Judgment No. HB 99/2003
Case No. HC 228/2003

JOHN LEYLAND MACNEIL

And

DAVID LESLIE MACNEIL

Versus

ANDREW THOMAS HASKINS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 10 FEBRUARY AND 9 OCTOBER 2003

R Moyo-Majwabu for applicants
N Mazibuko for the respondent

Chamber Application

NDOU J: The applicants seek an order against the respondent in the following terms:

"Terms of Final Order sought

That you show cause to this honourable court why a final order should not be made against you in the following terms:

1. That a partnership, involving John Leyland Macneil, David Leslie Macneil and Andrew Thomas Haskins, be and is hereby declared to exist in respect of stand number 8 Sibankwana, in Hwange District Council and the improvements thereon, which stand is hereby declared to be owned jointly and in equal shares by the 3 parties hereto.
2. That the said stand and improvements thereon be valued by a reputable valuer who shall produce a report on his valuation.
3. That after valuation, either applicants or respondent may offer to buy out the other by paying the 1/3 value to each of the others, failing which the said stand is to be sold to the best advantage and the net proceeds of sale shared equally amongst the parties;
4. That respondent pays the costs of suit.

Interim Order granted

Pending confirmation or discharge of this provisional order, the applicant is granted the following relief:

1. That respondent be and is hereby interdicted from selling or in any way alienating stand number Sibankwana in the Hwange District Council *(sic)*.
2. That pending the determination of this partnership dispute, respondent be and is hereby interdicted from occupying, using or benefiting from the use of the and stand and improvements thereon.

Service of the order

A copy of this order, together with a copy of the chamber application hereof shall be served upon the respondent by the Deputy Sheriff of this court."

The respondent opposes the application.

Applicant's case

The applicant's case is that on or about September 2001 the three parties decided to form a partnership which would lease to buy a vacant stand in the Hwange District on which they would construct a house. Having agreed on the idea of the aforesaid partnership, they approached the Hwange Rural Council and made an application for stand number 8 Sibankwana, in the name of the respondent. The application for the said stand was successful, and, after the respondent had signed the necessary agreements for the said stand and they set about raising funds for the construction of a house and having the building plans drawn up. The nature of their partnership agreement, which they did not reduce into writing, was that they were going to be equal partners in that venture, contributing equally to the construction and the related expenses. They appointed and hired Hwange Builders to build the house and out buildings on the said stand. The house and out buildings were put up at the costs of $6 058 028,34 and $1 220 009,58 respectively. These costs were raised by all the parties equally, it being agreed that they owned the project jointly and in equal shares. The applicant even bought a fridge, a freezer, 4 x ¾ beds and a 4 plate stove for the project. As they engaged Hwange Builders they made it clear to them that this

was a joint project and when they negotiated all the stages of the project and paid the contract price the latter were aware and understood the project to be a partnership undertaking as evinced by the supporting affidavit deposed to by Andrew Simon Walsh, an estimator at Hwange Builders. After the construction of the house and out buildings were completed and on or about 30 September 2002, for some totally unknown reason, the respondent informed the applicants that their partnership would not work and he suggested that the applicants should make him an offer to buy him out. The applicants made an offer to pay him $10 million for his stake in the project. The respondent rejected their offer and told them never to set foot on the project or he would call the police. From then on, the respondent has refused to discuss the partnership issue of the project with the applicants. When the applicants realised that they were not making any progress in resolving the partnership agreement with the respondent, the applicants through their legal practitioners, invited the respondent to make a counter offer to their $10 million offer they had made to him. The respondent, although not specifically denying the existence of the partnership, the essence of his position is that the applicants contributed funds for the construction of the house but that the applicants should drop their claim to it in exchange for him reducing what he is claiming from the respondents by $5 million. The applicants say they do not owe the respondent any money and that they do not know anything about the alleged agreement for him to assist them with the manufacture of stamp mills. In any event, the applicants do not see the relevance of this alleged agreement to the partnership agreement. The applicants are concerned that respondent is enjoying the sole use and access to the project which the three parties spent a lot of money on but denies them the right to do so, contrary to the spirit of the original agreement between the parties.

The applicants' view is that, in view of the respondent's attitude and his expressed position of the project, it is in the interest of justice that this court grants them a declaratory order to the effect that there is a partnership involving all the three parties in equal shares. The applicants fear that since the stand in question is registered in the name of the respondent alone, there is a great danger that the respondent may be tempted to sell or alienate it resulting in serious prejudice to them. As such they feel that it is in the interest of justice that the respondent be interdicted from alienating te stand pending the dispute. The applicants consider that the trust between them and the respondent, which should necessarily exist between partners, no longer exists and as such it is just and equitable that an order dissolving the partnership should be issued, directing that the assets of the partnership be valued by a reputable valuer and that the parties there to be given an option to buy the other(s) out. The applicants also state that, in order to prevent the respondent having continued advantage over the other partners, in the form of use of the project to their exclusion, their prayer is for an order interdicting him from using or benefiting from the house.

Respondent's case

Respondent states that it is not correct that he and the applicants agreed to form a partnership which would lease to buy a vacant stand in Hwange District on which to construct a house. He says that the true position is that he approached the Hwange Rural District Council long before the date mentioned by the applicants. He made the application in May 2001, i.e. some 4 months before the alleged formation of the partnership. He produced the receipt in respect of the application fee paid on 8 May 2001 as well as a letter from Hwange Rural District Council confirming his

application which was made on 8 May 2001. His application was successful and he was issued with stand 8 Sibankwana Township, Hwange.

He subsequently signed a "Lease to Buy" agreement with the ministry of Local Government, Public Works and national Housing (which he attached to his opposing papers) on 3 June 2002. He states that the applicants approached him in July 2001 in the manufacture of stamp mill, as he was an expert having made and run and maintained stamp mills for the past eight years or so. The parties agreed that he would assist them in the manufacture of stamp mills, and that they would pay him a commission of 10% if the value on the order of each stamp mill. Having known each other for a long time, since, they were boys, they never bothered to reduce the agreement into writing, and it remained an oral agreement. Subsequent to that agreement, he then made the applicants aware that he had been allocated a stand, being stand number 8 Sibankwana Township in Hwange and that he will be required to start construction on the stand very soon. He was aware that some stamp mills were being sold, but he was not being given his 10% commission. He asked the applicants for his commission but they brushed it off and said that they would pay him in due course. He says, perhaps, to cover up for there failure to pay his commission, the applicants agreed to contribute towards the construction of a residential dwelling on stand number 8 Sibankwana Township. There was no formal partnership agreement entered into, either in writing or orally, save that there was a loose arrangement that the applicants would jointly contribute towards half the costs of the construction and he would contribute the other half. He says that at no time did they agree that the two applicants would subsequently move into the residential dwelling. He is adamant that he is the sole owner of the stand notwithstanding this

loose arrangement that he referred to above. With respect to the house, the applicants contributed $2 509 117,88, whilst with respect to the out buildings they paid $1 220 009,58 bringing the total to $3 729 127,46. He says that the applicants contributed a further amount of around $1 000 000,00 for the construction of hand railing around the verandah and retaining wall, carports, hot pots, bathroom and shower room suite, making their total contribution to about $4 700 000,00. He concedes that Hwange Builders were used for the construction work. He says the applicants owed him far more than what they had contributed towards the construction of the house. He says he told the applicants that they had to terminate their business arrangements and that they pay him his commission for whatever stamp mills they had sold to date, and set off what they contributed towards the construction of the house against that. He stated that he knows for a fact that as at that time at least fifty-five stamp mills had been sold, an income of $220 000 000,00, thereby entitling him to a commission of $22 000 000,00. He is enjoying to sole use and access to the residential dwelling on stand number 8 Sibankwana on account of being the registered owner, so he says. He says, in any event, in terms of the "Lease to Buy" agreement a third party cannot obtain any rights or title to the stand without the prior written consent of the lessor. Without such written consent, any agreement between him and the applicants for them to acquire title which agreement is defied would be invalid. The said agreement, therefore, precludes the applicants from having any share in the aforementioned property. He stated that he had no intention of disposing of the stand or in any manner alienating it. For that reason he says that the matter is not urgent. He says, in any event why should he be interdicted, when at law, the applicants cannot take title to the disputed stand. He, however, says he is quite happy to pay he

applicants the $4 700 000 which they contributed towards the construction of improvements on the stand, subject to them paying him $22 000 000,00 in respect of the stamp mills.

He avers that there are serious material disputes of facts thus the applicants proceeded inappropriately by filing an application. He submits that the application has no merit and neither is it urgent. He states on the papers it is impossible to tell whether in fact there was a partnership agreement, if so the terms hereof. He submits that this is a proper matter for action than an application. As such he prays that the application be dismissed with costs on a higher scale.

It seems to me that the applicants are seeking an interdict *pendete lite.* The purpose of an interdict *pendente lite* is the preservation of the status quo, or the restoring thereof, pending the final determination of the parties' rights, it does not affect or involve the final determination of the parties' rights of such rights – *Alpeni* v *Minister of Law and Order and Lamani* v *Minister of Law and Order and Ors* 1989(1) SA 195 at 200J-201C, *Highstead Entertainment (Pty) Ltd t/a "The Club"* v *Minister of Law and Order and Ors* 1994(1) SA 387(c) at 390A-B; *Rekdurum (Pty) Ltd* v *Weider Gym Athlone (Pty) Ltd* 1997(1) SA 646 at 651D-E; *R A McLeod* v *A B Rolindo* HH-47-02 and *Civil Procedure in the Supreme Court* by Harms at 503 and 512. The gravamen of the application is to interdict the respondent from selling or alienating the disputed property. In such application for an interim the applicants have to establish a *prima facie* case on a balance of probability. Once the applicant succeeds in establishing a *prima facie* case then the court should grant the provisional order sought. In *Trustees of the Roper Trust* v *District Administrator, Hurungwe & 7 Ors* HH-192-01 at pages 7-8 of his cyclostyled judgment CHINHENGO J said,

"It is trite that this court will issue a provisional order with interim relief if the applicant has established a *prima facie* case and the interim protection he seeks is merited – see *Kuvarega* v *Registrar General* 1998(1) ZLR (H) at 193B. Order 32 rule 246(2) of the High Court of Zimbabwe Rules 1991 provides that –

> 'Where in an application for a provisional order the judge is satisfied `that the papers establish a prima facie case he shall grant a provisional order either in terms of the draft order filed or as varied'"

Where, therefore, a *prima facie* case has been established a judge has no discretion whether or not to grant the provisional order sought. On being satisfied that a *prima facie* case has been established the judge must ("shall") grant the order. The question in every such case is whether the applicant established a *prima facie* case. This is a question I have to ask in *casu*. If the answer is in the affirmative then the only discretion I have will be in respect of the variation, if need be, of the draft order filed by the applicants. As the applicants are seeking a interdict the first issue to determine is whether they have established existence of a clear right. Thereafter, i.e. if they have established a clear right, they must show-

(a) an infringement of their right by the respondent or at least a well grounded apprehension of such an infringement, and

(b) the absence of any other satisfactory remedy, and

(c) that the balance of convenience favours the granting of an interlocutory (i.e. interdict though where they can establish a clear right together with (a) and (b) they would be entitled to claim a final interdict) – *Knox D Archy Ltd & Ors* v *Jamieson and Ors* 1995(2) 579 (W);

Harnischfeger Coorporation v *Appleton & Ano* 1993(4) SA 479 (W) and *Mabhodho Irrigation Group* v *Maron Kadye and Ors* HB-8-03.

In this case, it is common cause that the applicants contributed to the construction of the house and outbuildings in the disputed stand. According to them this was pursuant to a partnership agreement whereas the respondent prefers to call it a "business arrangement" or "loose arrangement" whatever it is called the respondent concedes that it creates some rights as he offers to pay $4 700 000,00 in terms thereof. This relationship between the parties creates rights. This is the only logical explanation for the exchange of the large sums of money. The applicants paid Hwange Builders for the improvements on the stand. These payments are obviously not donations. In the circumstances I hold the view that the applicants established the existence of a clear right. On account of the respondent's conduct as outlined in their papers the applicants have shown a well grounded apprehension of infringement of their right. As the stand is in the name of the respondent there is nothing that would stop the respondent from selling it to an innocent third party thereby prejudicing the position of the applicants. They therefore, do not have any other satisfactory remedy and the balance of convenience favours the granting of the interim relief sought. In the circumstances the applicants have established a prima facie and the interim protection that they seek is merited. I, however, feel that in their draft order the applicants seek more than what they were able to justify and, as such, there is a need for a variation of the draft order. I have a discretion to do so in terms of order 32 rule 246(2) *supra*. In any event, the respondent will suffer no prejudice from the varied draft order being granted as he deposed to the fact that he has no intention of disposing of or alienating the property.

I vary the interim order granted to read:

> "Pending confirmation or discharge of this provisional order, the applicants are granted the following relief:
>
> That the respondent be and is hereby interdicted from selling or in any way alienating stand number 8 Sibankwana Township, Hwange District."

The rest of the terms of the draft provisional order otherwise remain as they are reflected.

James, Moyo-Majwabu & Nyoni applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners respondent's legal practitioners