



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No. 15/2016

In the matter between:

DUMISA ERIC NKOMONYE

Appellant

And

JACOBUS JOHANNES VAN SCHALKWYK

1st Respondent

THE DEPUTY SHERIFF HHOHHO DISTRICT

2nd Respondent

**THE NATIONAL COMMISSIONER OF ROYAL
SWAZILAND POLICE**

3rd Respondent

THE ATTORNEY GENERAL

4th Respondent

Neutral citation: *Dumisa Eric Nkomonye and Jacobus Johannes Van Schalkwyk & 3 Others (15/2016) [2017] SZSC 12 (01 June 2017)*

Coram: M.C.B. MAPHALALA CJ, S.P. DLAMINI JA and R. J. CLOETE JA

Heard: 02 May 2017

Delivered: 01 June 2017

Summary: *Application for condonation to file appellant's Heads of Argument and Book of Authorities and grant thereof – Ejectment proceedings and the Plea of lis pendes – Judgment of the court a quo confirmed and appeal dismissed with costs.*

JUDGMENT

S.P. DLAMINI JA

[1] This is an appeal against the dismissal of Plea of *lis pendes* and, consequently, the granting an order for ejectment against the appellant by the *Court a quo*.

[2] A brief background to the appeal is stated herein. Appellant registered into a Mortgage Bond in favour of the Swaziland Development and Savings Bank (Swazi Bank) over the immovable property which is the subject of these proceedings. The property was registered in the name of the Appellant. The Appellant fell into arrears. Consequently, the Swazi Bank successfully sued him for the payment of the amounts being owed and foreclosure of the Mortgage Bond. Thereafter, the immovable property was sold in execution by

the 2nd Respondent. Pursuant to the sale in execution, the immovable property was then registered in the name of the First Respondent upon payment of E1,050,000.00 sometime in 2015.

[3] In 2016, First Respondent successfully instituted ejectment proceedings in the *court a quo* against the Appellant ejecting him from the property as he remained in occupation of the property after the sale in execution. Apparently, the Appellant still remains in occupation of the property.

[4] A Plea of *lis pendes* by the Appellant to the ejectment proceedings was rejected by the *court a quo* as per the judgment of Justice S.B. Maphalala. The *court a quo* ordered that;

“ 1. *The First Respondent is ejected and evicted from:*

Certain: Portion 1 of Lot No. 395 situate in Stewart Street, in the town of Mbabane, District of Hhohho, Swaziland;

Measuring: 1032 (One Zero Three Two) square metres;

Extending: As crown Grant No. 3/1946 made in favour of Johannes Balthus Kok dated the 22nd day of May, 1946 and several subsequent Deeds the last of which is Deed of transfer No. 109/2005 made

in favour of Dumisa Eric Nkomonye dated 21st day of February, 2005 will more fully point out.

- 2. The Second Respondent is authorised to effect this Order forthwith.*
- 3. The Third Respondent is authorised and directed to lend such assistance as may in the Second Respondent's opinion be necessary.*
- 4. Costs of suit."*

[5] In his opposition to the relief sought by 1st Respondent (Applicant in the *court a quo*), Appellant (1st Respondent in the *court a quo*) filed a Notice to Raise Points of Law. The said notice was couched as follows;

***"BE PLEASED TO TAKE NOTICE THAT** the 1st Respondent hereby enters his Notice to Raise Points of Law to be heard in Limine at the hearing of the application.*

Lis Pendis

- 1) The issue for determination in this application is pending before this Honourable Court under Case No. 1320/15. The Court is to pass Judicial Notice of these facts.*
- 2) The Applicant was served with the Summons in respect of Case No. 1320/15.*

3) *A Return of Service in this regard is hereby annexed and marked “JJ1”.*

4) *The Applicant instituted the application knowing that dispute in this application is pending under Case No. 1320/15.*

WHEREFORE *the 1st Respondent prays that the Application be dismissed with costs.”*

[6] The Appellant’s opposition to the application by the 1st Respondent was amplified in the Appellant’s Heads of Argument as reflected in paragraph [4] at page 4 of the judgment of the *Court of quo* and reads as follows;

“[4] *In the 1st Respondent’s Heads of Arguments at paragraph 2 thereof the issues that lie for determination by this court are the following:*

2.1 *Lis Pendis*

2.2 *Whether Applicant has clear right in the property?*

2.3 *Whether the Applicant’s application is defective for non-joinder?*

2.4 *Whether there is dispute of facts?*

2.5 *Whether the matter is urgent?”*

[8] However, when the matter was finally heard at the *Court a quo*, only the issue of *lis pendis* was relied upon by the Appellant. His Lordship Justice Maphalala dealt with this point in his judgment and stated the following;

*“[20] I must, however point out that when this matter was argued on 11th September, 2015 only the first point **in limine** was addressed by the attorneys of the parties. Furthermore, it was also clear that the 1st Respondent relied on this point and has not answered to the main matter concerning the issue of vindication.*

*[21] On this point **in limine** it is contended for the 1st Respondent that whilst the Applicant has been served with the Summons by the 1st Respondent, the Applicant instituted the current Application for eviction. That the prayers (sic) Summons are to seek an order cancelling registration of title of the property in question in the light (sic) of the Application. As such the Applicant’s title to the property is not unassailable, has no right to eject the 1st Respondent from the property. In the premise the 1st Respondent pleads that the issue of title between the Applicant and himself is subject to determination in the action he has instituted. In this regard he (sic) has attached a copy of the Summons and the return of service being annexure “JJ1” and “JJ2” respectively. Therefore 1st Respondent pleads that the matter is **lis pendens**.”*

[9] Furthermore, the Learned Judge proceeded to conclude the matter as follows;

*“[25] On the above facts as outlined in the paragraph [24] **Supra** the fact that the sale in execution is being challenged by Eternal Stores (Pty) Ltd does not amount to **lis pendens**. There is a new party altogether. The 1st Respondent is the judgment debtor under case number 1320/2005 yet the property was declared executable under case no. 811/2014 where the Swaziland Development and Saving Bank is the judgment creditor.”*

[10] On the basis of the conclusion that the *court a quo*, the Learned Judge held that;

*“[30] In the totality of the facts of the matter, no issues of fact have been raised to the ejectment by the 1st Respondent. Therefore the point **in limine** raised is dismissed and further an order is granted in terms of the Notice of Motion.”*

[11] The Appellant was not satisfied with the judgment of the *court a quo* and launched this appeal. The grounds of this appeal are as follows;

- “1. The Court a quo erred in law and in fact in holding that the Appellant was not entitled to raise the plea of **lis pendens** in the matter.*
- 2. The Court a quo overlooked the fact that the cause of action before it was pending before the same Court wherein the Appellant herein (1st Respondent in the Court a quo) was contesting the title of the 1st Respondent herein (Applicant in the court a quo) to the property in question and thus by extension contesting the Applicant’s right to eject the 1st Respondent from the property.*

3. *The Court a quo erred in law and in fact, and misdirected itself in holding that the Applicant had a clear right in respect of the interdict sought, when in actual fact his right to the property, and therefore his entitlement to eject the Appellant herein (1st Respondent in the Court a quo) therefrom was under dispute in an action which was already pending before the Court a quo under Civil Case No. 1320/2015 and whose summons were furnished to the Court.*
4. *The Court a quo erred in law and in fact in holding that the 1st Respondent herein (Applicant in the court a quo) was entitled to an eviction order through vindication as the lawful property owner and that the 1st Respondent herein (Applicant in the court a quo) had satisfied the ground for vindication to eject. The title of the 1st Respondent herein (Application in the court a quo) to the property was not, in the circumstances, unassailable and had already been challenged in an action which was pending determination before the Court a quo when the application for eviction was instituted.*
5. *The Court a quo erred in law and in fact in dismissing the point of law in respect of disputes of fact. It was abundantly apparent in the papers filed before the Court a quo that the Applicant ought to have foreseen a dispute of fact arising in the matter because prior to Applicant instituting the Application for eviction, he had been served by the Appellant herein (1st Respondent in the Court a quo) with a Summons whose cause of action was to dispute the Applicant's alleged title to the property in question.”*

[12] In this matter the sale in execution proceeded and the property was then registered in the name of the Respondent. Even though the appellant has sought to set aside the sale in execution together with another Plaintiff in the *Court a quo*, that cannot be a lawful bar against 1st Respondent to seek to eject him from the property. Appellant is not challenging that he is judgment debtor and that there was anything untoward in the claim by Swazi Bank. In the absence of a legal defence to the ejectment proceedings, the Appellant is liable to be ejected from the premises by the 1st Respondent. From the papers, Appellant did not raise any substantive defence to the ejectment proceedings preventing the *court a quo* from granting the relief sought.

[13] The argument of the so called *Lis Pendes* is completely misplaced for the following reasons;

- (a) Apart from a claim the shortfall of the purchase price that was ultimately paid by Respondent to the Bank, there is no legal basis for Applicant to interject himself in proceedings seeking to challenge the sale in execution. Therefore, Appellant has other remedies including possible

actions for damages against other parties. Appellant was not a bidder in the sale in execution;

(b) No proceedings were instituted to suspend the legal consequences of the sale in execution in favour of the Respondent. One of those legal consequences of the sale in execution is the vindicatory rights of the purchaser (Respondent). The ejectment proceedings and the subsequent order granted against the Appellant is also part of those vindicatory rights;

(c) The party (1st Plaintiff) in the action concerned which challenges the sale in execution who may have a right regarding the sale in execution as an unsuccessful bidder, is not party to the present proceedings. For such a plea to succeed, the matter must be between the same parties, relating to the same subject matter and the same cause of action which is clearly not the case here. In the case of **NELISIWE NDLANGAMANDLA VS ROBERT SAMKELO HADEBE, SIFISO KHUMALO**, the Learned Ota J, as she then was at Paragraph 29 of the Judgment stated:-

“[29]...The requirements of a plea lis pendis are the same with regard to the person, cause of action and subject matter as those of a plea of res – judicata, which in terms are that the two actions must have been between the same parties or the their successors in title concerning the same subject matter and founded upon the same cause of complaint.” (my own underlining)

In addition the Learned Authors, **Herbstein and Van Winsen**, in their legal writings, **The Civil Practice of the Supreme Court of South Africa, 4th Edition, Juta (1997)**, dedicate quite a considerable amount attention to the subject and say, inter alia that:-

“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 res judicata, which, in turn, are that the two actions must have been between the same subject parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint.

- (d) The 1st Respondent obtained a home loan facility from the Standard Bank in order from the Bank to purchase the property. 1st Respondent

continues therefore to be liable to pay the instalments and interest to the bank on the loan advanced to him. On the other hand, Appellant was released from his indebtedness to Swazi Bank on the basis of the sale in execution yet he continues to occupy the property rent free. Furthermore, 1st Respondent had secured a Tenant, AVS Timbers (Pty) Ltd to rent the property for E6,500.00 per month.

[14] In the circumstances of this case, the Appellant did not advance any lawful defence to the ejectment proceedings and the *lis Pendens* argument is not open to him. There is no merit in the appeal and the *Court a quo* was correct, is somehow for different reasons to grant the relief sought by the 1st Respondent.

[15] In the result, this court makes the following order;

(i) That the appeal be and is hereby dismissed with costs; and

(ii) That the order granted by the *Court a quo* in be and is hereby confirmed.

S. P. DLAMINI JA

I agree

M.C.B. MAPHALALA CJ

I also agree

R. J. CLOETE JA

For the Appellant : Mr. M. Nkomondze

For the Respondents : Mr. H. Mdladla

