JAMES GINIO
versus
MEMASH HOLDINGS (PVT) LTD
and
ASHEL KUDZANAI MAENZANISE
and
MEMORY KATSINGANO
and
SINO- ZIMBABWE CEMENT COMPANY (PVT) LTD
and
CHITUNGWIZA MUNICIPARITY
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30 June, 7 July 2021 and 15 September, 2021

Unopposed court application for a declaratur

T. Kachara, for the applicant
Respondent in default

CHITAPI J: Ordinarily, a judgment would not have been necessary in an unopposed application. This judgment was considered necessary to clear an issue of *lis pendens* which arose when this application was dealt with by CHINAMORA J on 12 May, 2021. The learned judge removed the application from the roll and made note that an appeal pending before this court which was concerned with the same thereafter was set down for hearing on 24 May, 2021. It was considered then that to grant an order as prayed for by the applicant would pre-empt the decision of the appeal court. Upon resetting the application on the unopposed roll, the applicant filed supplementary heads of argument to address the issue of *lis pendens* raised by CHINAMORA J as aforesaid.

It is necessary to outline the background facts and paper final which culminated in the appeal in issue being filed under case no. CIV 'A' 184/20. The applicant averred that what generated the making of this application was that the applicant was issued with a warrant of execution against property issued out of the Magistrates Court, Gweru in Case No. 775/2017. The writ was issued in consequence of a judgment by consent granted on 26 July, 2018. The

parties in that case were the 4th respondent herein as plaintiff with the 1st, 2nd and 3rd respondents herein being the defendants. The 4th respondent sued the 1st, 2nd, and 3rd respondents for payment of money loaned and advanced against security of a Deed of Grant No. 3345/2016 dated 3 June, 2016. The 1st, 2nd and 3rd respondents registered a mortgage bond over the property described as Stand 20011 Seke Township measuring 220 square metres. In consequence of the consent judgment which ordered the 1st, 2d and 3rd respondents to pay the 4th respondent $USD 60 060.06 with interest and costs and further declared executable the mortgaged property, the 4th respondent caused the attachment in execution of the property.

Subsequent to the attachment of the property aforesaid, the applicant laid claim to the property. In the light of the adverse claim filed by the applicant with the Messenger of Court, the latter caused the issue of interpleader summons. The interpleader was determined against the applicant with the magistrate determining that since the title deed was not in the name of the applicants, the applicants had not proved ownership and entitlement to the property. There are other findings of the magistrate which I do not consider necessary to deal with for the reason that I may make findings which would touch on the determination of the appeal which was noted by the applicants against the judgment of the magistrate. It is noted that the appeal has not been determined. It is the pending appeal which raises the issue of *lis pendens.* I will return to the issue of the appeal being *lis pendens.*

Going forward, I must note that when CHINAMORA J removed the matter from the roll, he did not make any order that the appeal was *lis pendens vis-à-vis* this application. The learned judge simply indicated that there was an appeal pending and albeit raising the issue of *lis pendens*, he did not decide on it. This explains why the applicant filed additional heads of argument to address the issue of *lis pendens* and its effect on this application.

I consider it appropriate to address briefly the issue of *lis pendens* taking into account the factual position obtaining in this matter. Again, I will be careful to try as much as possible to avoid making conclusions which appear to determine the appeal. If however, I am found to have made findings which impact on issues which the appeal court is called upon to decide, I find solace in the principle that my findings do not bind the appeal court as a matter of law and procedure.

In regard to articulating the plea of *lis pendens,* I acknowledge that counsel for the applicant is on point in the averment made in para 7 of the supplementary heads of argument which I cannot do any better to than to quote the paragraph verbatim as follows:-

"7. The special plea of *lis alibi pendens* is well articulated by Herbstein and Van Winsen in the *Civil Practice of the Superior Courts in South Africa*, 3rd Ed at page 269-270 where they state as follows:

> 'if an action is already pending between the parties and the plaintiff therein 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 a different court, it is open to such defendant to take the objection of *lis pendens* that another action respecting the identical matter has already been instituted whereupon the court in its discretion, may stay the second action pending the decision in the first action.'

In the case of *Chigamu 2 Syndicate & 2 Ors* v *Cleo Brand Investments (Pvt) Ltd* HMA 14/20, ZISENGWE J stated as follows on p 5 of the cyclostyled judgment:

> "*Lis pendens* refers to a special plea raised by the defendant that the matter is being determined by another court of competent jurisdiction on the same action and between the same parties. For a plea of *lis pendens* to succeed, it must be demonstrated that the two matters are between the same parties or their successors in title concerning the same subject matter and founded on the same cause of complaint (see *Diocesan Trustees for Diocese of Harare* v *Church of the Province of Central Africa* 2009 (2) ZLR 57 (4) *Nestle (SA) Pty Ltd* v *Mars incorporated* (2001) 4 SA 315 (SCA). *Goldenkeys* v *Kotz* 1964 (2) SA 167."

The learned ZISENGWE J went further to state on the same page as follows:-

"In Erasmus, *Superior Court Practice*, (2nd edition) at D1-280 the following was stated:

> "The requirement that the parties be the same does not entail that the same plaintiff should have sued the same defendant in both proceedings. The plaintiff in the first proceeding could, as a defendant in the second, raise the plea of his *lis pendens* (see Ceasar Stone Solot – Yam Ltd World Marble and Granite 2000 CC2013 (b) SA 499 (SCA) at 505E-G, 506 B-C and 509 D-F."

In the case, *Tendai Tarinda* v *Cake Fairy (Private) Limited and Kathy Mwanza*, HB 38/20, KABASA J discussed the plea of *lis aliba pendens*. The learned judge made reference to the judgements *Nestle (SA) (Pty) Ltd* v *Mars Incorporated* (2001)(4) All SA 315 (SCA) quoted by the authors Herbstein and Van Winsen in their text *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa*, fifth Edition at p 605 as follows:

> 'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle which is that there should be finality to litigation. Once a suit has been commenced, before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibe pendens).* By the same token, the suit will not be permitted to be revived once it has been brought to its prosper conclusion (*res judicata).* The same suit between the same parties should be brought only once and finally. There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively.

In the absence of any of these elements, there is no potential for a duplication of actions."

The learned judge went further to note that the plea of *lis alibe pendens* was not an absolute bar to the court's discretion to deal with the latter case despite the lis being pending in an earlier pending suit. The learned judge quoted from p 606 of Herbstein and Van Winsen text as follows:

> "A plea of *lis pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The court intervenes to stay one or other of the proceedings, because it is *prima facie* vexatious to bring two actions in respect of the same subject matter. The court reserves a discretion in the matter even if all the essentials of the plea are present, and may in spite of that fact consider whether it is more 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 to proceed but this is not an immutable rule."

The learned judge on p 16 of the judgement further stated in regard to whether the nature of the proceedings would impact on the plea of *lis alibi pendens* as follows:

> "It matters not in my view that the matters have been brought by way of application and the other by way of action. It is not so much the vehicle by which the matters have been brought to court but the nature of the issues and the relief sought, that is, the substance and not form."

Upon a consideration of the decided cases and writings of eminent authors on practice and procedure in superior courts, it appears to me that the definition of the *lis alibi pendens* defence and factors which the court considers in determining its establishment is clear. It must however be stressed as KABASA J indicated (supra) that the court in considering the similarities of the *lis* on the two cases upon which the *lis pendens* defence rests must consider the substance of the cases and not their form nor the method by which they have been instituted whether by way of action or application. An all important feature of the defence is that the defence must be specially pleaded by the party seeking to invoke it and arrest the *lis* before the court from being proceeded with. In this respect, it is not for the court to invoke the special plea *mero motu*. The party raising the defence of *lis alibi pendens* is not only required to plead the defence specially but bears the onus to prove the special defence. Therefore, to the extent that the respondents herein did not oppose the applicant case, the *lis pendens* defence is not available to them and the court is not entitled to raise the defence *mero motu.*

Having determined that the *lis alibi pendens* defence must be raised by the defendant specially, I must before addressing the merits note that there is nothing on record to indicate that the magistrates court made a determination that the Deed of Grant in the names of the 1st respondent was authentic but he held that the applicant had not proved a better entitlement to the property. As a point of law, the magistrate's court has no jurisdiction to grant a declatur in the nature of the one sought in this application wherein the cancellation of a registered deed of transfer is sought. This is so because a registered Deed of Transfer can only be cancelled by order of the High Court as provided for in section 8 of the Deed Registries Act, Chapter 20:05 which reads as follows:

> **"8 Registered deeds not to be cancelled except upon order of court.**
> (1) Save as is otherwise provided for in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed confirming or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security shall be cancelled by a registrar except upon an order of court.
> (2) Upon the cancellation of any deed pursuant to an order of court –
> (a) the deed under which the land or any real right in land was held immediately prior to the registration of deed which is cancelled shall be revived to the extent of such cancellation unless a court orders otherwise; and
> (b) The registrar shall make the appropriate endorsement on the relevant deeds and entries in the registers."

In terms of s 2 of the Deeds Registries Act, the word "court" in the Act refers to the High Court. Since the Magistrates Court cannot grant an order that cancels a registered deed of transfer, it follows that it equally cannot declare who the owner of a disputed registered property should be as between contending claims. It must follow that the issue of who had superior title between the applicant and respondents was a matter beyond the jurisdiction of the Magistrates Court. The lis being one beyond the jurisdiction of that court, it could not be *lis pendens* within the parameters of the law.

A closer consideration of the magistrates courts order which was appealed against shows that all that the learned magistrate ordered was a declaration that the mortgaged property was executable to satisfy the judgment of the court. The applicant had in the interpleader claimed for an order that the property be released from attachment on the basis that it was his property yet there was in existence a deed of grant No. 3345/2016 which was still extant in the name of 1st respondent in which the disputed property was conveyed. The learned magistrate gave effect to the deed of grant as it was extant. I note again that this finding may impact on the decision on appeal. However, such finding is necessary for me to make in order to show

that the current application is not *lis pendens* in the interpleader application nor is it an appeal against the magistrates courts; determination.

It therefore must follow in my judgment that the appeal noted by the applicant in Case does not determine the main relief sought in this application which only the High Court is competent to grant. There should therefore be no confusion in regard to whether this application is or is not *lis pendens* the appeal. The applicant is entitled to the relief which he seeks save in regard to the claim for costs which are claimed against the 1st to 4th respondents. I do not find a basis for awarding costs against the 4th respondent because it did not oppose the relief sought despite being affected by the order which will result in the 4th respondents' failure to execute on the property to satisfy judgment granted in its favour. Again, s 8(2) of the Deeds Registries Act, provides for what the Registrar of Deeds is required to do in circumstances where an existing deed of title has been cancelled in terms of subsection (1) of the same section. In casu once the Deed of Grant has been cancelled, it automatically implies that the status of the property reverts to what the position was before the cancelled registration. It would be improper to make a declaration that the applicant is the rightful holder of rights and interest in the property. The status quo of the property follows as a written of law.

Accordingly the following order is made.

1. Judgment for applicant.
2. Deed of Grant No. 3345/2016 dated 3 June, 2016 is hereby cancelled.
3. The status of ownership of rights in the property shall revert to the position obtaining prior to the cancelled registration.
4. The 1st, 2nd and 3rd respondents jointly and severally the one paying the other to be absolved shall pay the applicants costs of this application.

Scanlen & Holderness – Applicants Legal Practitioners