

R.A. McLEOD
and
A.B. ROLINDO

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 8 March 2002

Urgent Chamber Application

Mr *T. Nyamanza*, for the applicant
Mr *J. Samukange*, for the respondent

NDOU J: In this urgent chamber application the applicant seeks an order in the following terms:

“Terms of Order Made

A. That you show cause to this Honourable Court why a Final Order should not be made in the following terms:

1. That the Respondent, Mr A.B. Rolindo, and all persons acting through him or on his behalf, be and are hereby interdicted from selling or attempting to sell in or in any way encumbering or attempting to encumber or evicting the applicant from certain immovable property situate in the district of Salisbury known as Number 10 Hillside Garden Flats, Ferrera Avenues Harare and all movable thereat pending the outcome of proceedings which the applicant intends to institute against the respondent claiming half share therein within ten days of the granting of the Order.

2. That the Respondent pays the costs of this application.

B. Interim Relief Granted

1. That pending the hearing of this application by this Honourable Court, the Respondent, Mr A.B. Rolindo, and all persons acting through him or on his behalf, be and are hereby interdicted with immediate effect from selling or attempting to sell in or in any way encumbering or attempting to encumber or evicting the applicant from certain immovable property situate in the district of Salisbury known as Number 10, Hillside Garden Flats, Ferrera Avenue, Harare pending the outcome of proceedings which the applicant intends to institute against the respondent claiming half share therein.
2. That the Respondent be is hereby interdicted from removing all movable remaining at Number 10, Hillside Garden Flats, Ferrera Avenue, Harare.
3. That should the Respondent have removed any of the movable property at Flat Number 10, Hillside Garden Flats, Ferrera Avenue, Harare, and such property not being the subject matter of MC 10423/2002, he be and is hereby directed to restore same to the possession of the Applicant within 48 hours of service of this order, failing which the Deputy Sheriff be and is hereby directed to restore possession of the said movables to the applicant.

C. Service of Provisional Order

1. That the Applicant or his legal practitioner are hereby granted leave to serve a copy of this order by hand on the Respondents.”

The salient facts of this case are that the applicant is respondent's ex-girlfriend with whom she has two children who are aged 20 years and 15 years respectively. The applicant seeks an interdict against the alleged planned sale by the respondent of flat No. 10, Hillside Garden Flats, Ferrera Avenue, Harare, inclusive of its entire furnishings. She avers as follows in her Founding Affidavit:

- “4. During happier times with respondent we acquired a home namely No. 10 Hillside Garden Flats, Ferrera Avenue, Harare.
5. I have it on good authority that the Respondent, who is now cohabiting with another girl, is contemplating to leave the country and to evict us from the home. He has even made threats to sell the flat and make us destitute. To this end he has advertised in the Herald more specifically on the 22nd February 2002 as will appear ex-facie Annexure “A”.
6. I verily believe that he will execute his plans and leave myself and the children homeless which in my humble submission will course us to suffer irreparable harm in particular because we are not in a position to secure alternative accommodation for ourselves. ...
8. In my humble submission the balance of probabilities favours the granting of an interdict against the delivery to the third party of the household goods as well as the sale of the flat. Further as already indicated the sale of the flat will cause irreparable harm to myself and the children. Further I believe that I have shown that I have a clear right which deserves the protection of the Court at least temporary pending the determination of our respective rights in the property in question.
9. I am advised that I am entitled to a substantial share in the property in question because of the level of my contribution towards its purchase during the time that we stayed together and were in fact in a tacit universal partnership.”

The respondent opposes the application.

Firstly, he avers that it is not urgent.

Secondly, he avers the applicant has no *locus standi* as he had no legal obligation to look after her and their 21 year old daughter. Thirdly, he avers the flat forming subject matter of this application is not his. He is merely leasing it with an option to purchase it and this is entirely up to the owner. If the owner offers it to him, he will purchase it. In the circumstances the applicant could not have made contributions to the purchase of the flat which he had not even acquired. He states that he was contacted by the owners of the property who indicated that they would want to sell the property. In order to determine the market price, he advertised purely for the purpose of determining the market price as the owners had indicated, that they would want \$6 million.

Fourthly, he avers that all the property he took possession of is his and not jointly owned with the applicant. He states that applicant has in the past sold some of her own property and he never challenged or questioned her because their relationship ended some 10 years.

It seems clear to me from the facts that the applicant is seeking an interdict *pendente 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 such rights. (see *Apleni v Minister of Law and Order and Lamani v Minister of Law and Order and Others* 1989 (1) SA 195 a AT 200j - 201c; *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 at 651D - E; *Highstead Entertainment (Pty) Ltd t/a 'The Club' v Minister of Law and Order and Others* 1994 (1) SA 387 (C) at 390A - B and Harms - *Civil Procedure in the Supreme Court* at 503 and 512).

In this case it is common cause that the applicant has been residing in the flat and enjoying the use of the movable property forming subject matter of the matter. It is common cause that the respondent moved out of the premises and set himself a home somewhere. Respondent was not residing in the flat for a

number of years. The applicant alleges that the respondent intended leaving the country.

It is common cause that on 22 February 2002 the respondent placed an advertisement in the Herald newspaper in the following terms:

“Duplex Flat: 2 bedrooms, very neat – Hillside, price \$6m –
Phone 780180 or cell 091 334354.”

It is common cause around the period when this advertisement appeared in the media or at least soon thereafter the respondent started removing property from disputed property. The respondent is privy to the circumstances under which he secured the flat. Although the respondent disputes that he and the applicant purchased the flat together he has not been candid enough to take the court into his confidence and state the alleged owner from whom he is leasing the property. He surely, should have evidence on the alleged lease. The applicant is seeking the interdict on the basis of a relationship she enjoyed with the respondent which resulted, *inter alia*, to a minor child who is staying with her at the disputed flat. She mainly bases her claim on the level of her contribution towards the purchase of the disputed property during the time that they were staying together and were in fact in a tacit universal partnership. This is the right that applicant seeks to protect. In such an application for an interim order the applicant has 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 this regard CHINHENGO J stated in the case of the *Trustees of the Roper Trust v District Administrator, Hurungwe & 7 Others* HH 192-2001 at pages 7 – 8 of his cyclostyled judgment:-

“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 188 (H) at 193 B. Order 32 R 246(2) of the High Court of Zimbabwe Rules 1971 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 to grant 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. I am satisfied that the applicant established a *prima facie* case. She has established a basis for the existence of a tacit universal partnership. On a balance of convenience she stands to lose if the order is refused whereas the respondent will not be prejudiced by granting of the order, especially in respect of the flat which he claims does not belong to him. She and her children has been living in the disputed flat for a number of years. She has been using the property that the respondent has removed from the flat. The respondent’s behaviour of taking movable property and selling it and the advertisement of the sale of the flat is consistent with someone leaving the country. I therefore, grant the provisional sought in terms of the Amended Draft as outlined above.

Messrs Coghlan, Welsh & Guest, applicant's legal practitioners.
Messrs Byron, Venturas & Partners, respondent's legal practitioners.