

COVERLINK INSURANCE BROKERS (PVT) LTD  
and  
ABEL MUNHANDE  
versus  
PHOEBE KUDZURUNGA  
and  
HAMUNAKWADI, NYANDORO & NYAMBUYA  
and  
ABSOLOM MAGWERE  
and  
THE REGISTRAR OF DEEDS

HIGH COURT HARARE  
TAGU J  
HARARE, 3 and 24 February 2016

**Urgent Chamber Application – Anti-Dissipation Interdict**

*L. Uriri*, for 1<sup>st</sup> and 2<sup>nd</sup> applicants  
*G. Nyandoro*, for 1<sup>st</sup> and 2<sup>nd</sup> respondents  
*J. Mumbengegwi*, for 3<sup>rd</sup> and 4<sup>th</sup> respondents

TAGU J: Allegations and counter allegations of fraud are a common phenomenon in this case. At the hearing of this matter the parties told the court that the third and fourth respondents indicated that they will abide by the decision of the court. Counsels for the applicants, first and second respondents agreed not to make any oral submissions. The court was urged to decide this matter on the basis of the papers filed of record. To that end the parties filed their heads of arguments and supporting affidavits. It is from the combined papers filed of record and the referenced files that the tragic story that precipitated this application unfolded. What happened can best be summarized as follows.

The first respondent Phoebe Kudzurunga was the lawful owner of a property, an undivided 0.71% share of Stand No. 97 situate in the District of Salisbury being the

remainder of Letombo measuring 18.3042 hectares held under Deed of Transfer No. 2966/2001, dated 15<sup>th</sup> April 2001. Sometime in August 2010 the first respondent was duped into signing certain documents she thought were an application for a loan pursuant to an advertisement that had appeared in the Herald. The advertisement was made by a loan shark one Arnold alias Tendayi Nyambuya who has since disappeared into thin air. She was asked to surrender her original copy of the Deed of Transfer as surety. Later the fraudster appeared at her property with one Edith Tsitsi Mandaza Chirochierwa who purportedly inspected the property for the purposes of the loan. The first respondent later realised she had been duped and the fraudsters could not be found. She made a report to the police. Meanwhile Tsitsi Mandaza Chirochierwa claimed to have purchased the said property from the first respondent. Tsitsi Mandaza Chirochierwa then filed a report of fraud against the first respondent and her son. The first respondent and her son were arrested and prosecuted but were acquitted. The original Deed of Transfer was returned to her. Unbeknown to first respondent her property had been fraudulently transferred into Tsitsi Mandaza Chirochierwa's names who in turn transferred the same property into the second applicant Abel Munhande's names. The second applicant in turn transferred the same property into the names of the first applicant Coverlink Insurance Brokers (Pvt) Ltd. The first respondent mounted several court applications trying to reverse the transfer of the Stand from the first applicant to herself. She however, finally succeeded and the property was returned to her in Case No. HC 3780/15. The court order by Tsanga J dated 15<sup>th</sup> October 2015 read as follows-

“IT IS ORDERED THAT:

1. Reversal of transfer of a 0.71 undivided share of Stand 97 Ray Close, Letombo Park, Harare from 1<sup>st</sup> Respondent into Applicant's name be and is hereby granted.
2. 1<sup>st</sup> Respondent to sign all necessary documents to pass transfer into Applicant's name within seven (7) days of this order, failure of which the Sheriff of Zimbabwe is authorised to sign same to pass transfer into Applicant's favour.
3. 1<sup>st</sup> to 5<sup>th</sup> Respondents to pay costs of suit.”

However, the order above was granted in default after the respondents failed to enter appearance to defend. The order is extant. The applicants subsequently filed an application for rescission of the said default judgment in terms of r 449 (1) (a) of the High Court Rules on the basis that the judgment was dubiously granted since the Summons was served at the property in question instead of at the applicants' legal practitioners. The application for rescission of the default judgment filed under case No. HC 667/16 is still pending.

Meanwhile, and on the basis of the order dated 15<sup>th</sup> October 2015 the first respondent caused the reversal of the Deed of Transfer into her names on 13 January 2016 and has since taken occupation of the said property.

The applicants have now filed this urgent chamber application for an anti-dissipation interdict alleging that “the first respondent and the second respondent (Hamunakwadi, Nyandoro & Nyambuya who are legal practitioners for the first respondent) are rogue characters who have no regard to the law whatsoever who do not hesitate to conduct themselves perversely. Thus compromising third respondent (Absolom Magwere- the Senior Registrar at the Deeds office) who has aided and abetted the illegal cancellation of title deed No. 1785/15 and who will continue to aid and abet the dissipation of the first applicant’s entitlement under title deed No. 1785/15. Moreso rendering the first applicant’s relief under case No. HC 667/16 futile.” They are seeking the following relief-

**“TERMS OF THE FINAL ORDER SOUGHT**

**IT IS ORDERED THAT:**

1. It is be and hereby declared that cancellation of title deed No. 1785/15 is void.
2. It is be and hereby declared further that the occupation of stand No. 97 Ray Close, Letombo Park, Harare by the 1<sup>st</sup> Respondent is unlawful and amounts to spoliation.

**CONSEQUENTLY IT IS ORDERED THAT**

3. It is be and hereby ordered that title deed No. 1785/15 be and is hereby reinstated.
4. It is be and is hereby ordered that 1<sup>st</sup> Respondent forthwith vacates from stand No. 97 Ray Close, Letombo Park, Harare.
5. Cost of this application shall be at a legal practitioner client scale *de bonis propriis*.

**INTERIM RELIEF GRANTED**

1. It be and is hereby ordered that an anti-dissipation interdict do hereby issue directing that pending the return date of this provisional order.
  - 1.1. That the 1<sup>st</sup> to the 4<sup>th</sup> Respondents are hereby interdicted from encumbering, disposing off and or transferring stand No. 97 Ray Close, Letombo Park, Harare.
2. Cost of this application shall be at a legal practitioner scale *de bonis propriis*.

**SERVICE OF PROVISIONAL ORDER**

1. This Provisional Order shall be effected by the Sheriff on the Respondents.”

The second applicant Abel Munhande who deposed to a supporting affidavit on his own behalf and on behalf of the first applicant is the director of the first applicant. He

confirmed to the court in his founding affidavit that he bought Stand No.97 Ray Close Letombo Park, Harare from Edith Tsitsi Mandaza and it was transferred to him on 24 November 2014. He referred to deed of transfer annexure A1. He said he later donated the said property to the first applicant and later registered it under deed No 1785/15 annexure A2. At one stage he evicted first respondent in HC 602/15. According to him HC 602/15 is extant. He is of the view that deed No. 1785/15 was reversed without a court order. He is challenging HC No. 3780/15 which cancelled deed 1785/15. He fears that if the anti-dissipation interdict is not granted he will suffer irreparable harm should his case under case HC 667/16 is successful.

The respondents opposed the application. Among other things they submitted that this application is not urgent since it took applicants about 14 days to lodge this application. Further they submitted that deed 1785/15 was reversed in terms of court order HC 3780/15. The first respondent told the court that she took occupation of her property which was vacant and there was no one to evict hence no need to get a court order.

#### **AD URGENCY**

This is an application for an anti-dissipation interdict. Hence the court took the view of the applicants that the urgency of the matter emanates from the very fact that anti-dissipation proceedings are meant to safeguard the *status quo* pending the determination of the dispute on the merits. Anti-dissipation proceedings are therefore on the same footing as spoliation proceedings and the urgency arises *ex lege*. Since the court is satisfied that the matter is urgent the court proceeded to deal with the matter on the merits.

#### **ANTI-DISSIPATION INTERDICT**

What is an anti-dissipation interdict? This court borrowed heavily the meaning of anti-dissipation interdict from the case of *Northern Farming (Pvt) Ltd v Vegra Merchants (Pvt) Ltd & Anor* 2013 (2) ZLR 343 (H) where Mafusire J quoted with approval the definition in *Knox D' Arcy Ltd and Ors v Jamieson and Others* 1996 (4) SA 348 (A). It is simply an ordinary interdict to restrain the respondents from disposing of assets. The assets in question may be the respondents' own assets. See also *Soller v Maintenance Magistrate of Wyberg and Ors* 2006 (2) SA 66 (C). Further, a more or less the same definition was given by the

respondents in their heads of argument where they quoted Ndou J in *Mfune v Mutiti & Ors* 2002 (2) ZLR 490 (H) where the learned judge stressed the following-

“.....an anti-dissipation order is a form of interlocutory interdict, and while the Applicant did not have to show that Respondents had no bona fide defence he had to establish a prima facie case; as well as an infringement or reasonable apprehension of an infringement of a right, the absence of any other satisfactory remedy and a balance of convenience in favour of granting the interdict.”

It follows, therefore, that the requisites for anti-dissipation interdict are-

1. A prima facie right, though open to doubt;
2. A well-grounded apprehension of irreparable harm if the relief is not granted;
3. That the balance of convenience favours the granting of an interim interdict; and
4. That there is no other satisfactory remedy.

In *casu* the applicants are alleging that if the respondents are not interdicted they may dissipate the property in question. In the event that they succeed in case HC 667/16 they would suffer irreparable harm and that they do not have an alternative remedy.

The facts of the matter are clear that the first respondent's property had been fraudulently taken away from her. The fraudsters sold the property to one Edith Tsitsi Mandaza Chirochierwa. Edith Tsitsi Mandaza Chirochierwa then sold the same property to first applicant Abel Munhande. Abel Munhande then donated the property to first applicant Coverlink Insurance Brokers (Pvt) Ltd. The first respondent Phoebe Kudzirunga reversed the deed of transfer to herself in terms of a court order in case HC 3780/15. She subsequently took over occupation of her house.

The conveyancer Mr Edwin Hamunakwadi who is also a partner in the second respondent Hamunakwadi, Nyandoro & Nyambuya, in a bid to show that the transactions reversing deed of transfer No. 1785/15 was not clandestinely done filed an affidavit stating that:

“1. PHOEBE KUDZURUNGA (born 5<sup>th</sup> September 1952) is the registered owner of the following:-

An undivided 0.71% share being Share No. 97 in certain piece of land situate in the District of Salisbury being the remainder of Letombo measuring 18.3042 hectares held under Deed of Transfer No. 2966/2001, dated 15<sup>th</sup> April 2001.

2. The said property was transferred to Edith Tsitsi Chirochierwa under Deed of Transfer No. 4669/14 dated 24<sup>th</sup> September 2014 and to Abel Munhande under Deed of Transfer No.

5720/14 dated 24<sup>th</sup> November 2014 and to Coverlink Insurance Brokers (Private) Limited under Deed of Transfer No. 1785/15 dated 11<sup>th</sup> May 2015.

3. In terms of the High Court order Case No. HC 3780/15, Ref Case No. HC 6138/15 dated 15<sup>th</sup> October 2015, the said Deeds are to be cancelled and Deed of Transfer No. 2966/01 revived.
4. ....”

Apparently, from the papers, the Stand in question belongs to the first respondent. The first respondent had original Deed of Transfer as far back as the date when she and her son were acquitted by the criminal courts. What had not been done was to cancel the subsequent deeds of transfer that were processed by Uiri Law Chambers after her original deed of transfer was fraudulently taken by the loan sharks one Anold alias Tendayi Nyambuya and Tsitsi Edith Chirochierwa. The first respondent has since taken occupation of her Stand.

The application by the applicants is to interdict the respondents from encumbering, disposing off and or transferring stand No. 97 Ray Close, Letombo, Harare to third parties. This is in line with what was said in the Knox D’Arcy case supra where it was held that the purpose of such an interdict was to prevent the respondent from freely dealing with his own property to which the applicant lays no claim because justice may require such restriction in cases where the respondent is shown to be acting mala fide with the intention of preventing execution in respect of the applicant’s claim even though there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims. In *casu* the applicants are claiming right of ownership over the same property.

On the other hand the respondents submitted that applicants no longer have title and interest of the property in question since the same was reversed into the name of first respondent through a competent court order and an interdict cannot be granted to protect non-existent rights even if they are open to some doubt or are unclear. The respondents relied on the case of *Airfield Investment (Pvt) Ltd v Minister of Lands & Ors* 2004 (1) ZLR 511 (S), where Malaba J held that:

“An interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken from him by operation of law at the time he makes an application for interim relief”

However, be that as it may, in the present case the applicants have not presented any evidence to show that the respondents intent to, and or are in a process of transferring,

encumbering and or disposing of the Stand in question. They have not shown a well-grounded apprehension of irreparable harm if the relief is not granted. For example they have not shown that the respondents have advertised the said Stand for sale, and or have been negotiating with any bank to use the property in question as security for a loan. Neither has the first respondent approached the third and fourth respondent with the view of transferring the deed of Transfer to a third party. In my view their fear that the Stand could be disposed of is baseless. How the first respondent is dealing with the property in question is not mala fide.

In *Stemffer Chemicals v Monsanto Co.* 1988 (1) SA 805 (T) at 809 F-G, Harms J said:

“.....the basis of an interdict is the threat, actual or implied, on the part of the Defendant that he is about to do an act which is in violation of the Plaintiff’s right and that actual infringement is merely evidence upon which court implies an intention to continue in the same course. I would have thought it axiomatic that an interdict is not a remedy for past invasion of rights. It is for the protection of existing right. C.F. *Meyer v Meyer* 1948 (1) SA 484 (T).”

As the court said above the applicants have not shown any threat, actual or implied on the part of respondents that they want to dissipate the property other than that they caused the reversal of the deed of transfer in terms of a court order. In any case even if the property is transferred to a third party they still have an alternative remedy. The new Deed of transfer can still be reversed. In any case a house is something that cannot be used up, it will remain there and if they win their case in HC 667/16 they can still get the house back. In the event that they lose the matter in case HC 667/16 that is not the end of the matter, they can still sue for damages from the people who unlawfully sold the house to them in the first place. I find the applicants’ application without merit. It must be dismissed.

The applicants had applied for costs on a higher scale *de bonis propriis*. The respondents submitted that it is unprecedented for costs to be granted both on the interim and on return date. They accordingly, also prayed for the same to be granted against applicants since this is a mischief of the highest order and urged the court to frown at such wanton and reckless abandon of legal principles and ethics. I agree. Costs will be on a higher scale *de bonis propriis*.

In the result I grant the following order:

1. It is be and is hereby ordered that the application is dismissed.
2. Costs be and are hereby awarded on a higher scale *de bonis propriis*.

*Uriri Attorneys-At-Law*, applicants' legal practitioners  
*Nyandoro & Mukwewa*, respondents' legal practitioners