IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO. 1879/20**

In the matter between:

SIFUNDZANI PRIMARY SCHOOL **APPLICANT**

And

PRISCILLA KATEULE **1st RESPONDENT**

REGISTRAR OF DEEDS **2nd RESPONDENT**

ATTORNEY GENERAL **3rd RESPONDENT**

Neutral Citation: *Sifundzani Primary School vs Priscilla & 2 Others [1879/20] [2021] SZHC 44 (30 March 2021)*

Coram: **LANGWENYA J**

Heard: 26 March 2021

Delivered: 30 March 2021

Summary: *Civil Procedure-applicant seeking an interim interdict against the respondents pending the outcome of an action for the payment of E506, 577.79 by first respondent- aim*

of this application is to attach known immovable property of the first respondent pending the finalization of an action instituted already against the first respondent-points of law raised in limine that the matter is lis pendens; applicant's failure to satisfy the requirements of an interdict and failure to observe utmost good faith in the filing of this ex parte application.

JUDGMENT

[1] The applicant is a *universatas personorum* with the power to sue and be sued in its own name and having its principal place of business at Mbabane, eSwatini.

[2] The first respondent is an adult female Zambian national and a former employee of the applicant and residing in Mbabane, eSwatini.

[3] The first respondent was employed by the applicant as a bursar and was responsible for running the accounts' office in the school. On divers occasions, the first respondent is alleged to have misappropriated a total amount of E506 577.79 belonging to the applicant. Through case number 825/2019 the applicant issued summons against the first respondent for the payment of E506 577.79.

[4] On 9 October 2020 and through a notice of motion, applicant moved an *ex parte* application for an order in the following terms:

1. That a rule nisi be issued returnable on the date to be determined by the Court calling upon the first respondent to show cause why an order in the following terms should not be made final-

1.1 Interdicting and restraining the first respondent from selling lot number 1546 situate in Mbabane extension 11 (Thembelihle township), district of Hhohho, eSwatini registered under Deed of transfer number 640/2014 and or alienating same in whatever way pending the outcome of action proceedings instituted by the applicant against the first respondent under case number 825/2019;

(2). That the *rule nisi* operates with immediate and interim effect returnable on a date to be determined by the above court;

(3). Costs of suit and

(4). Further and or alternative relief as the court may deem fit.

[5] The applicant avers that the first respondent-a Zambian national is a *peregrinus* to the jurisdiction of this court. Applicant submits that the first respondent's only property in the Kingdom of eSwatini is the one sought to be attached in the present application. Applicant fears that there is a likelihood that the first respondent may dispose of the immovable property prior to judgment being obtained in the action proceedings in favour of the applicant. There is also concern on applicant's part that other creditors of the first respondent may attach the property referred to in this application, sell it for debts owed by first respondent prior to judgment being obtained to the prejudice of applicant.

[6] The applicant submitted that they have a clear right to the repayment of the monies that were allegedly fraudulently taken by the first respondent whilst she was in applicant's employ. It is applicant's contention that it will suffer

irreparable harm if it is unable to recoup the loss incurred as a result of first respondent's unlawful conduct. Here, applicant relies on the fact that the first respondent has no other immovable property aside the property referred to in this application against which a judgment debt may be levied.

[7] The first respondent did not file answering affidavits, instead she filed a notice to raise points of law which was served on applicant's attorneys on 30 October 2020. In the notice to raise points of law, the first respondent raises a plea of *lis pendens*-which means there is a similar case pending before court and asking that this application be dismissed with costs because it is merely a regurgitation of the facts and evidence in the main action.

[8] No answering or confirmatory affidavits were filed by the first respondent in essence contending that the dispute (*lis*) in the present application is premised on the same cause of action which is pending before the High court.

Requirements for the plea of lis pendens

[9] The requirements for the plea of *lis pendens* in terms of the law are these: there must be pending litigation between the same parties or their privies; based on the same cause of action; and in respect of the same subject matter but this does not mean the form of relief claimed in both proceedings must be identical[1]. The plea of *lis pendens* is not absolute. This means that even if it is found that the requirements have been met, the court has discretion to allow an action to continue should it be considered just and equitable in the circumstances despite the earlier institution of the same action.

[1] LAWSA Vol 3 para 247

[10] A plea of *lis pendens* is open to a litigant who contends that a dispute between the same parties concerning the same cause of action is pending before the same court or another court with the same jurisdiction. The plea is based 'on the proposition that the dispute (*lis*) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised[2].' The party raising the plea of *lis pendens* bears the onus of proving all the requirements[3].

[11] I deal with whether the requirements outlined above have been met in the present matter.

Pending litigation

[12] Counsel are in one accord that there is action proceedings pending before the High court. That is as far as they agree. The first respondent argues that the present application is a regurgitation of the averments in the particulars of claim in the action proceedings under case No. 825/2019. The averments are denied in first respondent's plea-so the argument goes. Put differently, the first respondent contends that the application is based on the same cause of action and the same subject matter.

[13] The applicant argues that the present application proceedings is about the attachment of first respondent's immovable property in order to safeguard the interest of the applicant pending the finalization of the action proceedings while the action proceedings are an action for payment of monies unlawfully taken from applicant by first respondent. In my judgment, the determination of the applicant's claim for payment of E506

[2] *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite & Others* 2013 (6) SA 499 (SCA).
[3] *Marks & Kantor v Van Diggelen* 1935 TPD 29

577.79 is separate and independent from an application that the first respondent be interdicted from alienating the immovable property cited herein pending the outcome of action proceedings instituted by the applicant.

[14] The plea of *lis pendens* is aimed at achieving the same policy goal, namely to prevent the repetition of law suits, the harassment of a defendant by a multiplicity of actions and the possibility of confliction decisions[4]. The present application, in my view is anything but a regurgitation of the action proceedings under case 825/2019.

Dispute between the same parties

[15] It is common cause that the dispute between the same parties has not been met in the present matter. While first respondent argues that the parties are the same in the action and application proceedings and that third and fourth respondents in the application proceedings are only cited for convenience. I disagree. Without the cooperation of the third respondent, the relief sought by applicant in these proceedings would amount to naught.

It is trite law that all four requirements must be satisfied before the plea of *lis pendens* can succeed. From the above, it follows therefore that at least, two of the requirements for the invocation of the plea of *lis pendens*- 'pending litigation' and 'between the same parties'-have not been met. That being the case, it becomes unnecessary to enquire whether the remaining requirement has been satisfied.

[4] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 at 838-9.

Interdict

[16] The first respondent complains further that the applicant has not proved the requirements of an interdict in general and of an anti-dissipation interdict in particular as the applicant has no clear right to the order sought in this application. Specifically, the application does not satisfy the requirements of an anti-dissipation interdict-so the argument goes. No allegation of an anti-dissipation interdict has been made by the applicant.

[17] The first respondent argues that the applicant has no right-clear or prima facie-to the order it seeks. Applicant has no interest in attaching the first respondent's immovable property for a speculative debt-so the argument goes.

[18] The first respondent argues that the applicant has not satisfied the requirements for the grant of an interim interdict. The issue of reference to requirements of an interdict and raising same as a point of law raised in *limine* is, to me, a misnomer. This I say because it is not possible to determine this issue without reference to the facts of the merits of the matter. The issue of whether the applicant herein has a clear or prima facie right, whether the right is being infringed and whether there is no alternative relief is determined from the evaluation of the entire conspectus of facts presented and not as a point of law[5].

[19] The first respondent has not filed her answering papers. Without providing a factual basis and material facts, the first respondent argues that applicant has no prima facie or clear right to the orders sought herein. She does not state on what basis she makes this assertion. For the first time in her heads of

[5] *Wendy Young vs Lisa Evans and 3 Others (1008/18) SZHC [2020] (223) 30th October 2020.*

argument, first respondent argues that the orders sought are prejudicial to her as they seek to limit her rights of ownership and are tantamount to an interim execution even before the court has decided on the action proceedings. She asserts that if the main action is dismissed, she would incur costs rescinding the interdict restraining her from dealing with her property as she deems fit. Again, these are new facts that applicant has not had occasion to address because first respondent did not file her pleadings save the notice to raise points of law.

[20] That the applicant has a clear if prima facie right to repayment of the monies allegedly fraudulently taken from it by first respondent while in its employ is to me not in doubt. That applicant would be prejudiced if judgment is returned in its favour and there were insufficient assets to meet the judgment debt the court may issue against the first respondent in respect of the loss incurred by the applicant as a result of first respondent's conduct.

[21] The balance of convenience favours the grant of the interdict. The first respondent will suffer no prejudice if the interdict is granted as the property will remain in her name and possession until judgment in the main action is handed down. If the property is not attached, the first respondent may alienate it to the prejudice of the applicant if judgment in the main action is granted in applicant's favour.

[22] I am of the view that in the circumstances, there is no other alternative remedy available to the applicant which may protect the status quo ante pending the finalization of this matter and the action instituted by applicant against the first respondent.

Ex parte application

[23] The first respondent laments further that the applicant did not disclose certain facts much against the strictures of an application made *ex parte*. The facts which first respondent avers ought to have been disclosed by applicant is that the first respondent is now domiciled in Zambia and is now represented by counsel herein. Filing the application under a different case number, first respondent submits was meant to justify non-service of the application on her legal counsel and then obtain judgment in her absence. Again, this has not been set out in first respondent's pleadings in the absence of her answering papers.

[24] From a reading of applicant's pleadings, I am satisfied that they disclose that the first respondent is a Zambian national. There is nothing in the papers of the applicant that point to non- disclosure of crucial information.

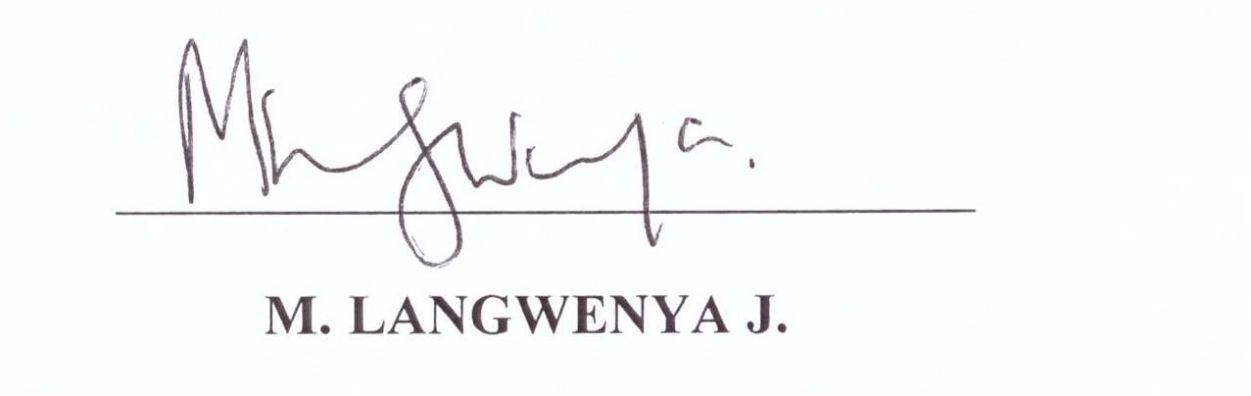
[25] In light of the fact that the first respondent has not pleaded to the merits, she stands or falls by the points of law[6].

[6] See: Jacobs Van Schalkwyk v Dumisa Nkomonye and three others Civil Case No. 1349/2015.

[26] For the above reasons, I find that the applicant has succeeded in establishing the requirements for an interdict and I make the order in the following terms:

1. The first respondent is interdicted and restrained from selling and or alienating in whatever way lot no. 1546 situate in Mbabane extension no. 11 (Thembelihle township) district of Hhohho, eSwatini, registered under Deed of Transfer No. 640/2014 pending the outcome of action proceedings instituted by the applicant against the first respondent under case number 825/2019.

2. First respondent's points of law are dismissed with costs.



M. LANGWENYA J.

For the Applicant: Mr. W. Maseko

For the first Respondent: Mr. B. Phakathi.