

THE HIGH COURT OF SWAZILAND STANDARD BANK SWAZILAND LTD

And

SOKESIMBONE INVESTMENT (PTY) LTD 1st Defendant

REYNOLD S. BAARTJIES 2nd Defendant

Civil Case No. 1197/04

Coram S.B. MAPHALALA – J

For the Plaintiff MISS L. KUNENE

For the Defendants MR. M. MABILA

JUDGMENT (25/06/2004)

Before court is an application for summary judgment where Defendants have filed a notice in terms of Rule 6(12) (c) raising points in limine. These points are couched as follows:

"1. The matter is res judicata as it was finalized by the Magistrates' Court for the district of Hhohho (under Case No. 1779/03) on the 27th August 2003, Reference is made to

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annexure "RB" hereto (being a copy of the notice of motion in the Magistrates' - Court) and annexure "STC4" to plaintiff's particulars of claim. –

Alternatively

2. The matter is lis pendens in the Magistrates Court for the district of Hhohho under Case No. 1779/03",

The Plaintiff has issued out summons against the Defendants for payment of the sum of E120, 408-25; interest thereon at the rate of 16% per annum and 3% penalty interest from 30th April 2003 to date of payment; and costs as between an attorney and his own client.

The substantial allegations made by the Plaintiff is that on or about 14th November 2000, the Plaintiff represented by its Manager Mr. Alan Murray and the 1st Defendant represented by the 2nd Defendant as its Director concluded a written lease agreement annexed marked "STC1" and "STC2". In terms of which the Plaintiff leased and delivered to the 2nd Defendant a certain motor vehicle, a Mercedes Benz Sprinter 413 panel van registration no. SD 030 PG.

Annexures "STC1" and "STC2" set out the standard terms and conditions operating and effective between the parties.

In paragraph 7, 7.1, 7.1.1, 7.1.2, 7.2, 7.3, 7.4, 7.5, 7.6 and 8 the Plaintiff outlines how the parties were bound to each other in terms of the lease agreement.

On or about 29th August 2003, the Plaintiff was granted a final order by the Magistrate's Court for the district of Hhohho under Case No. 1779/2003. At the time the court ordered seizure and attachment of the said motor vehicle, the Defendant was in arrear payment of instalments in the amount of E88, 435-91 and the total outstanding amount was the sum of E275, 197-65. The messenger of the court duly executed the order and delivered the vehicle to the Plaintiff.

The Plaintiff on receipt of the motor vehicle appointed a valuator who valued the vehicle at E122, 139-

00. The Plaintiff communicated the valuation of the said motor

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vehicle to the 1st Defendant and requested payments of the balance of instalments outstanding in the sum of E120,420-25 from the 1st Defendant in accordance with the material terms of the agreement.

The Plaintiff avers that the 1st Defendant is in breach in that it has failed to tender the outstanding balance due to the Plaintiff since the agreement was cancelled and the motor vehicle repossessed and valued. The Plaintiff has duly cancelled the agreement as per the Magistrates Court order under Case No. 1779/2003. (Annexure "STC4").

When the matter came for arguments on the points in limine it was contended for the Defendants that in the present case, as seen in annexure "STC4" and "RB", the issue between the parties has been finalized and this court cannot deal with it anymore as the Magistrates Court made a final and definitive order thereon. The alternative argument advanced is premised on the principle of *lis pendens*. The court was referred to the cases of *Lindiwe-Kunene vs Bheki Kunene - High Court Civil Case No. 2390/99* and that of *FNB T/A Wesbank vs Commissioner of Police and another Civil Case No. 280/01*.

The argument against the plea of *res judicata* is that the relief sought is not identical in the two courts. The matter under Case No. 1779/03 in the Magistrates Court was a matter wherein the Applicant was seeking for an order for seizure and attachment of a motor vehicle due to arrear rental payments due to the Applicant by the Respondent in accordance with the terms and conditions of the lease agreement. The Magistrate Court on the 23rd July 2003 on hearing of the notice of motion issued an interim order returnable on the 29th August 2003. On the return date the court confirmed the interim order and a final order was issued forthwith.

It is contended for the Plaintiff that in the present case the plaintiff's cause of action is significantly different from the one before the Magistrates Court. In *casu* the Plaintiff is claiming for liquidated damages arising from the balance outstanding less the net value of the motor vehicle after it was recovered by the Plaintiff and disposed of. Therefore, so the argument goes, a plea of *res judicata* in the circumstances cannot succeed as one of the intergral requirements has not been fulfilled.

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It would appear to me that the plaintiff's contention is correct that the plea of *res judicata* cannot be sustained on the facts. However, it remains to be seen whether the *ratio decidendi* in the case of *Lindiwe Kunene vs Bheki Kunene (supra)* applies to the facts of the present case. I shall revert to this aspect of the matter later on in the course of this judgment.

On the plea of *lis pendens* the contention advanced for the Plaintiff is similar to the submission made in respect to the plea of *res judicata*.

It would appear to me again that the plaintiff's submissions are correct that on the facts a plea of *Us pendens* cannot be sustained. Having said that however, it behoves me to further examine whether the *dicta* in the case of *Lindiwe Kunene (op cit)* applies in *casu*. In that case the Applicant instituted divorce proceedings against the Respondent before the Subordinate Court for the district of Lubombo, based on malicious desertion. The matter- which came before Masuku J was for *inter alia* the determination of a point in limine by the Respondent as to whether the High Court had jurisdiction to entertain the matter in light of the fact that the *lis* was pending before the subordinate court. The learned Judge in that case held that the subordinate court had jurisdiction to entertain and grant the relief sought by the Applicant. The court relied on the provisions of Section 15 (c) of the Magistrates Court Act No. 66 of 1938. The relevant provision reads as follows:

"Saving any other jurisdiction assigned to any courts by this Act, or by any other law the persons in respect of whom the court shall have jurisdiction shall:-

e) Any persons whatever, in respect of any proceeding incidental to any action or proceeding instituted in any action or proceeding instituted in the court by such person himself'.

The learned Judge at page 3 of the unreported judgment stated the following:

"The application in issue is a proceeding pendente lite, incidental to an action instituted by the present Applicant before the Siteki Magistrate's Court. For that reason, it is clear that court has jurisdiction to entertain the application and grant relief that it may be minded to give".

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Mr. Mabila for the Defendants in the present case relied heavily on what was said in the above-cited case and urged me to hold that the liquidated damages claim is incidental to the proceedings in the Magistrate Court. Therefore the Plaintiff ought to have instituted the present claim in that court.

In my respectful view, the facts in *Lindiwe Kunene* (op cit) are clearly distinguishable from the facts in the instant case. In the *Kunene* case the Applicant had instituted divorce proceedings in the Subordinate Court and sought to move an application in terms of Rule 43 pendente lite before the High Court. The proceedings at the time the matter was brought before the High Court were still pending in the Magistrate Court. This in my view, is the most distinguishing feature from the present case. The proceedings in the Magistrates Court were finalized culminating in a court order. In the present case the claim in the Magistrate Court was for the attachment of the vehicle yet in the case before this court the claim is for liquidated damages. The dicta in the *Lindiwe Kunene* case does not apply to the facts in casu.

For the afore-going reason I dismiss the points of law in limine and rule that the matter proceeds on the merits. Costs to be the costs in the cause.

S.B.MAPHALALA

JUDGE