

GODFREE GATSI
versus
D MED HEALTHCARE (PVT) LTD

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 13 December 2021& 20 April 2022

COURT APPLICATION

B Makururu, for the plaintiff
W P Mandinde, for the defendant

MANZUNZU J This is an application for a declaratur in terms of section 14 of the High Court Act, Chapter 7:06. The order sought is in the following terms;

- “1. The application for a declaratur be and is hereby granted.
2. The removal of the applicant from being a director and secretary of the respondent on the 1st July 2018 purportedly due to resignation be and is hereby declared null and void.
3. The suspension of the applicant in terms of SI 15 of 2006 on 24 July 2018 be and is hereby declared null and void.
4. The CR14 stamped 18 July 2018 by the Registrar of Companies be and is hereby declared null and void.
5. Respondent be and is hereby ordered to pay applicant the sum of US\$47 175.00 being outstanding remuneration from July 2018 to July 2021.”

The applicant’s case is that he assisted in the formation of the respondent whereupon he became its director together with Johannes Lukas Swart and Albertus Jacobus Hoffman. On 24 July 2018 the applicant was suspended from duty by Trust Jefferson whom he says was a director of a different company from the respondent. Realizing the delays in the disciplinary hearing, the applicant says he referred his matter to a Labour Officer in terms of s 101 (6) of the Labour Act which he subsequently withdrew on 27 August 2021.

What emerges from the papers of the parties is that the disciplinary proceedings against applicant had commenced before the applicant opted for its referral to the Labour Officer. Pleadings were filed before the Labour Officer before the withdrawal of the matter.

The respondent says the withdrawal of the matter by the applicant means the disciplinary proceedings can now proceed. Instead the applicant decided to file the current application. The respondent raises a preliminary point that of *lis pendens*. There is also the allegation that this matter is prematurely brought before the court and that it is an abuse of court process.

The first issue to decide is, what is the effect of the withdrawal of the matter which was before the Labour Officer. I agree with the respondent that such withdrawal reverts the matter back to the disciplinary hearing. The disciplinary proceedings instituted by the respondent remain pending. But can such proceedings preclude the current application on the basis of *lis pendens*.

The renowned authors Herbstein and Van Winsen in the *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, 5th ed* deal with the defence of *lis pendens* as atated at p 605:-

“*Lis pendens* is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court... It matters not, in my view that the matters have been brought by way of application and the other by way of action. It is not so much the vehicle by which the matters have been brought to court but the nature of the issues and relief sought, that is the substance and not the form.”

In the 3rd edition at p 269 the same authors Herbstein and van Winsen in *The Civil Practice of the Superior Courts in South Africa* said;

"If an action is already pending between parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendant to take the objection of *lis pendens*, that is, another action respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first action."

In *Nestle (SA) (Pty) Ltd v Mars Incorporated* (2001) 4 ALL SA 315 (SCA), it was stated as follows:

“The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of these elements there is no potential for a duplication of actions.”

It is therefore trite that for the defence of *lis pendens* to succeed the following requirements must be met.

- a) There must be another pending matter
- b) Between the same parties
- c) On the same cause of action
- d) In respect of the same subject matter.

In the pending disciplinary proceedings we see the same parties. The cause of action and subject matter are the same. It is to do with whether or not the applicant is guilty or innocent of alleged misconduct. There is need for the due process of the law to take its own course. If the applicant is found not guilty by the tribunal then the present application will not be necessary. In the event the applicant is found guilty he can pursue internal remedies.

I agree with the respondent that not only is the other matter pending but the present application has been brought prematurely. I further squarely agree with the respondent that this court cannot reinstate the applicant before a determination on whether or not his employment was lawfully terminated. This should come out of the pending disciplinary hearing.

The respondent cannot be faulted for alleging the applicant is bent on abusing court process. The applicant is trotting from one forum to the other without finality in each process. The applicant's reasons for withdrawing the matter from the Labour Officer is because he realized same has no jurisdiction to grant a declaratur and yet it was the applicant who took the matter there in the first place.

I find merit in the preliminary points raised by the respondent although costs on a punitive scale are not justified.

DISPOSITION:

1. The preliminary points raised by the applicant succeed.
2. The application be and is hereby dismissed with costs.

Makururu and Partners, applicant's legal practitioners
Maseko Law Chambers, respondent's legal practitioners.