

HH 75-03
HC 2192/02

EDWARD ELIO GALANTE
versus
GERALD SUMMERFIELD
and
SHAINA SUMMERFIELD
and
TOPAZ SUMMERFIELD

HIGH COURT OF ZIMBABWE
MAKONI J,
HARARE, 10, October and 20 December, 2002
and 10 September, 2003

E T Matinenga for the applicant
E W W Morris for the respondent

MAKONI J: On the 2nd March, 2002 the applicant obtained a provisional order from this Court. In terms of the provisional order, the interim relief granted was to authorise and direct the Deputy Sheriff to apprehend and arrest the respondents and to detain them at Harare Central Prison. It also directed that the Officer-in-Charge Harare Criminal Prison, Enterprise Road receive, into his custody, pursuant to the order, the respondents and shall keep them safely until such time as they shall lawfully be discharged or they provide security to the Zimbabwean equivalent of US\$250 000,00. The respondents were given leave to anticipate the return day on twenty four hours notice to the applicant.

The final order sought by the applicant was that the respondents be arrested *tamquam suspectus de fuga* and kept in custody pending the determination by this Honourable Court of an action instituted by the application for the delivery to him by one or more of them or all of the respondents all the items specified on the Annexure attached to the application and marked "A" and that the respondents, jointly as well as severally, the one paying the other to be absolved, bear the costs of this application. The applicant now seeks to have the Provisional Order confirmed.

The interim relief was granted *ex parte*. The third respondent

was arrested pursuant to that order. Thereafter the parties entered into an agreement whereby the respondents were to surrender their passports to the applicant's legal practitioners in order to obtain the release of the third respondent.

The brief background to the application is that the applicant was married to the 1st and 2nd respondents' daughter Ronnie Jacaranda Galante (Jacaranda) and at the time the application was filed they were engaged in an acrimonious divorce. The third respondent is a sister to Jacaranda and is resident and domiciled in the United States of America (USA). She comes home once a year for a holiday.

On the 22nd January, 2002 Jacaranda left the country for the USA. Coincidentally the 3rd respondent arrived in the country from the USA on the same day. Prior to Jacaranda's departure she had arranged for the matrimonial property to be stored with various people, amongst them the 1st and 2nd respondents. She left without the applicant's knowledge. When applicant became aware that Jacaranda had left the country, he obtained a Court Order to gain access to the matrimonial home at Macheke Farm. When he visited the home, he discovered that the matrimonial property had been removed. He obtained a variation of the Court Order to allow him access to those places where he was aware the property had been stored. He managed to recover property stored with Biddulphs and one Mr Steich Ferreira. After that he compiled a list of the missing property and it was applicant's belief that the property was stored with 1st and 2nd respondents. He managed to get a Land Cruiser and a collection of wines from the 1st and 2nd respondents. The 1st and 2nd respondents aver that when the Deputy Sheriff came to their house, on more than one occasion, they pointed out to him the paintings but he did not remove them. The applicant disputes this and he filed an affidavit from the Deputy Sheriff in support of his contention.

The applicant then instituted an action against Jacaranda and the three respondents claiming the return of the missing property.

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The action was filed on the 28th February, 2002. The following day, the 1st March, 2002, he then filed the present application. His basis for filing the present application was that the respondents were leaving the country on the 3rd March, 2002. He believed that it was the intention of the respondents to remove some very valuable paintings from Zimbabwe and that if they succeeded in doing so, he would suffer irreparable prejudice in that he would not be able to establish that they had in fact removed the property thereby precluding him from any claim against them or Jacaranda. He would have been deprived of items of significant value with no prospect of recovering same and that he would lose items of extremely sentimental value to him.

The respondents oppose the application mainly on two grounds. Firstly they aver that they never intended to leave the country as alleged by the applicant. They checked with Richard Summerfield and he indicates that he never told the applicant such information. Secondly, they handed over to the Deputy Sheriff the Land Cruiser and the wine collection and they pointed out to him the collection of paintings which he did not remove. They have now handed over to their legal practitioner the collection of paintings.

I will deal with the third respondent separately from the 1st and 2nd respondents. In his papers, the applicant seeks the arrest of the 3rd respondent *ad confirmandum jurisdiction* but the draft order seeks arrest *tamquam suspectus de fuga*. In my view, as far as the 3rd respondent is concerned, it is not necessary to determine which of the two could have been the correct procedure. The applicant failed, in his papers, to show that the 3rd respondent had anything to do with the removal of property from Macheka Farm.

All he could say was that the 3rd respondent travelled to Zimbabwe, for reasons not clear to him but which he believes relate to the divorce between him and his wife. He did not establish a basis for such belief. Her only "crime", as was submitted by respondent's counsel, was to arrive in the country for her annual holiday on the same day that her sister departed for the USA. I therefore find no basis to confirm the order in respect of the 3rd respondent.

As regards the 1st and 2nd respondents, it is my view that the order being sought has been overtaken by events. Some of the paintings, which were the applicant's main concern, are now in the custody of the respondents' legal practitioners Messrs Honey and Blanckenberg. I must however comment that the respondents have not been candid with the court when they say they pointed out the paintings to the Deputy Sheriff and he refused to remove them. The Deputy Sheriff has filed an affidavit in which he disputes that fact. In any case why would he refuse to remove the property he

had specifically gone to remove?

The other paintings were disposed of by Jacaranda. This is clear from correspondence and the testimony of the applicant in the divorce matter. SMITH J, who presided over the divorce, made a finding that Jacaranda had disposed of some of the property which the applicant claims to be his. If the applicant has any recourse, it is against Jacaranda and not the respondents and she is not a party to this matter.

The respondents are praying for costs *de bonis propriis* against Mr Bull. They did not actively pursue the argument in their heads of argument and the issue was half-heartedly argued on the day of the hearing. The submissions by respondent's counsel almost amounted to a concession that the order was not appropriate. However, my view is that the applicant should pay the respondents' costs. As I have already stated elsewhere in this judgment, the applicant had no basis whatsoever for dragging the 3rd respondent to court. As regards the 1st and 2nd respondents he failed to establish a basis for his belief that they wanted to leave the country with his property.

In the result the court will make the following order -

- 1) The Provisional order issued on the 2nd March, 2002 is hereby discharged;
- 2) The applicant is ordered to release the respondent's passport forthwith;
- 3) Applicant is to pay costs of suit.

*V H Fitzpatrick, c/o N H Franco & Co, applicant's legal practitioners
Atherstone & Cook, first respondent's legal practitioners*