



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No. 919/2015

In the matter between:

V J R ESTATE AGENTS

Plaintiff

And

WAYNE D. THRING

Defendant

Neutral citation: *VJR Estate Agents vs Wayne D. Thring (919/2015 [2015] [SZHC 175] (9 October 2015))*

Coram: **MAPHALALA PJ**

Heard: **31 September 2015**

Delivered: **9 October 2015**

For Plaintiff: Ms M. Hillary
of M.J Hillary Attorneys

For Defendant: Mr. M. Ndlovu
of Masina Ndlovu Attorneys

Summary: (i) Plaintiff filed a Combine Summons before the Manzini Magistrate Court for the sum of E47,761.55.

- (ii) Plaintiff filed a further Combined Summons before the High Court under Case No. 919/15.
- (iii) Defendant has raised a Special Plea that this cause of action in the same as in the case before the Magistrate Court.
- (iv) In my assessment of the arguments of the parties I agree that the Special Plea ought to succeed and dismiss the Plaintiff's action with costs

JUDGMENT

The issue before court

[1] The Plaintiff under the present case no. 919/2015 has by Summons dated the 19 June, 2015 instituted action against the Defendant in which seeks the following:

- (i) Payment of the sum of E 47 761.55;
- (ii) Costs of suit
- (ii) Further and / or alternative relief

[2] The Defendant has raised a Special Plea of **lis pendens** as follows:

1. **Defendant herein state that**

1.1 The very same cause of action between the same parties an concerning the very same lis and prayers sought – is pending – and very much actively so –

Manzini Magistrates Court Case No. 234/15. A copy of the proceeding is herein attached and marked “CJ”;

1.2 Plaintiff has not abandoned proceedings under the said case no. 234/15 but has instead chosen to now reinstitute the very same proceedings again;

1.3 This amounts to a wanton abuse of court process and an unwarranted multiplicity and duplication of proceedings that is deserving of an adequate sanction by the above Honourable Court through an adverse order for costs.

Wherefore Defendant will pray for a dismissal of the action under High Court Civil Case No. 919/15 and with costs at the scale of attorney and own client.

The back ground

[3] The history of the matter as gleaned from the Heads of Argument of the Plaintiff’s attorney is the following:

- 1. The parties signed and entered into a lease agreement in terms of which the plaintiff agreed to let certain premises to wit; Lot 21 Ndumbu Township, Ngwane Park Manzini in the Manzini District**
- 2. The material and or implied terms of the lease agreement are as follows:**
 - 2.1 Commencing on the 1st day of April 2014**
 - 2.2 For a period of one year**
 - 2.3 With an option to renew for another year at a rental to be agreed**

- 2.4 At a rental of E4 000.00**
- 2.5 With a cash handling fee of E100.00 per thousand**
- 2.6 Rental to be paid in full and on time that the deposit may not be applied in lieu of rental**
- 2.7 That the defendant was further responsible for the payment of water services to the premises**

3. The defendant took occupation of the premises on or about 1st April 2014, and remained in occupation till on or about 31st March 2015, where the lease agreement expired. The defendant continued his occupation of the premises till on or about June 2015 on the basis of a day to day lease, on the same terms as the lease agreement.

I beg leave to refer to a copy of the lease agreement at page 7 of the book of pleadings.

4. It is common cause that the defendant failed to honor the terms of the lease agreement, as he failed to pay rentals for the months extending between August 2014 and June 2015, and as a result thereof the Applicant instituted proceedings for Confirmation of the Landlords hypothec in the Manzini Magistrates Court under case no. 234/2015 and obtained an Interim Court order for same made returnable on the 29th June 2015.

I beg leave to refer to the Application at page 19 of the book of pleadings.

5. The Messenger of Court attempted service of Application and the execution of the Interim Court order upon the Respondent at; Lot No. 21 Ndumbu Township, Ngwane Park Manzini in the Manzini District, but was unable to do so as the Respondent had since vacated the premises with the immovable property.

Annexed hereto is a copy of the Interim Court Order and the Messenger of courts return of service marked “A1 and A2”

- 6. Pursuant thereto the Plaintiff instituted proceedings by way of summons under case no. 919/2015 before the Honourable Court for payment of an amount of E47 761.55 being arrear rentals in an amount of E45 200.00 and arrear water services in an amount of E2 561.55.**
- 7. The Plaintiff then by notice dated 29th June 2015, subsequently withdrew its action i the proceedings and tendered costs.**

Annexed hereto is a copy of Notice of withdrawal marked “3”.

The arguments

[4] The attorneys of the parties canvassed their arguments in court on the 31st September 2015 and filed Heads of Arguments for which I am grateful. I shall in brief outline in salient features each parties arguments for a better understanding of the issue for decision by the court in the following paragraphs.

(i) The Plaintiff’s Arguments

[5] As I stated above in paragraph [4] of this judgment the attorneys of the parties filed Heads of Argument and I must say the attorney for the Plaintiff filed very comprehensive Head of Argument citing decided cases in support her conclusions.

[6] In para 9 thereof dealt with the Plaintiff loan agreement, citing the legal authority of **Voet** that there are three requirements for a successful reliance of the plea of **lis pendens**. That the litigation is between the same parties; that the

cause of action is same; and that the same relief is sought in both. That the **onus** that rests upon the party raising **lis pendens** is to prove **all** the above requisites referring to the legal authority of **Johannes Voet** being **Commentary on the Pandects (Gane's Translation, 1957)**.

[7] The attorney for the Plaintiff then dealt with the **cause of action** in paragraphs 10 to 18 of her Heads of Argument referring to the case before the Magistrates Court and in this court I am shall revert to pertinent arguments in due course.

[8] The above subject is also dealt in detail under the heading **"AD the same relief sought"** and cited the South Africa case of **Fisheries Development Corporation v AWJ Investment, 1979 (3) JA 1331 at 13.38** where **Nicholus J** stated the following:

"It is well established that the court has an inherent right to prevent the abuse of its process in the form of frivolous or vexatious litigation". The learned Judge continued to highlight grounds for a stay of proceedings at page 1339.

'a ground for the grant of a stay that the institution or continued prosecution of the action by the plaintiff vexatious or frivolous or an abuse of the process of court".

[9] It is contended for the Plaintiff that the proceedings before court are neither vexatious or frivolous, **mala fides** on the above process of court as the amount is still owing and Defendant has not disputed that fact. Therefore Plaintiff prays for the dismissal of the Special Plea under case no. 919/2015 and the order in terms of the Summons.

(ii) **The Defendant's argument**

[10] The attorney for the Defendant advanced arguments for his client and filed Heads of Argument and premised his arguments with what is stated by the learned authors **Herbstein and Van Winsen, Civil Practice of the High Court of South African, 5th Edition page 310** to the following:

“if an action is already pending between the same 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”.

[11] The attorney for the Defendant further cited the same authors **Herbstein et al** (supra) at page G10 to the following legal principle:

“A plea of lis alibi pendens does not have the effect of a absolute bar to the proceedings in which it is raised. The court intervenes to stay one or the other of the proceedings, because it is prima facie vexatious to bring two actions in respect of the same matter. The court reserves a discretion in the matter even if all the essential of the plea are present, and may in spite of that fact consider ‘whether it is ore just and equitable or convenient that it [the action against which the special plea is advanced] should be allowed to proceed’. It often happens that the court will decide that the lis which was first commenced should be the one proceed...”

[12] On the application of the law to the facts the attorney for the Defendant argue that in **casu**, it is not in contention that the very same cause of action between the very same parties and concerning the very same **lis** and prayers sought – was **(at the time the special plea herein was raised)** still very much actively

pending under Manzini Magistrates Court Civil Case No. 234/15 wherein the pleadings had run a considerable mile.

[13] The attorney for the Defendant contends that the next enquiry therefore is **“what is to become of these procedure under this present case no. 919/15”**.

[14] That in **casu** the Plaintiff has sought to circumvent the above enquiry by withdrawing the proceedings at the Magistrates Court as reflected on the Notice of Withdrawal attached to the Plaintiff’s Summons. That this Notice of Withdrawal has unfortunately been served and filed **after receipt of the special plea**.

[15] The Special Plea was raised and served on the 29 June, 2015. The withdrawal on the other hand in the Magistrates Court matter was served and filed on the 30th June, a day after service of the Special Plea.

[16] The attorney for Defendant then cited the High Court case **of Lydia Fakudze vs the Swaziland Electricity Company Case No. 1190/08** to the **dictum** that the Plaintiff had two choices. The Plaintiff may very well set the Special Plea now for the court to determine whether, **and at the specific point in time in which it was raised**, it was meritorious. In the alternative the Plaintiff may well formally concede in a letter or other communication that the Special Plea is good and embody a tender for costs therein. The latter, given the Plaintiff withdrawal of the earlier Magistrates Court proceedings, would have been the most ideal route as opposed to the expense at which both parties are now being subjected to.

[17] Further the attorney for the Defendant then cited a plethora of decided cases in this court on costs. That in **casu** the Defendant seeks for costs on the punitive scale citing the cases **of Nelson Shodi Zikalala vs the Principal Secretary in the Ministry of Agriculture and 2 others Case No. 2419/03, in High Court Case No. Muhle Oneway Services vs Phillip Khumalo Case No. 1580/99 and that of Emmanuel Kodwo Ezraah vs Mavung’vung Holdings family Trust and 5 Others High Court Case No. 3556/2009.**

[18] In the result the attorney for the Defendant prays for an order for costs of the Special Plea at a punitive scale

The Court’s analysis and conclusions thereon

[19] Having considered all the papers and arguments of the attorneys of the parties it is not in contention that the very same cause of action between the very same parties and concerning the very same **lis** and that according to the Defendant the prayers sought were **(at the time the special pleas herein was raised)** still pending under Manzini Magistrates Court Civil Case No. 2341/15.

[20] The Defendant’s attorney further posed a question as to what is to become of these new proceedings under this present case no. 9191/15. That Plaintiff has sought to circumvent the above enquiry by withdrawing the proceedings at the Magistrate Court. That this appears from the Notice of Withdrawal attached to the Plaintiff’s Summons. That the folly of the said withdrawal is that withdrawal was served and filed **after receipt of the special plea**. The Special Plea was raised and served on the 29th June 2015. The withdrawal on the other hand was served and filed on the 30 June 2015, a day after service of the Special Plea.

[21] In my assessment of these facts it would appear to me that the arguments of the Defendant are correct that the withdrawal of the Magistrates Court proceedings and specifically after service of the Special Plea was an indirect admission by the Plaintiff that the Special Plea was good in law. That in these circumstances the Defendant is entitled to a judgment on the Special Plea. By withdrawal of the Magistrates Court matter the Plaintiff was thereby in effect avoiding to deal directly with the issue raised in the Special Plea.

[22] In this regard I find **dictum** in the High Court case of **Lydia Fakudze vs Swaziland Electricity Company (supra)** apposite.

[23] On the question of costs, I have considered all the arguments of the attorney for the Defendant that I issue costs at a punitive scale. In exercise of my discretion on costs subsequently I rule that Plaintiff pay costs at the ordinary scale.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE