IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 61/2003

In the matter between:

NONDUMISO HAIR DRESSING SALON **Applicant**

vs

LEBOMBO TRADING (PTY) LTD **Respondent**

Neutral citation: *Nondumiso Hair Dressing Salon vs Lebombo Trading (Pty) Ltd (61/2003) [2014] [SZHC 34] (11th April 2014)*

Coram: **MAPHALALA PJ**

Heard: 11th February 2014

Delivered: 11th April, 2014

For Applicant: Mr. M. Ndlovu

For Respondent: Mr. L. Mzizi

Summary: *(i) Before court is an appeal against the judgment of the Manzini Magistrate's court on the grounds that* inter alia *the court erred in fact and in law by dismissing the plea of* lis pendens *raised by the Respondent in the court* a quo.

(ii) *The Respondent in this appeal advanced* au contraire *arguments that the court* a quo *did not err and therefore all the grounds of appeal ought to fail on various arguments*.

(iii) *In the result, the court finds that the point of* lis pendens *succeeds and set aside the judgment of the Court* a quo *and order that the parties file the relevant affidavits before the court below to be heard by another Magistrate other than the Magistrate in this Review Application.*

Legal authorities cited in the judgment

1. ***Jabulile Persis Maziya and Another vs Thembi Khanyisie Bhila, Supreme Court Case No.52/2001.***
2. ***RSA Faktors Bpk vs Bloemfontein Township Developers (Edms) Bpk en Andere 1981(2) SA 141 (O).***

JUDGMENT

The Appeal

[1] Serving before this court is a civil appeal from the Manzini Magistrate's court. The Appellant has filed an appeal against the ruling of the Magistrate in the court *a quo*. The grounds of appeal and are as follows:

"a) The court a quo *erred in law and in fact in dismissing the plea of* lis pendens *raised by the Appellant under the said case number 1577/2013 and* viz *the ruling the court made under the said civil case 1593/13;*

b) The court a quo *erred further in fact and in law in prematurely dealing with the merits of the matter under civil case number 1577/2013 when all it had before it at such time was appoint* in limine *relating to* lis pendens;

c) The court thereby erred in fact and in law in granting the Respondent the orders it did under case number 1577/2013 and without affording the Appellant the opportunity or right of being heard on the said merits; and

d) The court a quo *erred in fact and in law granting* (sic) *the Respondent the orders it did under case number 1577/13 and with costs at a punitive scale without affording the"*

Facts that are common cause

[2] The following facts are common cause between the parties and therefore it is important to outline them *in extenso* for a better understanding of the issues for decision by this court (as outlined in the Heads of Arguments of the Appellant's attorney):

*"a) Respondent by way of Urgent Application, under Manzini Magistrates Court Civil case number **1539/ 13**, sought the eviction of the Respondent from certain property it had leased to it;*

b) The Appellant, as Respondent a quo *had duly filed certain points of law opposing such proceedings under the said Civil Case Number **1539/2013**. These were by Judicial Directive set-down for hearing by the court for the **12th April 2013.***

*c) Before the Hearing of the said **12th April 2013** could commence, the Respondent did by notice dated the **11th April 2013** seek to withdraw the proceedings under the said case number **1539/13**. This Respondent did without leave of Court and without the consent of the Appellant. While the said notice of withdrawal embodied a tender for costs, it was however silent regarding the scale at which such costs were being tendered.*

*d) This absence of the scale of the tender therefore resulted in the Appellant rejecting such withdrawal and further moving an application, still under the very same case **number 1539/13**, in terms of the Magistrates court Rules **ORDER XIX -2 (2)** and for the court to make a full and clear determination of the issue of costs in the event the withdrawal was to be accepted. This application and the act of rejection of the said withdrawal, it is the appellants case, duly had the effect of keeping fully alive the issues and the application under the said case number **1539/13***

e) *Almost immediately, on the **11th April 2013**, upon receipt of this **ORDER XIX 2 (2)** application filed by the Applicant and scheduled for hearing on the **12th April 2013,** being the date initially given to the parties to argue the points* in limine *under the said case number **1539/13,** the Respondent moved another new and fresh urgent application now under Civil Case Number **1577 / 2013**. This new application under civil case **1577 / 2013** was also set down for hearing on the very same **12th April 2013.** This new application under civil case number **1577/13**, save for remedying the legal complaints raised, was he same as that moved under civil case number **1539/13.***

f) *Now, to this New application filed under the said case **1577/13**, the appellant duly filed a Notice of Raise a Plea of* Lis Pendens, *in that, and according to the Appellant, the respondent was not entitled to proceed and reissue fresh process for the same cause of action up and until everything pertaining to the proceedings under **1539/2013** had been concluded.*

g) *The matter (s) could not proceed on the said **12th April** 2013 and arguments were only heard – simultaneously on both files – on the **23rd April 2013.** It is, for clarity, worthy to point out as well that on the said **23rd April 2013** when the matter (s) came up for arguments, this was primarily for the determination of two and only two issues, viz*

a. *The **ORDER XIX 2(2)** application raised by the Appellant; and*

b. *The Plea of **lis pendens** Raised by the Appellant.*

h) *Indeed when the matter came up for argument on this day, the said two issues were argued and nothing more.*

i) *When the Ruling was delivered however, it now did, with respect, extend prematurely to certain aspects of the matter, viz the grant of a final Judgment – not even a rule- on the merits. I deal now with the grounds of Appeal* ad seriatim."

[3] The court heard the arguments of Mr. M. Ndlovu for the Appellant and Mr. Mzizi for the Respondent where both attorneys filed comprehensive Heads of Arguments for which I am grateful. Following will be short summaries of those arguments for a better understanding of the issues for decision by this court.

(i) Appellant's arguments

[4] The attorney for the Appellant filed useful Heads of Arguments for which I am grateful. He made submissions on the various grounds of appeal in paragraph [2] to [6] of his Heads of Arguments and I shall revert to some of the pertinent arguments as I proceed with this judgment.

[5] He further cited a *plethora* of legal authorities in support of his contention. These include the legal authority in *Herbstein and van Winsen, The Civil Practice of the Supreme Court of South Africa, (Juta)* at page 569; the case of *Ernest Mazwi Mngomezulu vs Lucky Groening and Two Others, High Court Case No.2105/2010* and the *Supreme Court* case of *Jabulile Persis Maziya and Another vs Thembi Khanyisile, Supreme Court Case No.52/09.*

[6] At paragraph [6] of the Applicant's Heads of Arguments Mr. Ndlovu for the Appellant advanced the following argument:

> "*[6] It is further very much with great comfort that this very question, as* in casu*, has been the subject of judicial scrutiny and legal interpretation by our very own Supreme Court in the matter of* ***Jabulile Persis Maziya and Another vs Thembi Khanyisile Bhiya, Supreme Court Case No.52/2009***. *In the said case the appellant had at the court* a quo*, to an application for attachment of a motor vehicle, raised a Rule 30 application. The Rule 30 application (only) had fully been argued in the court* a quo. *However when the judgment was issued the court* a quo *had gone beyond its dismissing the Rule 30 application and had awarded a final order on the merits against the Appellant notwithstanding that the Appellant had neither been afforded the opportunity*

of filing or arguing on the merits. The Supreme Court therefore, while upholding the judge a quo's *decision of dismissing the Rule 30 application (though on grounds totally distinct) however went on to reverse her final order granted on the merits and further gave the Appellant the opportunity to file on the merits and with a further directive that the matter thereafter serve before another judicial officer at the court* a quo."

[7] Finally, it is contended for the Appellant that the Appeal on the above submissions ought to succeed with costs at a punitive scale.

(ii) Respondent's arguments

[8] Mr. Mzizi who appeared for the Respondents also filed useful Heads of Arguments for which I am also grateful. The first argument advanced for the Respondent is what is stated at paragraph 1.4 of his Heads of Arguments to the following legal proposition:

> *"1.4 It is worthwhile to mention that the appellant has only filed the learned Magistrate's ruling. Appellant has not sought or filed the Magistrate's reasons for the ruling. This option was available to the Appellant as per the provisions of Order No. XXX Rule 1 sub rule (1) and (2) which provides,*
> *'ORDER NO. XXX*
> *Appeals*

1. (1) Upon the request in writing by any party within four days after judgment and before noting appeal and upon payment by such party of the prescribed fee the judicial officer shall within ten days deliver to the clerk of the court a written judgment showing –

(a) the facts he found to be proved; and
(b) his reasons for judgment.

(2) Such written judgment shall become part of the record."

[9] In respect of the dismissal of the plea of *lis pendens* the attorney for the Respondent advanced various arguments from paragraph 3.1.1 to 3.1.11 of his Heads of Arguments and cited the case of *RSA Faktors BPK vs Bloemfontein Township Developers (EDMS) BPK en Andere 1981(2) SA 141 (O)* where the following legal principle was propounded:

> *"A defence of* lis pendens *rests on the existence of a pending earlier action and is indeed dependent on the actual existence of such other action. Suspension for non-payment of costs suggests that the previous action has been disposed of and that only the costs still have to be paid. The payment of costs cannot be regarded as part of action at law... What happens thereafter in connection with the enforcement of the order for costs or the*

collection of the costs has to do with a procedure which does not form part of the original action at law between the parties."

[10] The final argument by Mr. Mzizi for the Respondent is concerned with the issue of the premature examination with the merits and the opportunity to be heard in paragraphs 3.2.1, 3.2.2, 3.2.4 and 3.2.5 therefore, on this basis the above basis the Applicant's second and third grounds of appeal are without any merit.

[11] Finally, it is contended for the Respondent that the appeal ought to be dismissed with costs.

The Court's analysis and conclusions thereon

[12] Having considered the able arguments of the attorneys of the parties I shall proceed to examine the grounds of appeal in paragraph [1] of this judgment *ad seriatim* against the stated arguments of the parties in the following paragraphs:

(i) That the Court *a quo* errors in law and fact in dismissing the plea of *lis pendens*

[13] The Appellant's contention was that it had raised an interlocutory application which was an Application that was concerned with costs of the withdrawn proceedings.

[14] The Respondent on the other hand has taken the position that it is common cause that Civil Case No.1539/13 had been withdrawn by the Respondent when Case No.1577/13 was instituted. However, the Appellant vehemently contend that it is not so and has set out the background of this case at paragraph [1], (a), (b), (c), (d), (e), (f) and (g) of the Heads of Arguments of Mr. Ndlovu for the Appellant.

[15] In my assessment of the competing arguments of the attorneys of the parties I am inclined to agree with the arguments of the Appellant. I say so because of what is stated by Mr. Ndlovu for the Appellant at paragraph (c), (d), (e), (f), (g) and (h) of his Heads of Arguments reproduced above in paragraph 2.

[16] Clearly therefore, on the above arguments this ground of appeal ought to succeed.

(ii) That the Court *a quo* erred further in fact and in law in prematurely deciding on the merits of the matter under Civil Case No.1577

[17] Under this ground of appeal it is contended for the Appellant that the court *a quo* erred in fact and in law in deciding prematurely the merits and granted the Respondent a final order without giving the Appellant the opportunity of filing opposing affidavits and being heard on the merits.

[18] It is contended for the Appellant in this regard that the Court *a quo* had before it only two issues at that time being in Order XIX application brought by the Appellant and the *lis pendens* point *in limine* raised. These were the only issues argued on the day as can be seen from the Record (2) of the transcript of the Magistrate's handwritten notes/record.

[19] On the other hand it is contended for the Respondent that the second and third ground of appeal are interlinked. That the issue that arises in these grounds is whether it was proper for the court *a quo* to grant the relief sought by the Appellant who had only filed a notice to raise points *in limine* that linked to this issue is a determination whether Applicant was deprived of its right to be heard on the merits of the case.

[20] That it is within the rights of a litigant to only raise points *in limine* in its defence and not to file any Answering Affidavit on the merits. That the courts have on numerous decisions held that not filing an Answering Affidavit on the merits is risky on the part of the Appellant due to the fact that if the point *in limine* fails the court will grant the relief sought. The Respondents further advanced arguments in paragraph 3.2.3and 3.2.4 of the Heads of Arguments of Mr. Mzizi to support his arguments on this point.

[21] The final argument advanced for the Respondent is that in the circumstances that the Appellant is dissatisfied with being deprived of a right to be heard it would have simply applied for review since this could have been a procedural irregularity instead of a ground of appeal.

[22] The court has a discretion concerning the future conduct of the proceedings where a plea of *lis pendens* is raised. In my assessment of all the parties' arguments to and fro I am inclined to exercise my discretion in favour of the Appellant being persuaded by the *dictum* in the Supreme Court case of *Jabulile Persis Maziya and Another vs Thembi Khanyisile Bhila, Supreme Court Case No.52/2009.*

[23] In the above case the Appellant had at the court *a quo* an application for attachment of a motor vehicle, raise a Rule 30 application. The Rule 30 application (only) had been fully argued in the court *a quo*. However, when the judgment was issued the court *a quo* had proceeded beyond dismissing the Rule 30 application and had awarded a final order on the merits against the Appellant notwithstanding that the Appellant has neither been afforded the opportunity of filing or arguing the merits of the case. The matter was taken before the Supreme Court, which, while upholding the Judge *a quo*'s decision of dismissing the Rule 30 application. However, went on to reverse the final order granted on the merits and further gave the Appellant the opportunity to file on this merits with a further directive that the matter serve before another judicial officer of the court *a quo.*

[24] It would appear to me on weight of the *dicta* cited above that the interests of justice demand that the Applicant be given the opportunity to advance their case on the merits. The arguments advanced by Mr. Mzizi for the Respondent that Appellant has elected to only deal with the preliminary point of *lis pendens* is answered by the authority of the Supreme Court in *Jabulile Persis Maziya (supra).*

[25] I have also assessed the arguments of the parties regarding the 3rd and 4th grounds of appeal and find that the arguments of the Appellant ought to succeed even on those grounds of appeal.

[26] For the above reasons therefore I rule that the appeal succeed on all grounds and that the matter is referred back to the court *a quo* to be heard by another Magistrate other than the Magistrate who granted the final order.

[27] It is ordered that the Appellant files an opposing affidavit in accordance with the Rules of that court and thereafter the Respondent is to file its reply in accordance to the law.

[28] I rule, furthermore, that the Respondent to pay costs of this appeal and in exercise of my discretion that costs are levied on the ordinary scale.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE