

JOHN TRANOS MATUKUTIRE
versus
RATIDZAI MATUKUTIRE
and
MEMORY NZOUNHENDA
and
ARTHEUR MASIMBA NYAMUTAMBA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 18 & 2 November 2022

Opposed Application

F Mahere, for the applicant
1st respondent in person
T L Mapuranga with T M Makamure, for the 2nd and 3rd respondent

CHITAPI J: The applicant seeks an order that is constituted by a declaration with an accompanying interdict and costs of suit. The content of the applicant's draft order reads as follows:

“**WHEREUPON** after reading documents filed of record and hearing counsel:

IT IS ORDERED THAT

1. The Agreement of Sale entered into between the 1st, the 2nd and 3rd Respondents in respect of the sale of stand No. 1263 Goodhope Township Harare, measuring 1 950 square metres dated 4th of August 2020 be and is hereby held to be unlawful, wrongful and accordingly set aside.
2. The 1st, 2nd and 3rd Respondents be and are hereby interdicted from interfering with the Applicant's stay, possession and ownership of stand No. 1263 Goodhope Township Harare in whatever manner.
3. The Respondents are ordered to pay costs of suit on a punitive scale, jointly and severally, one paying the other to be absolved.”

The respondents opposed the application. In her notice of opposition the first respondent objected to the propriety of the application procedure adopted by the applicant. She averred that there were material disputes of fact which could not be resolved on the papers. She averred further that the factual disputes, to the knowledge of the applicant existed before the application was filed. The first respondent also objected to the application on the basis that there already existed another pending action matter under Case No. HC 6135/20 filed on 20 October 2020 which deals with the

same subject matter of the dispute involving the same the parties and same relief being claimed as in the current application filed on 4 March 2021. The first respondent was in effect pleading *lis alibi pendens* as a dilatory defence.

The second and third respondents raised three points *in limine*. They contended firstly that there were material disputes of fact which made the dispute non suited for resolution by way of application as opposed to action procedure. Secondly the second and third respondents objected to the application on the basis that the dispute was *lis pendens* in Case No. HC 6135/20. An additional feature of the opposition was that the second and third respondents had filed a counter claim in Case No HC 6135/20 in which they seek an order that the property in dispute be transferred to them by the applicant herein. Fourthly the second and third respondents objected to the application on the basis that the dispute at stake was *res judicata*, between the parties herein, the dispute having been determined by MUREMBA J by order in Case No. HC 7254/20.

For the avoidance of doubt MUREMBA J granted an order by consent as follows on 15 December 2010 in case No. HC 7254/20. The order is extant to date:

“WHEREUPON after reading documents filed of record and hearing counsel
IT IS ORDERED BY CONSENT THAT:

1. Pending the finalization of case No. HC 6135/2020, the first and second respondents be and are hereby ordered not to sell or dispose stand 1263 Goodhope Township of Lot 16 Goodhope – Mount Hampden, Harare.
2. Pending the finalization of Case No HC 6135/20 the first and second respondents are hereby ordered not to interfere with the applicants’ occupation of stand 1263 GoodHope Township of Lot 16 of GoodHope, Mount Hampden.
3. Each party bears its own costs.”

The brief background to the dispute at play involves principally the applicant and his estranged wife, the first respondent. The applicant claims to be the owner of stand 1263 GoodHope Township, Lot 16 Goodhope. Harare. He relies for his assertion to ownership upon a deed of transfer No 8809/2001 in which the property was conveyed to him on 4 September, 2001. The second and third respondents claim to have purchased a subdivision of the property by virtue of an agreement of sale entered into between them and the applicant. The first respondent signed the agreement on behalf of the seller. The second and third respondents attached to the opposing affidavit, letters purportedly signed by the applicant wherein he gave the second and third a notice to remedy the breach of the sale agreement due to the failure by the said respondents to pay the whole purchase price upon signature of the agreement of sale for the subdivision Stand 1263. The

letters dated 6 and 16 August, 2018 were not disputed by the applicant. The letters were attached to rebut the denial by the applicant that the sale of the subdivision to the second and third respondents was fraudulently or clandestinely entered into by the first respondent with the second and third respondent without the knowledge of the applicant.

The applicant instituted Case No HC 6135/20 as plaintiff with the respondents *in casu* being the third, second and first defendants as they are named in this application. The prayer sought by the applicant in Case No. HC 6135/20 is couched as follows in the summons and repeated in the declaration:

“The plaintiff claim against the first and second defendants is for:

- (a) Eviction of the defendants and all those claiming occupation through them from stand 1263 Goodhope Township, Lot 16 of GoodHope Harare
- (b) Costs of suit on a legal practitioner and check scale”

The cause for the eviction pleaded in Case No HC 6135/20 is that the second and third respondents’ occupation of the subdivision in dispute is illegal as the applicant never sold the property to the second and third respondents nor did they pay for the property. Case No 6135/20 *is litis contestatio* and pending a pre- trial conference to be held.

The next development is that the second respondent herein petitioned this court under Case No HC 7254/2020 and obtained an order against the applicant herein and the first respondent. MUREMBA J on 15 December, 2020 granted by consent the order which has been quoted herein above. The consent order is clear. It managed Case No. HC 6135/2020. The court ordered that the subdivision concerned should not be sold or disposed of by the applicant and first respondent pending the conclusion of Case No HC 6135/20. Crucially the court made an order by consent that the applicant and first respondent should not interfere with the second respondent’s occupation of the property pending the finalization of Case No HC 6135/20.

The current application by the applicant was filed next on 4 March 2021 which was 3 months after the order of MUREMBA J was granted. The applicant in the draft order as already recorded seeks a declaration of nullity of the agreement of sale entered into by the first, second and third respondent on the basis that he did not as the registered owner of the subdivision sell the subdivision to the second and third respondents and that the first respondent is the one who purported to sell the property behind the applicant’s back. The applicant also seeks that “his possession and ownership of the stand” should not be interfered with.

The respondents' objection on *lis pendens* was that the issues sought to be determined are the same as in Case No HC 6135/20 which is a summons case. Upon a consideration of the material facts of the matter it is my view that the objection has merit. The position with the law in relation to *lis pendens* is set out by the celebrated authors Herbstein and Van Winsen in their book "*The Civil Practice of the High Courts of South Africa*, 5th ed.', Vol. 1 at p 310. They say;

"Lis pendens

If an action is already pending between the parties and the plaintiff 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 in a different court, it is open to the defendant to take the objection of *lis pendens*, that is, that another action respecting the identical subject matter has already been instituted. Thereupon the court, in its discretion, may stay one action pending the decision of the other. Objection is usually taken by way of a plea in abatement..."

In respect of the elements of the plea of *lis pendens*, CHIKOWERO J in the case of *Ivy Chipande v C M Grobellar and 2 Ors* HH 654-18 stated as follows on p 4 of the cyclostyled judgment:

"The plea of abatement of *lis pendens*.

The requisite of the plea are

- (a) litigation is pending
- (b) the other proceedings are between the same parties or their privies
- (c) the other proceeding are based on the same cause of action; and
- (d) the pending proceedings are in respect of the same subject matter.

It is the law that even where a party satisfies all these requirements the court has a discretion to grant or refuse a stay of proceedings on the ground of *lis alibi pendens*. In exercising the discretion, the court has regard to the equities and the balance of convenience. Ultimately the question is whether justice will not be done without the double remedy. I refer to a few only of the decisions confirming that the defence of *lis pendens* is not a complete bar to further proceedings concerning the same, but is a discretionary tool in the hands of the court. See *Khan v Provincial Magistrate, Harare and Others* 2006 (1) ZLR 298(H). *Diocesan Trustees: Diocese of Harare v Church of the Bround of Central Africa* 2009(2) ZLR 57(H); *Mhunga v Mtindi* 1986(2) ZLR 171 (S)."

In relation to *lis pendens*, the applicant in para 3 of the answering affidavit stated that he denied the *lis pendens* defence. He averred that the causes of action in Case No HC 6135/20 and in the current application were different. He averred that:

"... the cause of actions are different in all matters. I seek to have an illegal agreement of sale cancelled for it offends my rights and there is no such order pending before the court in relation to the same."

The quoted response does not really appreciate the *lis alibi pendens* concept. It is a response more situated to a *res judicata* plea. *Lis alibi pendens* is concerned with the avoidance of a multiplicity of suits being filed in the courts dealing with a common dispute involving the same parties claiming the same or substantially the same relief. It must be noted that in case No HC 6135/2020, the second and third respondents filed a counter claim in which they seek transfer of the property in dispute based upon rights which allegedly derive from the sale agreement which the applicant seeks to have declared as illegal and invalid. Therefore the issue of the validity of the sale agreement is already subject of determination in Case No HC 6135/2020. The interdict sought by the applicant that he should not be interfered with respondents in his stay, possession and ownership of stand 1263 Good Hope Township is subject to a standing order of MUREMBA J in Case No HC 7254/20202 which protected the third respondent's occupation of the same stand pending the finalization of Case No HC 6135/2020. The applicant cannot seek a contrary interdict and would have been advised to abide by the existing interdict unless it is set aside or otherwise varied by the court.

The second and third respondent also submitted that the applicant's sought relief of an interdict was *res judicata* because the order of MUREMBA J determined occupational rights which were made subject to the finalization of Case No 6135/20. The argument is sound because MUREMBA J considered that the Case No HC 6135/20 merited protection and regulation of the possession and occupation of the disputed stand pending the determination of that case. It comes as a surprise that the applicant seeks protection of possession and/or occupation of the stand because the court per MUREMBA J determined with the applicant's consent that occupancy be reposed in the third respondent.

The last point *in limine* was that there were material disputes of fact which are not capable of resolution on the papers. It appears to me that the necessity for resolution of this point *in limine* must be preceded by a resolution of whether this application is affected by *lis alibi pendens*. *If it is*, then the issue of material disputes of fact must be resolved only if the court dismisses the objection *of lis pendens or upholds* it but nonetheless decides in its discretion that the hearing of this application is proceeded with despite the other *pending lis*.

In deciding whether or not this application is subject to *lis pendens* in Case No HC 6135/20, the court should consider the substance of both pending cases and not their form. It is clear that

in Case HC 6135/20 the applicant as plaintiff seeks the eviction of the second and third respondents herein as defendants therein from the same property involved in this matter on the basis that the second and second respondents purport to have bought the property yet he did not sell it to them. The applicant denies such purchases. In *casu* the applicant seeks cancellation of the purported agreement of the sale of the stand to the second and third respondents. In substance there is therefore no distinction between the two cases because the common issue is to determine the rights which each of the disputants claims to have on the property. Other orders like an interdict become ancillary to the determination of the ownership issue. In my view *lis pendens* has been established in that case number HC 6135/20 already deals with the issue of the disputed ownership of the stand, the same being raised in the current application which was instituted subsequent to case number HC 6135/20.

Having ruled that *lis alibi pendens* has been established the next issue is to decide whether or not to continue with the hearing of this application since the court has a discretion to proceed to hear it. In this regard the court in exercising its discretion must do so judiciously upon a consideration of the facts and circumstances of the case as may appropriately be considered *in casu*. The court per MUREMBA J in case number HC 7254/20 already determined the issue of possession and occupation of the disputed stand pending the determination of case number HC 6135/20. Case number HC 6135/20 deals with the issue of ownership of the stand and the ancillary relief of eviction. The applicant is being ingenuous by seeking to sneak in this application clothed as one seeking a declaratur yet case number HC 6135/20 would still require the court to make a finding of who the true owner of the property is. Case number HC 6135/20 also includes a counter claim by the second and third respondents wherein they seek an order for transfer of the disputed property. A determination of the current application will prejudice the determination of the counter claim. It is not in the interests of justice to proceed with the current application. It must be stayed until case number HC 6135/20 is dealt with. The parties can revisit the current application after the conclusion of Case number HC 6135/20 if they are so advised.

The respondents seek costs on the legal practitioner and client scale. They did not motivate the justification for seeking punitive costs. Such costs are not merely for the asking and giving. They constitute a special order of costs as they are a departure from the norm. Any special order

requires to be specially pleaded and specially justified in turn. I therefore find no justification to order costs on that punitive scale. Costs must however follow the event.

The application is disposed of as follows:

IT IS ORDERED THAT:

1. The point *in limine* on *lis pendens* succeeds.
2. The hearing of this application is stayed pending the finalization of case number HC 61352/20.
3. For the avoidance of doubt the order of MUREMBA J dated 15 December 2020 granted by consent in case number HC 7254/20 is extant until set aside or varied.
4. The applicant is to pay the wasted costs.

Mugiya and Muvhami Law Chambers, applicant's legal practitioners
Rubaya & Chatambudza, second and third respondent's legal practitioners