

PAULINE MUTSA MAKONI
versus
JULIUS TAWONA MAKONI
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 20 July 2015 and 22 October 2015

Opposed Matter

T. Mpofu, for the applicant
T. Magwaliba, for the 1st respondent

MWAYERA J: The applicant approached the court seeking a final interdict. To put into perspective, the background of the matter, the applicant and respondent instituted divorce and ancillary issues proceedings in the United Kingdom. A decree *nisi* which was later confirmed by the English Court was granted. It was essentially for dissolution of marriage and transfer of all the immovable matrimonial assets in England and Zimbabwe to the applicant. Among other properties the respondent was to transfer all of his legal estates and beneficial interest in all of the property 5 Reinfontein Close, Harare. The applicant approaching the court seeking to protect rights conferred by the decree *nisi*. The respondent opposed the application on the basis that the applicant failed to establish the requirements for a final interdict.

During the hearing the applicant argued that the request was for an interdict and not a final interdict. It is thus important for the requirements of a final and interim interdict to be outlined.

CB Prest; *The Law and Practice of Interdicts* (SA:Juta Law; 2014) pp 34-80 the learned author discusses the requirements of Law of Interdicts in detail. Specific reference is made to the leading case of *Setlogelo v Setlogelo* 1914 AD 221 which case has been quoted with approval in *Econet Wireless Holdings v Minister of Information* 2001 (1) ZLR 373 at 374 B and *Airfield Investments (Pvt) Ltd v Minister of Lands and Ors* 2004 (1) ZLR p 511.

From these cases, it is settled that the requirements for a final interdict can be summarised as follows:

1. a clear right which must be established on a balance of probabilities.
2. irreparable injury actually committed or reasonably apprehended
3. the absence of a similar protection by any other remedy.

On other hand the requirements of an interim interdict were a enunciated by Malaba JA (as he then was) in *Airfield Investment (Pvt) v Minister of Lands and Ors* 2004 511 at 517 wherein it was stated as follows:

“It must be borne in mind that an interim interdict is an extra ordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an application for interim relief must satisfy before it can be granted. In *LF Bashof Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) 3A 256 (C) at 267 A-F, Lorbett J (as he then was) said an application for such temporary relief must show:

- ‘(a) that the right which is the subject matter of the main action which he seeks to protect by means of an interim relief is clear or if not clear, is *prima facie* established though open to some doubt,
- (b) that, if the right is only *prima facie* established there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right,
- (c) that the balance of convenience favour the granting of the interim relief, and
- (d) that the applicant has no other satisfactory remedy”.

The requirements of an interdict final or interim are fairly settled. The applicant is seeking for an interdict to stop the respondent from disposing of number 5 Reifontein Close and also an interdict stopping the respondent from transferring No. 5 Reitfontein Close unless ordered by a court of competent jurisdiction. At the hearing the applicant sought to amend the relief to reflect that applicant was not relying on a decree nisi but on a decree absolute since the decree nisi had been confirmed at the time of hearing. The applicant also further sought an interdict barring the respondent from removing the applicant’s belongings from number 5 Reinfontein Close without the written permission of the applicant.

The prayer by the applicant even with the amendment, is clearly a request for a final interdict. One of necessity therefore is to look at the requirement of an interdict in relation to the facts of this case.

The applicant argued that she has a right to the immovable property whose disposal she seeks to bar. The basis of the right as given by the applicant is the decree *nisi* which was

subsequently confirmed by reason of the decree absolute by an English court. In other words, the applicant argues she has a clear right by virtue of the English court order.

The respondent, on the other hand argued no clear right existed or had been established given that the applicant was relying on an unregistered foreign court order.

It is abundantly clear that at the time of filing the application and hearing, the English order was not registered in Zimbabwe in line with Civil Matters (Mutual Assistance) Act [Chapter 8:02]. The fact that the English court judgment was at the time of hearing, not registered was conceded by the applicant's counsel. Section 7 of the Civil Matters (Mutual Assistance) Act provides that once a foreign judgement is registered, it shall have the same effect for purposes of execution as if it was a judgement of the appropriate court concerned. It follows therefore, that before registration, which is at the discretion of the court concerned, there is no judgement to talk about insofar as enforcement is concerned.

The fact however, remains that there is an extant English Court Order. The facts of the matter do not establish a clear right but a *prima facie* right. The *prima facie* right emanates from the rule nisi which was confirmed by the decree absolute of the English Court. Even in the absence of registration of that order or in absence of the order, the applicant, by virtue of marriage to the respondent, would have a claim to the property in question. A *prima facie* right, even if its open to doubt, would work in favour of establishment of a right entitling the applicant to an interim relief. It is apparent from both the applicant and respondents' submissions, that there is pending litigation which relates to the property in question specifically case HC 50/15 wherein the respondent is seeking a declaratur in relation to the property in issue. Also it is clear that enforcement of the English Order hinges on registration of the same in this jurisdiction and that has not been done. The circumstances clearly depict that there are pending proceedings between the applicant and respondent. The requirements of an interim or interlocutory interdict as discussed earlier are:

- (1) a right, even open to doubt
- (2) an injury actually committed or reasonably apprehended and
- (3) the absence of a similar or adequate protection by any other ordinary remedy.
- (4) The balance of convenience favours the granting of the interim relief.

See also *Boadi v Boadi and Anor* 1992 (2) ZLR 22 and *Flamelily Investments Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378.

In *casu* the applicant has established a *prima facie* right in the property in question, it being potentially a matrimonial asset.

Given the existence of the English Court order and the pending litigation, the applicant's fears are well founded. The applicant has shown on a balance of probabilities that there are grounds for a reasonable apprehension that her rights will be detrimentally affected if an interim interdict is not granted. The applicant need not wait for the harm to be occasioned. Given the circumstances of this case, the entertainment of the fear that the respondent might dispose of and transfer the property is well grounded. The interim interdict in the face of pending litigation involving the property in question is the only available remedy which will avert injustice either way.

Upon considering the applicant and respondent's circumstances, it is worth noting that the respondent will not be prejudiced by the granting of the interim interdict. The respondent has mounted an application for a declarator in respect of the property in question which, if granted, would establish his rights to the property in question. The grant of an interim interdict to mainly stop him from selling and transferring the property will not affect his proprietary right. On the other hand, failure to grant the applicant the interim interdict will mean that if she successfully registers the English Court Order and the pending application for declarator is dismissed, the applicant will suffer great prejudice for the property for which she has established a *prima facie* right will have been disposed of. The balance of convenience in this case tilts more in favour granting of the interim relief. Such an interim relief will preserve the right of the parties until the right is fully ventilated. The preservation of the *status quo* will not only give room to full ventilation into the parties' rights but also prevent occurrence of an apprehended injury.

From the foregoing discussion, it is crystal clear that the applicant has not established a clear right and as such a final interdict cannot be sustained. The applicant has however, established a *prima facie* right for which there is reasonable apprehension that the right might be injured. The remedy available, that this court grants is that of a temporary interdict pending final determination of the right.

Accordingly therefore it is ordered that

1. The 1st respondent be and is hereby interdicted from disposing of No 5 Reintfontein Close, Highlands, Harare also known as the Remainder of Subdivision A of Lot 6 Reintfontein situate in the District of Salisbury held under Deed of Transfer No. 04388/95 unless directed by a court of competent jurisdiction.

2. The 2nd respondent be and is hereby interdicted from effecting transfer of No. 5 Reinfontein Close, Highlands, Harare also known as the Remainder of Subdivision A of Lot 6 Rienfontein situate in the District of Salisbury held under Deed of Transfer No. 04388/95 to anyone unless ordered as such in terms of an order of a court of competent jurisdiction.
3. The 1st respondent shall pay the cost on an ordinary scale.

Munangati & Associates Incorporating Goneso & Associates, applicant's legal practitioners
Magwaliba & Kwirira, 1st respondent's Legal practitioners