IN THE SUPREME COURT OF SWAZILAND

Civil Appeal No: 05/2013

In the matter between:

ANTOINETTE CHARMAINE HORTON	**APPELLANT**
AND	
ROY DOUGLAS NICOLAS FANOURAKIS	**FIRST RESPONDENT**
REGISTRAR OF DEEDS	**SECOND RESPONDENT**
ATTORNEY GENERAL	**THIRD RESPONDENT**

Neutral citation:	*Antoinette Charmaine Horton v. Roy Douglas Nicolas Fanourakis and Two Others (05/2013) [2013] SZSC68 (2013)*
Coram:	**A.M. EBRAHIM, JA** **S.A. MOORE, JA** **M.C.B. MAPHALALA, JA**
Heard:	15 November 2013
Delivered:	29 November 2013

Summary

Civil Appeal – interlocutory interdict – appeal against the judgment of the Court *a quo* dismissing the application for an interim interdict – the basis of the appeal being that the Court *a quo* never dealt with the interim interdict in its judgment but only dealt with Universal Partnership – held that for the application to have succeeded, appellant had to prove, *inter alia*, the existence of a *prima facie* right to the property whose transfer it seeks to interdict – held further that in order to do so, appellant had to establish that a Universal Partnership existed between the appellant and first respondent – appeal dismissed with costs.

JUDGMENT

M.C.B. MAPHALALA, JA

[1] The appellant instituted Motion Proceedings in the Court *a quo* against the first, second and third respondents, on an urgent basis, for an interim relief operating with immediate effect interdicting the transfer of Portion 3 of Consolidated Farm Peebles Block (South) No. 8, Manzini District, Swaziland into the name of The San – Roy Trust pending the determination of an action to be filed by the appellant to declare the relationship between the parties as a Universal Partnership. She further sought an order for costs in the event of opposition to the application.

[2] The Court *a quo* dismissed the application on the 23rd January 2013 on the basis that the appellant has failed to establish the existence of a Universal Partnership between the appellant and the first respondent. The appellant filed a Notice of Appeal timeously on the 24th January 2013; however, she did not file the Record of Proceedings until the 19th September 2013. The Record had to be filed within two months of the date of noting of the appeal. However, during the appeal, the application for condonation for the late filing of the Record was not opposed by the respondent; and, the Court granted the application.

[3] The appellant raised three grounds of appeal. Firstly, that the learned judge *a quo* erred in law and in fact and committed a gross irregularity by determining the issue of the legal existence or otherwise of a Universal Partnership yet she had to decide whether or not the appellant was entitled to an interdict pending an action to determine whether the property sought to be transferred formed part of the assets of a Universal Partnership between the appellant and the first respondent. Secondly, that the learned judge *a quo* erred in law and in fact in not granting an interlocutory interdict on the facts of the particular case. Thirdly, that the judge *a quo* erred in law and in fact in deciding the issue of the existence or otherwise of a Universal Partnership on Motion Proceedings yet there were material disputes of fact.

[4] It is not in dispute that the appellant and the first respondent were engaged to marry in April 1994, and, that they have been living together as husband and wife since 1988. They have a child by the name of Warren Fanourakis aged fifteen years. It is further not in dispute that the appellant was employed as an Accounting Clerk by Ngwane Poultry (Pty) Ltd in 1986, being one of the family businesses established by the first respondent's father who died in 2005. She concedes in her replying affidavit to this fact, and, adds that she was initially employed by Hillview Butchery (Pty) Ltd, which is a subsidiary of the other businesses; and, that she subsequently

became a Manageress of Hillview Butchery (Pty) Ltd as well as that of Ngwane Poultry (Pty) Ltd. She doesn't deny that she is still an Accounting Clerk of the family businesses notwithstanding that she is cohabiting with the first respondent as husband and wife.

[5] It is not denied that the property sought to be interdicted was owned by the deceased, the first respondent's father, Antoine Socrates Nicolas Fanourakis; this property was bequeathed to the first respondent by his father in terms of his Last Will and Testament. The first respondent is the Executor of his father's Estate, and, he has already lodged the Final liquidation and Distribution Account with the Master of the High Court. The appellant objected to the Distribution Account; however, her objection was heard by the Master who subsequently issued a ruling in favour of the first respondent. Pursuant thereto the appellant made an application for review of the Master's ruling before the High Court under Civil case No. 1032/2012; however, she later withdrew the review application.

[6] What precipitated the present litigation is the formation of The San Roy-Trust by the first respondent in respect of the property, and, the beneficiary of the Trust is their child Warren Fanourakis. She sought to stop the registration of the Trust in the Deeds Registry partly because she was not involved in the formation of the Trust and partly because she was

not a beneficiary of the Trust. Her contention is that she has formed a Universal Partnership with the first respondent at Common law, and, that the first respondent cannot deal with the assets of the Estate without her knowledge and consent.

[7] The appellant claims to have been the brains behind the success of the deceased's businesses; however, she does not dispute the fact that all the companies which run the family businesses were established by the deceased long before she was employed as an Accounting Clerk. It is further common cause that the property belonged to the deceased. Similarly, there is no evidence that any of the assets in the various companies belong to the first respondent or that they were acquired by the first respondent during his cohabitation with the appellant. Legally, it is inconceivable how the deceased's property could form part of the Universal Partnership when the deceased and the appellant had no relationship between themselves other than that of employer and employee. Neither the first respondent nor the appellant contributed to the purchase of the property or to any of the assets of the deceased.

[8] It is apparent from the deceased's Will that the first respondent was appointed as the Executor and Administrator of the Estate. The deceased further bequeathed the property to the first respondent, together with, *inter*

alia, 66% shares in Ngwane Poultry (Pty) Ltd as well as the entire shareholding of Hillview Butchery (Pty) Ltd, T.F. Spares (Pty) Ltd and the San Roy Farms (Pty) Ltd. The deceased further bequeathed to his daughter Sandra Elaine Black (born Nicolas Fanourakis), *inter alia,* a subdivided portion 37 (a portion of portion 3) of Consolidated Farm Peebles Block (South) No. 8, District of Manzini as well as 34% of deceased's shareholding in Ngwane Poultry (Pty) Ltd. The Will was made on the 24th February 2004.

[9] Incidentally the appellant concedes, in her replying affidavit, that the deceased's property is not subject to the Universal Partnership for want of a relationship between herself and the deceased. However, she argues that the farm should be transferred from the Estate into the name of the first respondent so that it would be subject to the Universal Partnership before being transferred to the Trust. Ironically, she further contends in the replying affidavit that "the farm has everything to do with the universal partnership between the parties because it was bequeathed to one of the partners and thus falls into the joint estate; and that any decision relating to the farm should be reached by consensus between the parties". According to the appellant, the first respondent has no right to unilaterally transfer the farm to the Trust without consulting her.

[10] The Judge *a quo* states clearly in her judgment that “the applicant seeks an interdict against the first respondent who intends to transfer immovable property to a trust on the basis that the latter forms assets of a Universal Partnership”. At the end of the judgment, she dismisses the application for an interim interdict. It is further apparent from the founding and replying affidavits that the appellant bases her application upon the existence of a Universal Partnership between the parties.

[11] It is trite law that in order to establish an interim interdict, a party has to show a *prima facie* right, which is a right which is open to some doubt. See *Setlogelo v. Setlogelo* 1914 AD 221 at 227. For the appellant to have succeeded in the Court *a quo*, she had to show that she had a *prima facie* right to the property whose transfer she was seeking to interdict. The only way to prove a *prima facie* right in this case is by showing that the property formed part of a Universal Partnership between the parties. The criticism levelled at the judge *a quo* for embarking on the inquiry whether or not a Universal Partnership existed between the parties is therefore misconceived.

[12] *Corbert J* in the case of L.F. Boshoff Investments (Pty) Ltd v. Cape Town Municipality 1969 (2) SA 256 (C) at 267 deals with the essential requirements of an interim interdict, and, he says the following:

"Briefly these requisites are that the applicant for such temporary relief must show:

(a) That the right which is the subject-matter of the main action and which he seeks to protect by means of 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 favours the granting of interim relief;

(d) That the applicant has no other satisfactory remedy.

. . . .

Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the Court's approach in determining whether the applicant's right is *prima facie* established, though open to some doubt, is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action."

[13] It is well settled that interdicts are based upon rights arising from substantive law which are sufficient to sustain a cause of action. The applicant for an interlocutory interdict must show a right which is being infringed or which he apprehends will be infringed. Any failure to establish a *prima facie* right means that the application will not succeed; and, it does

not have to be shown on a balance of probabilities. The prima facie right sought to be protected is a legal right arising out of substantive law. See the following authorities:

- *Albert v. Windsor Hotel* 1963 (2) SA 237 (E) at 240-241
- *Dalrymple & Others v. Colonial Treasurer* 1910 TPD 372 at 379
- *Webster v Mitchel* 1948 (1) SA 1186 (W) at 1189.
- *Setlogelo v. Setlogelo* (supra) at 227.
- The Law and Practice of Interdicts, C.B. Krest SC, Juta & Co. Ltd, 1996 at pp 49-57.
- Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa, fifth edition, Volume 2, Cilliers et al, Juta & Co, 2012, pp 1456-1463

[14] Clayden J in *Webster v. Mitchell* (supra) at 1189 said the following:

> **"The use of the phrase "*prima facie*" established though open to some doubt indicates, I think, that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the**

respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to some doubt. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."

[15] The principle laid done in *Webster v. Mitchell (*supra) at 1189 has been qualified to the extent that the criterion on an applicant's own averred or admitted facts is whether the applicant on those facts could obtain final relief at the trial. See *Ogilvie Thompson J* in the case of *Gool v. Minister of Justice* 1955 (2) SA 682 (C) at 688.

[16] Holmes J in *Olympic passenger service (Pty) Ltd v. Ramlagan* 1957 (2) SA 382 (D) at 383 said the following:

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak. The expression "*prima facie*" established though open to some doubt seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there

> **being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."**

[17] I wish to emphasise though that the most important requirement of an interim interdict is the *prima facie* right; however, this is not to downplay the significance of the other essentials but to emphasise the legal principle that where the applicant for such an interdict has established a strong *prima facie* right, the Court in the exercise of its discretion, may place less emphasis on the other requirements. Similarly, where the applicant fails to establish the *prima facie* right, there is no point for the Court to enquire into the other essentials of the remedy. See *Erasmus v. Senwes Ltd* 2006 (3) 529 (T) at 540.

[18] As stated in the preceding paragraphs, in order for the appellant to obtain an interim interdict in the Court *a quo*, he had to establish a *prima facie* right to the property sought to be transferred by the appellant; and, this could only be done by proving the existence of a Universal Partnership between

the parties. The leading case in South Africa dealing with Universal Partnership was decided by the Supreme Court of Appeal in the case of *Butters v. Mncora* 2012 (4) SA 1 SCA at para 11 and 18 where Brand JA delivering a unanimous judgment of the Court had this to say:

> **"... the general rule of our law is that cohabitation does not give rise to special legal consequences. More particularly, the supportive and protective measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period.... Yet a cohabitee can invoke one or more of the remedies available in private law, provided of course, that he or she can establish the requirements for that remedy. What the plaintiff sought to rely on in this case was a remedy derived from the partnership. Hence she had to establish that she and the defendant were not only living together as husband and wife, but that they were partners. As to the essential elements of a partnership our Courts have over the years accepted the formulation by Porthier.... The three essentials are, firstly, that each of the parties brings something into the partnership or binds themselves to bring something into it, whether it be money, or labour, or skill. The second element is that the partnership business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. A fourth element proposed by Porthier, namely, that the partnership contract should be legitimate, has been discounted by our Courts for being common to all contracts."**

[19] His Lordship dismissed the proposition that a partnership, including a Universal Partnership, must consist of a commercial undertaking. At para 14, he stated the following:

> **"14. It appears to be uncontroversial that, apart from particular partnerships entered into for the purpose of a particular enterprise Roman and Roman-Dutch law also recognised universal partnerships. Within the latter category, a distinction was drawn between two kinds. The first was the "*societas universorum bonorum* – also referred to as the *societas omnium bonorum* – by which the parties agree to put in common all their property, present and future. The second type consisted of the *societas universorum quae ex quaestu veniunt*, where the parties agree that all they may acquire during the existence of the partnership, from every kind of commercial undertaking, shall be partnership property."**

[20] His Lordship dismissed the proposition that a universal partnership of the first kind, those including all property were not allowed in Holland save between spouses and perhaps putative marriages. This proposition further held the view that even where a partnership of all property was allowed, it required an express agreement and could not be brought about tacitly. He preferred the formulation made by Porthier which does not distinguish universal partnership in general and those between cohabitees in particular.

[21] His Lordship summarised the legal position as follows at para 18:

> **"18. In this light our Courts appear to be supported by good authority when they held, either expressly or by clear implication, that;**
>
> **(a) Universal partnerships of all property which extend beyond commercial undertakings were part of Roman-Dutch Law and still form part of our law.**
>
> **(b) A universal partnership of all property does not require an express agreement. Like any other contract, it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties.**
>
> **(c) The requirements for a universal partnership between cohabitees, are the same as those formulated by Porthier for partnership in general.**
>
> **(d) Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached."**

[22] The above case reiterates the Common law principles on Universal Partnerships; and, it does reflect the law in this country. When considering the essential requirements of the doctrine of Universal Partnerships as espoused by the South African Supreme Court of Appeal, I fail to comprehend how the judge *a quo* could be said to have misdirected herself in the judgment. It is very clear on the evidence that the appellant did not work or contribute her skills and labour for the benefit of a universal partnership with the first respondent. She discharged her duties in her capacity as an Accounting Clerk employed by the Hillview Butchery (Pty) Ltd as well as Ngwane Poultry (Pty) Ltd, which companies were owned by the deceased and subsequently by the deceased's Estate. Any profit generated by the companies was for the benefit of the deceased and not the partnership, and subsequently for the Estate. The farm, in particular, belonged to the deceased and was not part of any partnership assets; the deceased bequeathed the farm to the first respondent, who has the right to transfer it to the Trust on the basis that it does not form part of the assets of any Universal Partnership.

[23] Accordingly, the following order is made:

(i) The appeal is dismissed with costs.

M.C.B. MAPHALALA
JUSTICE OF APPEAL

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

S.A. MOORE
JUSTICE OF APPEAL

For Appellant: Advocate Lucas Maziya
Instructed by Attorney
Luke Malinga

For Respondent: Attorney Sipho Nkosi

DELIVERED IN OPEN COURT ON 29 NOVEMBER 2013