IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 2199/2010**

In the matter between:

KAREEM ASHRAF **1ST PLAINTIFF**

MONA ASHRAF **2ND PLAINTIFF**

VS

GIGATEH (PROPRIETARY) LIMITED **DEFENDANT**

Coram **Ota J.**

For Applicant: **Mr. L.R. Mamba**

For Defendant: **Mr. B. Mndzebele**

JUDGMENT

OTA J,

The Plaintiffs took out combined summons against the defendant claiming inter alia the following reliefs

1. An order ejecting the defendant and all claiming title under it from the premises.
2. Interest thereon at the rate of 9% per annum calculated from the date of issue of summons to date of final payment.
3. Costs of suit.

The claim is founded on the plaintiffs particulars of claim as is found on pages 3 to 5 of the book, to which is exhibited annexures A and B respectively.

After the defendant delivered a notice of intention to defend, the plaintiffs commenced a summary judgment application for the reliefs claimed. In it's affidavit resisting summary judgment, the defendant raised the special plea of *lis alibi*

pendens, seeking to defeat the claim in limine. The defendant contends that on the 21st of April 2009, the plaintiffs instituted proceedings before the High Court of Swaziland, seeking inter alia for an order ejecting the Defendant from premises situate at portion, 23 Farm 300, District of Manzini. That these proceedings which are registered under Case No. 1405/2009, are still pending and have not been finalized. That in the claim instant, the Plaintiffs also claim ejectment of the defendant from the same premises. Therefore, there are two actions pending between the same parties, founded on the same cause of action, in respect of the same subject matter. The defendant thus prayed the Court to stay the present claim pending the outcome of the claim instituted under 1405/2009. What then is the law on this subject matter?

The learned authors **Herbstein and Van Winsen** in the text The Civil Practice of the Supreme Court of South Africa (4th edition), 249 – 250, elucidated the requisites for a successful plea of *lis pendens* ,in the following language.

‘‘ The requisites of a plea of lis pendens are the same with regard to the person, cause of action and subject matter as those of a plea of res judicata, which, in turn, are that the two actions must have been between the same parties, or their successors in title, concerning the same subject matter and founded upon the same cause of complaint. For a plea of res judicata to succeed, however, it is not necessary that the ‘‘ cause of action’’ in the narrow sense in which the term is sometimes used as a term of pleading should be the same in the latter case as is in the earlier case. If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same time determining that question or issue, then that determination though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be res judicata in any subsequent action between the same parties in respect of the same subject matter. The same principle will generally apply when the plea is one of lis pendens. -----In order to decide what matter is in issue, one should consult the pleadings, not the evidence led’’

It follows from the foregoing exposition, that three ingredients must be evident in both claims to sustain a successful plea of lis pendens, namely:-

1) The parties must be the same.
2) The subject matter of the claims must be the same.
3) The cause of action must be the same.

The question that naturally arises at this juncture to my mind, is, whether the facts sated herein, when juxtaposed with the three requirement ante, vindicate the special defence urged?

It is apposite for me at this juncture to first consider the meaning of the term ‘‘ *cause of action*’’ as demonstrated by case law, before taking and further steps.

In the case of The **Minister of Natural Resources and Energy V Johannes Nkwanyana Civil Case No. 3952/05, Annandale J,** defined cause of action as follows:-

‘‘ Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact---, but every fact which is necessary to be proved----’’

Similarly, in **Evins V Shield Insurance Co. 1980 (2) SA 814 at 838, Corbett JA,** stated as follows:-

‘‘ The proper legal meaning of the expression ‘‘ cause of action’’ is the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a Plaintiff to succeed in his claim-----’’

Now, in the previous claim under Case Number 1405/2009 the Plaintiffs claimed the following reliefs against the Defendant:-

1) Cancellation of the agreement of lease.
2) Ejecting the Defendant and all claiming title under it from the premises.

3) Payment of the sum of E22,000-00.
4) Interest thereon at the rate of 9% per annum calculated from the date of issue of summons to date of final payment.
5) Costs of suit.
6) Further and alternative relief.

I have hereinbefore set out the claim instant. There is no doubt that the ejectment of the Defendant from the premises in issue was subject matter in both claims. However, the cause of action which is decipherable from the pleadings filed of record in both claims clearly differ. Whilst in 1405/2009, the Plaintiffs claim for ejectment of the Defendant was premised on the allegation of default on the part of the defendant to pay rentals, in the case instant, the prayer for ejectment is clearly founded on the allegation of expiration of the lease agreement between the parties by exffluxion of time. The question of the termination of the lease agreement, which by the facts stated, allegedly took effect on the 30th April 2010, is not a question that would

have been determined in the earlier Case 1405/09, since at the time of instituting the claim, the fact of the expiration of the lease agreement was non existent, or was not in issue, thus the prayer for cancellation of the lease agreement in 1405/09.

It is common cause that in Case Number 1405/09, that the Defendant raised a counter claim to the Plaintiffs claim and the parties were referred to trial. By reason of this fact, defence counsel **Mr Mndzebele** contends in oral submission, that it will not be just or equitable for the Court to permit the claim instant to proceed along side the former, as to do so will render the counter claim raised in the former hallow, an academic exercise. What the defence is obviously contending by **Mr Mndzebele**'s line of argument is that the claim instant is an abuse of the process of the Court, in that the Plaintiffs are trying to use it to overreach the former action. The Defendant was in these circumstances required to put the counter claim in the former case before the Court to enable the Court guage the effect of the said counter

claim on the prayer for ejectment. The Defendant failed to do this. In as much as I agree that the Court will uphold a plea of *lis pendens* even where all the requisites of such a plea are not evident, provided it is just and equitable to do so, it is also trite that a Court cannot speculate on the contents of a document not before it. In the absence of the Defendant's counter claim in 1405/09, any forage into same is tantamount to a voyage in the realm of conjecture, an enterprise that is forbidden for a Court.

In the light of the totality of the foregoing, the Defendant's plea of *lis pendens* thus fails and is accordingly dismissed with costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE……01…… DAY OF ……June……2011

OTA J.

JUDGE OF THE HIGH COURT