ASTRA HOLDINGS LIMITED
TRADING AS ASTRA PAINTS
versus
ADRIAN CHULU
and
CLEOLLA CHULU

HIGH COURT OF ZIMBABWE
DEMBURE J
HARARE, 2 July 2024 & 4 July 2024

**Urgent Chamber application**

*D Sigauke*, for the applicant
No appearance for the first respondent
*T H Gunje*, for the second respondent

DEMBURE J: This is an urgent chamber application for an interim interdict, in particular for what is commonly referred to as an anti-dissipation interdict. This form of an interdict is a summary order meant to preserve assets by restraining their disposal pending the determination of a dispute involving the parties. The dispute pending is an action matter Case No. HC1349/24 initiated by the applicant against the first respondent. The terms of the interim relief sought by the applicant are worded as follows:

> "TERMS OF INTERIM ORDER GRANTED
> Pending determination of this matter, the applicant is granted the following relief;
>
> 1. That pending final determination of the proceedings instituted by the Applicant against first respondent under Case No. HCH 1394/24 and the satisfaction of any judgment made therein, first respondent shall not sell, cede, donate, transfer or in any manner whatsoever alienate the following assets or his rights or shares therein;
>
> (i) Certain immovable property being an undivided 0,0298% share being Share No. 4153 in certain piece of land situate in the District of Salisbury called Lot J of Borrowdale Estate.
> (ii) Stand No. 502 Caledonia Phase 6.
> (iii) Toyota Fortuner motor vehicle Registration No. AGE 2472.
> (iv) BMW 520i motor vehicle Registration No. APH 9505.
> (v) All household goods and effects.

2. First respondent is hereby ordered to preserve the assets referred to in paragraph I herein and to that end, shall within 48 hours of this order deliver the Toyota Fortuner motor vehicle Registration No. AGE 2472 and BMW 520i motor vehicle Registration No. APH 9505 to applicant's offices at 14 Burnley Road, Workington, Harare where they shall be kept in safe custody pending final determination of the proceedings under Case No. HCHI 349/24, failing which the Sheriff for Zimbabwe is hereby authorised and directed to seize the vehicles and deliver to applicant's aforesaid business address at first respondent's cost.

   Or alternative to the relief in paragraph 2 above;

2. First respondent is hereby ordered to preserve the assets referred to in paragraph 1 herein and to that end, the Sheriff for Zimbabwe is hereby directed forthwith to seize and place under attachment the Toyota Fortuner motor vehicle Registration No. AGE 2472 and BMW 520i motor vehicle Registration No. APH 9505 and hold the same under his custody pending final determination of the proceedings under Case No. HCH 1349/24."

At the hearing, the applicant, however, abandoned the second prayer in the draft interim order.

**THE FACTS**

The first respondent was employed by the applicant as its Financial Accountant from 2002. On 21 November 2023, the first respondent was dismissed from employment following a disciplinary hearing held in his absence. The acts of misconduct the first respondent was convicted of were that during the period extending from 1 May 2022 to 31 October 2023, he had defrauded the applicant company by fraudulently and unlawfully transferring the company funds to some named third parties purportedly for payment of fictitious invoices. The total prejudice suffered by the applicant was about U$359 696.68. This was revealed by the forensic audit carried out by external auditors for the relevant period which was attached to the application.

On 8 March 2024, the applicant had summons issued in this court against the first respondent under Case No. HCH 1349/24 wherein it claimed payment of US$198 279.50 and a further US$161 417.18 or alternatively, ZWL$166 682 630.00 as restitution of funds he allegedly defrauded the company. It claimed that the first respondent defrauded it by the unlawfully transfers from its foreign and local currency bank accounts held with CBZ Bank. The first respondent is defending the claim and the matter is pending set down for a pre-trial conference. Meanwhile, the second respondent who is married to the first respondent had a summons issued in this court for a decree of divorce and other ancillary relief under Case No. HCHF 976/24. The second respondent, who opposed the present application stated that she had not lived with the first respondent as husband and wife since 2018.

It is common cause that on 17 June 2024, the respondents signed a consent paper agreeing to the divorce and distributed their matrimonial property in terms thereof. The matter was initially set down for hearing and determination on the unopposed roll in the Family Division of this court on 27 June 2024. The applicant stated that it discovered through its legal practitioners on 24 June 2024 that the first and second respondents were "purportedly divorcing". There was no affidavit from the said legal practitioners confirming this allegation though. This urgent application was then launched on 26 June 2024. I hasten to say that from what was placed before me I did not find any good reason to warrant this court having to question the legitimacy of the divorce process instituted in terms of the law. The applicant questioned the timing of the divorce and what it alleged was the haste to finalise this action. The matter was postponed to Thursday, 4 July 2024 after the applicant's legal practitioners sought postponement to allow me the opportunity to consider this urgent chamber application.

The applicant further contended that the respondents' consent paper in which they "purports to give away all assets to second respondent and their minor child, including two immovable properties and two vehicles leaving first respondent with absolutely no assets of value to his name" was part of an illegal scheme for the first respondent to avoid execution of any judgment that may be issued against him in the action matter and to put it as stated in the certificate of urgency "to conceal the proceeds of crime and run ring the justice system." The applicant stated that these were all assets of the first respondent or in which he had an interest. I did not, however, see any proof of these assets being proceeds of crime at all.

The assets in question are as set out in the draft interim order sought which include the Crowhill and Caledonia stands, two motor vehicles and household goods. The second respondent disputed that the assets were those of the first respondent but that they were part of their matrimonial estate which they had since alienated or distributed in terms of the consent paper signed on 17 June 2024 in the divorce matter. The applicant, therefore, seeks an urgent interdict barring the first respondent from donating or alienating any and all assets in his name pending the conclusion of Case No HCH1349/24 as it said the judgment which it may obtain in that action will become a *brutum fulmen*.

**PRELIMINARY ISSUE**

The second respondent raised the following points *in limine*:

1. That there is a fatal non-joinder of her minor child Adriana Tadiswa Musonda Chulu (Born on 14th September 2006) as part of the matrimonial estate between the respondents was alienated to her by agreement.
2. That there is a material non-disclosure of material facts by the applicant to mislead the court, particularly on grounds that there are criminal proceedings against the first respondent which have not yielded a conviction as the first respondent has been removed from remand and that the applicant did not state the nature of the first respondent's defence in the action under case No. HCH1349/24.
3. That the matter is not urgent.

I asked the parties to address me on the issue of urgency first as that preliminary issue can dispose of the matter. The issue for determination is therefore:

1. Whether the matter is urgent.

**THE LAW**

The law is settled on what constitutes urgency contemplated by the rules of this court. In *Equity Properties (Pvt) Ltd* v *Alshams Global BVI Ltd & Anor* SC 101/21 at p. 11, KUDYA JA put the law aptly as follows:

> "It is trite that I have the discretion to decide on the matter of whether or not an application is urgent is a matter in the discretion of the court a quo…
> The law on what constitutes urgency is settled. Urgency is manifested by either a time or consequence dimension. See *Kuvarega* v *Registrar-General & Anor* 1998 (1) 188 (H) at 193E; *Document Support Centre (Pvt) Ltd* v *Mapuvire 2006* (2) ZLR 240 (H); *Gwarada* v *Johnson& Ors* 2009 (2) ZLR 159 (H) and *Sitwell Gumbo* v *Porticullis (Pvt) Ltd t/a Financial Clearing Bureau SC* 28/14 at p 3…
> It is apparent that the consequence dimension presupposes that the harm sought to be protected in an impending matter would be amorphously irremediable without the interim indulgence."

In *Kuvarega* v *Registrar General & Anor*, 1998 (1) ZR 188 (H) at 193 F-G this court held that;

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws is not the type of urgency contemplated by the rules…"

MAKARAU J (as she then was) in *Document Support Centre (Pvt) Ltd* v *Mupurore* 2006 (2) ZLR 240 (H) endorsed CHATIKOBO J'S sentiments from *Kuvarega* and stated as follows:

> "… It appears to me that the nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications… Some actions, by their very nature,

> demand urgent attention and the law appears to have recognized that position. Thus, actions to protect life and liberty of the individual or where the interests of minor children are at risk demand that the courts drop everything else and in appropriate cases, grant interim relief protecting the affected rights. The rationale of the court acting swiftly where such interests are concerned is in my view clear. Failure to act in these circumstances will result in the loss of life or the liberty of individuals or the infliction of irreversible physical or psychological harm on children."

The urgency of the matter must also be viewed in the light of the interim interdict order sought. It is, therefore, not always the case that the remedy for an interdict can be sought on an urgent basis. Each case depends on its own circumstances. The nature of an interdict has been highlighted by several authorities. In *MDC T* v *Timveos & 4 Ors* SC 9/22 at p9 the court stated that:

> "An interdict is a summary order, usually issued upon application, by which a person is ordered either to do something, stop doing something in order to stop or prevent an infringement of a certain right."

In the context of this urgent application, the nature of the interdict sought is what is commonly referred to as an anti-dissipation interdict. It is an ordinary interdict meant to prohibit or restrain the disposal of assets pending the determination of a dispute: See *Shabtai* v *Bar & Ors* HH707/14. By its nature, therefore, an interdict cannot be sought where the assets have been sold or alienated as that would be what was described by the court in *Stumbel Bloc Zimbabwe (Pvt) Ltd* v *Ncube & Ors* HH 92/23 "as an attempt to close the stables when the horse has bolted".

**APPLICATION OF THE LAW TO THE FACTS**

Both counsels for the applicant and the second respondent correctly cited case law authorities on what constitutes urgency contemplated by the court rules. Mr *Gunje,* for the respondent, submitted that the matter is not urgent and the legal practitioner who signed the certificate of urgency failed to apply his mind to the issue. He submitted that the cause of the complaint was not the divorce proceedings but the claim for restitution against the first respondent and that the applicant should have acted as long back as 8 March 2024 when it caused summons to be issued against the first respondent.

On the consequence dimension, he argued that there would be no irreparable prejudice if the court does not intervene on an urgent basis in this matter as the applicant has nothing to protect in the circumstances. He also submitted that the first respondent by agreement in terms of the consent paper signed on 17 June 2024 has already alienated the rights or interests he has in the matrimonial assets in question and therefore, the horse has bolted. That alienation cannot be

prohibited as it has already been done. No urgency, therefore, arises and the matter should be removed from the roll with costs.

On the other hand, *Mr Sigauke*, for the applicant submitted that both in terms of time and consequence as outlined in the case authorities the matter was urgent. The cause of action for the present application or the need to act arose on 24 June 2024 when the applicant discovered the divorce proceedings and in particular, the consent paper which he argued was meant to defeat the enforcement of any future judgment that can be made in its favour. That the applicant acted swiftly in filing the application. On the effect of the consent paper, he submitted that the assets have not yet been alienated. He further submitted that the interim order sought on an urgent basis was appropriate in the circumstances as there would be irreparable harm to the applicant if the court does not intervene urgently. Further, that the judgment in the pending action against the first respondent would be ineffectual since he will not have any assets to execute after the divorce order is granted.

He further submitted that the facts of the matter are on all fours with those in the *Shabtai* case, *supra*, where MAFUSIRE J upheld the urgency of the matter. I disagree that the facts are similar. In *Shabtai*, the applicant sought to stop a disposal or sale of an asset, which had not yet been sold. The interdict sought then was meant to restrain the disposal of an immovable property in Borrowdale and not to seek to stop a disposal that had already taken place. An interdict is only a remedy meant to stop a continued or reasonably anticipated infringement of a right. It cannot be employed to stop or restrain what has already taken place. See *Equity Properties supra* at p13. Further, in the *Shabtai* case, the dispute that was pending involved the same parties unlike in this case where there are other persons with interests in the assets such as the second respondent and the minor child who have nothing to do with the pending action against the first respondent. In any case, however, I am not bound by that decision.

Urgency is not only the imminent arrival of the day of reckoning but also based on whether there is still necessity for the court to intervene to grant an interim interdict in the circumstances. The consequence dimension helps resolve this matter. The question of when did the applicant's cause of action or time to act arose became unnecessary to decide since I have decided that what has taken place or occurred cannot be interdicted. In other words, the issue of an interdict falls

away if the application when filed the asset would have been alienated already. Thus, MANGOTA J in *Stumble Bloc Zimbabwe* case *supra*, concluded that:

> "So is the point that the need to stay execution fell away since the goods had already been sold, meaning this court cannot interdict something that has been done lawfully. For these reasons, the court is of the view that the applicant is attempting to close the stables when the horse had bolted."

In this matter, it is common cause that the respondents signed a consent paper on 17 June 2024. This was before this application was even filed. A consent paper is by law a contract between the parties in divorce proceedings. In terms of section 7(5) of the Matrimonial Causes Act [*Chapter 5:13*]:

> "In granting a decree of divorce, judicial separation or nullity of marriage an appropriate court may, in accordance with a written agreement between the parties, make an order with regard to matters referred to in paragraphs (a) and (b) of subsection (1)."

Where parties have agreed on the proprietary consequences of their divorce, such a contract is sacrosanct, binding and enforceable by the courts. The agreement or consent paper must be honoured and enforced by this court. It would be contrary to public policy for the court to fail to give effect to such contracts in the absence of a valid reason. Thus, in *Neves* v *De Brito & Anor* HH 505/21 TSANGA J stated that:

> "[10] Besides the clean break principle the rationale is quite straight forward. Such agreements will have been arrived at in accordance with what the parties themselves would have freely and voluntarily agreed should be the proprietary consequences of their divorce. As stated in *David Richard Kempen* v *Carol Kempen SC 14 / 2016:*
> "Generally speaking, lawful agreements freely concluded by persons of competent capacity are sacrosanct and therefore enforceable at law without let or hindrance by courts of law and tribunals".
>
> And also;
>
> "Our legal system pays great honour to the doctrine of sanctity of contract to the effect that lawful agreements are binding and enforceable by the courts. In *Book* v *Davidson 1988* (1) ZLR at 369F, the court held that, it is in the public interest that agreements freely entered into must be honoured."

In terms of the respondents' consent paper which is an agreement or contract, and in particular clause (5) thereof, the first respondent alienated his rights in respect of the assets in question to the second respondent and their minor child. That agreement must be given effect as there was no evidence placed before me proving that the contract is void or unenforceable based on any valid recognisable ground. The first respondent has already alienated or ceded his rights or interests in the assets to the second respondent and the minor. The court cannot be asked to

intervene on an urgent basis to stop or prohibit what has already taken place lawfully. This resolves the point *in limine*.

The court should also take judicial notice of the fact that the second respondent is equally entitled to the protection of the law. She is not a party to the action pending under Case No. HCH 1349/24. She satisfactorily explained how the assets were acquired in the first place. Counsel for the applicant conceded and accepted her testimony in that regard and even decided to abandon paragraph two of the draft interim order seeking to have the two motor vehicles judicially attached. She has nothing to do with the first respondent's misdemeanours and cannot be used as a sacrificial lamb in the fight between the applicant and the first respondent. I am not persuaded that the applicant will suffer any irreparable harm if this court fails to intervene on an urgent basis. There is no urgency in this case, as the assets which the applicant seek to preserve have already been alienated lawfully to parties not involved in the pending action Case No. HCH1349/24.

The applicant can still wait for the finalisation of its action and decide what to do at the appropriate time. "The horse has bolted" and there is nothing to preserve or seek to protect now. I also find it to be mere conjecture and not a reasonable factual conclusion that the judgment if ever it is issued in favour of the applicant in the action matter will not be enforceable or will be a *brutum fulmen*. The circumstances of this matter, in my view, do not call for the undue interference on the right of the second respondent, a third party, to the finality of her divorce litigation as has been submitted. It is not in the interests of justice for me to do so.

**CONCLUSION**

It is on the basis of the above reasons that I uphold the point *in limine*. I find this application not urgent. I noted that *Mr Gunje*, had asked me to remove the matter from the roll with costs should I find the matter not urgent. In light of the peremptory provisions of rule 60(18) of the High Court Rules, 2021, once I am of the view that the application is not urgent, I have to strike the application from the roll of urgent applications. Having made the above finding, it becomes unnecessary for me to determine the other points *in limine* raised by the second respondent. As *Mr Gunje*, properly conceded, costs on a legal practitioner and client scale are not justifiable in the circumstances of this matter. I did not hear *Mr Sigauke*, submitting that he is opposed to the award of such costs to the second respondent on the lower scale in the event that the matter is resolved

on the issue of urgency. In my view, an appropriate order of costs is that the costs should be on an ordinary scale.

**DISPOSITION**

Accordingly, it is ordered that:

1. The application be and is hereby struck off the roll of urgent applications.
2. The applicant shall bear the costs of this application on an ordinary scale.

**DEMBURE J**: .....

*Musengi & Sigauke*, applicant's legal practitioners
*Gunje Legal Practice*, second respondent's legal practitioners