WILFRED CHIBAGE
and
CLEOPATRA FADZISO CHIBAGE
versus
PROSECUTOR- GENERAL
and
TOBBIAS ZANGAIRAI
and
LIOBA VIMBAI MAPURANGA
and
REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
CHIKOWERO J:
HARARE, 20 & 30 June 2023
Opposed Application

*F Musudu,*for the applicants
A Jakarasi, for the 1st respondent
No appearance for the 2nd, 3rd & 4th respondents

CHIKOWERO J:

1. This is an application made in terms of S 37 J (2) of the Money Laundering and Proceeds of Crime Act [*Chapter 9 :24*] (" the Money Laundering Act") for the setting aside of an interim freezing order.

BACKGROUND

2. On 27 January 2023 in the matter Prosecutor – General V Tobbias Zangairai, Lioba Vimbai Mapuranga, Anenyasha Zangairai, Wilfred Chibage, Cleopatra Fadziso Chibage, Cheryl Zivai Zigora, Coxwell Mbiabolawe, Taphros Madondo, Registrar of Deeds and Registrar of Motor Vehicles HACC 01/23 this Court granted an unexplained wealth order accompanied by an interim freezing order the material paragraphs of which read as follows:

" IT IS ORDERED THAT:

1. The first respondent gives a sworn statement to the Officer in Charge Zimbabwe Republic Police Criminal Investigations Department Asset Forfeiture Unit located at Old Criminal Investigations Department Headquarters in Morris Depot, Corner Josiah Chinamano Avenue and 10th Street, Harare within 30 days of service of this order upon him setting out the nature and extent of the respondent's interest in the property specified in subparagraphs (a) to (x) below, explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met) and producing all supporting documents and receipts showing proof of legitimate business and source of income for the acquisition of the following property:
   …….

(g) property situated on a piece of land in the District of Salisbury being remaining extend of stand 2963 Marlborough Township of Stand 2891 Marlborough Township measuring 1000 square metres under Deed of Transfer 4242/14 that was sold and ceded rights on 4th and 5th respondents.

2. The respondents or anyone acting through them be and are hereby interdicted I restrained from disposing or dealing with the property referred to in para 1 of this order until the terms of this order are discharged by order of this court.
3. Mkhululi Nyoni, an Investigating Officer in the employ of the Zimbabwe Republic Police and or other law enforcement officers of the law proper to the execution of warrants be and are hereby authorised to enter into any precincts in which properties specified in para 1 are physically stationed between 0800hours in the forenoon and 1600 hours in the afternoon of any day for the purpose of identifying, seizing and securing them from dissipation.
4. The respondents or anyone acting through them be and are hereby interdicted/ restrained from disposing or dealing with the property referred to in paragraph 1 of this order which shall be under receivership or trusteeship of the Asset Management Unit until the terms of this order are discharged by order of this Court.
5. The ninth respondent (Registrar of Deeds) be and is hereby directed not to administer any change of title to the specified property in para 1(a) to 1(i) of this order until the terms thereof are discharged by order of this Court.
6. Any duly attested member of the Zimbabwe Police Service shall serve this order on the respondent."

3. The order was granted pursuant to an *ex parte* chamber application for an unexplained wealth order accompanied by an interim freezing order in terms of s 37B as read with S 371 of the Money Laundering Act as amended by Act 11 of 2019.

THIS APPLICATION

4. On 30 May 2023 the applicants (who are the 4th and 5th respondents in the main matter) filed the present application. The same is headed:

"COURT APPLICATION FOR VARIATION AND DISCHARGE OF INTERIM FREEZING ORDER IN TERMS OF SECTION 37J (2) OF THE MONEY LAUNDERING AND PROCEEDS OF THE (SIC) CRIME ACT [*CHAPTER 9:24*]

5. The heading, with respect, suggests needless uncertainty on the part of the applicants on the nature of their application. This is so because s 37 J (1) of the Money Laundering Act gives an applicant the option of applying for the variation or the discharge of an interim freezing order. These remedies cannot be combined and sought in one court application as the heading to the applicants' papers suggest. S 37 J (2) of the Act provides that a person subjected to an interim freezing order may at any time apply to this court for the setting aside of the order on good cause shown.

   That too is a distinct remedy. It cannot be combined with an application for variation or discharge of an interim freezing order.

6. The draft order, which was not amended, is in these terms:

"TERMS OF THE ORDER

1. The interim freezing order granted by the Honourable Court on the 27th day of January 2023 against 1st and 2nd applicants interdicting / restraining them or anyone acting through them from disposing or dealing with the property situate in the District of Salisbury being remaining extend of stand 2963 Marlborough Township of stand 2891 Marlborough Township measuring 1000 squre metres under Deed of Transfer 4242/14, is hereby discharged.
2. It is hereby ordered that stand 2963 Marlborough Township, Harare, be and is hereby removed from the Trusteeship and receivership of the Asset Management Unit.
3. Respondents are hereby ordered to pay costs of suit on the legal practitioner and client scale."

7. Despite the draft order suggesting that the main relief sought is the discharge of the interim freezing order in so far as it affects the applicants, I am prepared to proceed on the basis that this is a S 37 J (2) application. Ms Musudu, at the hearing, told me that it was such. In any event, the Supreme Court in Ahmed v Docking Station Safaris Private Limited SC 70/18 held that in cases where the headings on the cover of an application tell one thing and the contents of the founding affidavit tell another, the nature of the application that is before the Court is determined by the founding affidavit and not the headings on the cover of the application. I think the same approach holds true *in casu* where in addition to the heading on the cover of the application and the contents of the founding affidavit not aligning, the draft order itself speaks to relief different from that claimed, at least in part, in the founding affidavit.

WHAT IS "GOOD CAUSE?''

8. S 37 J (2) of the Money Laundering Act reads as follows:
   "Any person subjected to an interim freezing order may at any time apply to the High Court that issued the order to set it aside on good cause shown"
9. The Act does not define the words "good cause".

10. However, courts in this and other jurisdictions have considered the meaning of the words in question and applied that meaning to the facts of the cases before them.
    I propose to adopt the same approach and, at the end of the day, determine whether the applicants have shown good cause for the setting aside of the interim freezing order in so far as it affects them.
11. In *S* v *Jussab* 1970 (1) RLR 181 (AD) the appellant had broken a condition in respect of which a sentence of imprisonment had been suspended, by being convicted subsequently by a magistrate of an identical offence. The magistrate had refused to suspend further the suspended sentence, in terms of S 382(3) of the Criminal Procedure and Evidence Act [*Chapter 31*] (the equivalent of S 358(7) of the Criminal Procedure and Evidence Act [Chapter 9:07] It was argued, for the appellant, that good cause had been shown for the further suspension of the suspended sentence. At 185C-D the Court cited with approval the case of *Richard William Montgomery* v *The Queen (judgement* No. AD 153/69 (not reported), where QUENET JP said:

    "In the context of Section 382(3) of the Criminal Procedure and Evidence Act [*Chapter 31*], the word 'good,' in my view, means 'sufficient' or 'satisfactory'. Having said that, I would draw attention to the remarks of Sir JAMES ROSE – INNES, in *Cohen Brothers* v *Saumuels*, 1906 T.S 221, at p.244. The learned judge considered it 'hardly possible, and certainly undesirable' for the court to attempt to define 'a good cause'- that was something the Court had to decide in the light of the circumstances of each case."

12. Indeed, in *S* v *Wilson* 1984(2) ZLR 129 (S) the Supreme Court allowed an appeal against the sentence on being satisfied that a concession had been properly made, that, on the facts of the case before it, "good cause" had been shown for refusing to bring a suspended sentence into operation pursuant to the power granted under s 337 (2 c)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*]. See also Union Carbide *Management Services (Pvt) Ltd* v *Cluff Minerals Exploration (Zimbabwe) Ltd and Ors 1989 (1) ZLR 224 (HC) and Cluff Mineral Exploration (Zimbabwe) Ltd* v *Union Carbide Management Services (Pvt) Ltd and Ors* 1989 (3) ZLR 338(S)
13. In Cluff Mineral Exploration (Supra) the Supreme Court made the point that the words "good cause" are of wide meaning. In Jussab (supra) its view was that "good cause" means "sufficient and satisfactory reasons" and that the circumstances of each

particular case would determine whether good cause had been shown. It seems to me that the determination of whether good cause has been shown in each case involves the exercise of judicial discretion.

14. In light of the legal position expounded in the precedents that I have referred to I now examine the reasons put forward by the applicants to determine whether good cause has been shown to set aside the interim freezing order in so far as it affects them.

THE APPLICANTS WERE NOT GIVEN NOTICE OF THE MAIN APPLICATION

15. I agree with Mr Jakarasi that this ground cannot be good cause for the setting aside of the interim freezing order. This is so because the statute in question provides for the granting of an unexplained wealth order accompanied by an interim freezing order pursuant to a single ex *parte* application. Where the Court is not satisfied that a case for the granting of an unexplained wealth order has been made, it may dismiss the *ex parte* application. Alternatively, the Court may require the applicant to serve notice of the application on the respondent before proceeding with the application. What this means in the present case is that, since the Prosecutor -General had filed one *ex parte* application for an unexplained wealth order accompanied by an interim freezing order, the need to serve notice of the same on the present applicants would only have arisen if the Court had required that such service be effected. A reading of the provisions of SS 37 B (1) and 371(1) of the Act makes this clear. Those provisions state:

"37B Unexplained Wealth Orders

(1) The High Court may on an ex parte application made by an enforcement authority, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for the making of the order is fulfilled:
Provided that if the Court is not so satisfied, it may dismiss the application or require the applicant to serve notice on the respondent before proceeding with the application.
S 37 1 (1) of the Act is in these terms:

"3711. Interim freezing of property in connection with unexplained wealth orders

(1) At the same time and before the same Court that an application for an unexplained wealth order is made under Section 37 B, the applicant enforcement authority may apply for an interim freezing order in respect of all or part of the property that is the subject of the unexplained wealth order applied for."

In these circumstances, the fact that notice of the main application was not served on the applicants *in casu* does not establish good cause for the setting aside of the interim freezing order.

THE INTERIM FREEZING ORDER IS AN INTERDICT HAVING THE EFFECT OF RESTRAINING THE APPLICANTS AND ANYONE ACTING THROUGH THEM FROM DISPOSING OF OR DEALING WITH THEIR PROPERTY (THE PROPERTY IN QUESTION)

16. In taking this point, the applicants are relying on s 44(1)- (3) of the Act. The provisions read:

> 44. Exclusion of property from interdict
> (1)Where a person who is not the relevant person having an interest in property that is subject to an interdict applies to the court to exclude his or her interest from the interdict, the court shall grant the application if satisfied –
> (a) in the case of an interdict to secure property for a confiscation order, either-
> (i) that the property is not the proceeds or an instrumentality of crime, and that the applicant was not, in any way, involved in the commission of the offence in relation to which the interdict was grated; or
> (ii) where the applicant acquired the interest-
> A. Before the commission of the offence, the applicant did not know that the relevant person would use, or intended to use, the property in or in connection with the commission of the offence; or
> B. At the time of or after the commission or alleged commission of the offence, the interest was acquired in circumstances which would not arouse a reasonable suspicion that the property was the proceeds or an instrumentality of crime.
> C. In the case of an interdict to secure property for a benefit recovery order, that the property interest which is the subject of the application is not property in which the relevant person has an interest.
> (2). For purposes of subsection (1)(a) (ii), the value of the applicant's interest shall be in proportion to the consideration the applicant provided to the relevant person.
> (3). where a person having an interest in property that is subject to an interdict who is a defendant applies to the court to exclude his or her interest from the order, the court shall grant the application if satisfied-
> (a) in the case of an interdict that secures property for a confiscation order that the property is not the proceeds or an instrumentality of crime; or
> (b) In the case of an interdict that secures property for a benefit recovery order, that a benefit recovery order cannot be made against the defendant"

The applicants attached copy of an agreement of scale reflecting that they purchased the property in question, through Heaven on Earth Real Estate, from the second and third respondents. They also attached copy of Deed of Transfer Registered Number 4242/14 wherein they appear as the owners of the property. In short, they seek that the property be released from the operation of the "interdict" on the basis that they are legitimate owners who purchased the property from the 2nd and 3rd respondents in good faith and for fair value. I think Mr Jakarasi is correct when he says the applicant's reliance on the provisions of S 44 of the Act is misplaced. What is sought to be set aside is an interim freezing order, not an interdict. S 44 (1)- (3) is inapplicable to the circumstances of this matter. An interim freezing order is not for

purposes of the Act the same thing as an interdict. The nature of an interim freezing order is captured in S 371 (3) of the Act, in these words:

" 371 Interim freezing of property in connection with unexplained wealth orders.
(1)…….
(2)
(3) An interim freezing order is an order that prohibits the respondent to the unexplained wealth order, and any other person with an interest in the property, from in any way dealing with the property (subject to any exclusions under section 37k)

17. S 37K of the Act deals with the Court's power to vary an interim freezing order which includes the exclusion of property from an interim freezing order and to exclude the prohibition from dealing with the property to which the interim freezing order applies. I reiterate that the present is not an application for the variation of an interim freezing order but an application for the setting aside of an interim freezing order.
18. It follows that the legitimate owner – cum – interdict ground, being misplaced, is not a good cause for setting aside the interim freezing order.

MATERIAL NON-DISCLOSURE

19. The applicants complain that at the time of the making of the main application, the Prosecutor –General did not disclose the existence of their Deed of Transfer in respect of the property in question. They argue that the Court granted the interim freezing order unaware that they were registered owners of the property
20. That cannot be correct. The reason why the applicants were cited as the fourth and fifth respondents in the main matter was because title in the property in question had been transferred to them by the second and third respondents *in casu.* The Deed of Transfer Registered number was captured both in the founding affidavit and the interim freezing order, hence the clause prohibiting the Registrar of Deeds (also cited as a party) from administering any change of title in the property outside the terms of a Court order. In any event the applicants themselves would not have filed this application if the Prosecutor- General had not disclosed to the court that title now resided with the applicants and that he needed an order to allow him not only to investigate the genuineness of that title but to prohibit any further transfer of title in the interim. There was, in the circumstances, no material non –disclosure.

THERE IS NOT AND NEVER WAS ANY REAL RISK OF DISSIPATION OF THE PROPERTY IN QUESTION

21. The applicants argue that there is good cause to set aside the interim freezing order because it was granted in circumstances where there was no cogent evidence placed before the Court, which granted the order, of perverse conduct on the part of the applicants.
22. In making this submission, the applicants are in substance contending that this Court misdirected itself, in disposing of the main matter, when it thought that it was necessary to grant not only the unexplained wealth order but also the interim freezing order for the purposes of avoiding the risk of any confiscation order, benefit recovery order, civil forfeiture order or property seizure order, that might subsequently be obtained, being frustrated.
23. This Court cannot sit as an appellate Court to determine the correctness or otherwise of its own decision.
24. In granting the interim freezing order the Court was satisfied that the requirements of S 37 1(2) had been established. That is no longer a live issue. It is moot. It cannot, for my purposes, be a ground for showing good cause to set aside the interim freezing order.

COSTS

25. The applicants did not make any submissions on why costs should not be in the cause. Indeed, the applicants themselves argued for costs on a punitive scale.

ORDER

26. IN THE RESULT, IT IS ORDERED THAT:

1. The application be and is dismissed.

2. The applicants shall jointly and severally the one paying the other to be absolved pay the first respondent's costs of suit.

Manyangadze Law Chambers applicant's legal practitioner
The National Prosecuting Authority, first respondent's Legal Practitioners