. The oppressiveness of the order to the defendant and its interference with the rights and obligations of third parties must be kept to the minimum necessary in order to achieve the objectives of the anti-dissipation interdict.”

Further, in the case of *DS, R v DS, M and Others*, 2012 ZAGPJHC 227, it was stated that an applicant must show a well-grounded apprehension of irreparable loss and that because of the draconian nature, invasiveness and conceivably inequitable consequences of anti-dissipation relief, the courts have been reluctant to grant such relief except in the clearest of cases. The case before me cannot be held to be such a case for reasons alluded to herein.

It is clear from the very purpose and definition of this interdict that the intentions of the defendant must be *mala fide*, he must act in a calculated way to either secretly dissipate assets or to hide them from the reach of the plaintiff.

This has not been shown to be the case in the facts before me. First respondent was out of employment, with financial obligations which he could no longer meet. With or without plaintiff's pending suit, from the facts, first respondent would have acted in a similar fashion in order to meet his financial obligations. He thus cannot be held to be acting *mala fide* in a bid to

defeat applicant's claim which is precisely the reason why even applicant heard this from the first respondent himself.

It is clear that the anti-dissipation interdict can bring misery to other third parties other than the defendant himself hence the emphasis on the need for the court to carefully consider this aspect. In this case, applicant cannot dispute that the property was sold on 9 September before the granting of the interdict. In other words, the interdict was granted to stop harm that had already occurred. The interdict was already overtaken by events the day the provisional order was granted. Applicant tries to attack the validity of the sale agreement between the parties, but that is not for this court, this court cannot declare an agreement between two parties who have not approached it for a pronouncement on its validity or who have not sought any cancellation and the court starts to determine the rights of those parties in the agreement or proceed to pronounce on the validity or otherwise of the agreement. What is before this court is an application for an anti-dissipation interdict not on application for a declaration of the rights of the parties pertaining to the agreement they entered into or its validity or otherwise. If the parties want to have the validity of the agreement pronounced they can do so on another platform.

In this particular matter the issue for determination is whether the interdict should be confirmed in such circumstances. The agreement of sale between fourth and first respondents has not been cancelled, it has not been set aside, no declaration has been made on its validity or otherwise and it remains operative as against the parties bound by it until it is either cancelled or pronounced as invalid.

Clearly fourth respondent is a third party, who allegedly acquired the property before the interdict was granted and whose agreement has neither been cancelled nor declared invalid. This court certainly cannot confirm the interdict in these circumstances, given the nature of the remedy and the likely invasion of third parties rights as stated in *Herbstein and van Winsen (supra)*.

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I accordingly find that the interdict cannot be confirmed in such circumstances.

I accordingly discharge the provisional order with costs.

Calderwood, Bryce Hendrie and Partners, applicant's legal practitioners
Messrs Job Sibanda and Associates, 4th respondent's legal practitioners